THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs J Mustard	**AND**	**M & M Embroidery (Newcastle) Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **17 and 18 May 2016**

Before: **Employment Judge A M Buchanan (sitting alone)**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr M McFetrich - Solicitor**

JUDGMENT

It is the judgment of the Tribunal that:-

1 The claim for unfair dismissal is well founded and the claimant is entitled to a remedy.

2 There will be a reduction from any compensatory award of compensation of 25% to reflect the possibility that the claimant would have been fairly dismissed pursuant to the principles in **Polkey –v- A E Dayton Services Limited 1988 ICR 142**.

3 There will be an increase in any compensatory award of 8% pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to reflect the breach by the respondent of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

4 There will be a reduction from any basic award and compensatory award of compensation for unfair dismissal of 50% to reflect the culpable and blameworthy conduct of the claimant which contributed to her dismissal.

5 The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £6,288.08 forthwith. This sum includes an award pursuant to section 38 of the Employment Act 2002.

6 The Employment Tribunals (Recoupment of Benefits) Regulations 1996 do not apply to this award.

7 The respondent is ordered pursuant to Rule 75(1)(b) and Rule 76(4) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to pay to the claimant the issue fee of £250.00 and the hearing fee of £950.00 paid by the claimant in relation to this claim.

8. The total sum payable by the respondent to the claimant is £7,488.08 and is payable forthwith.

REASONS

Preliminary matters

1 By a claim form filed on 24 January 2016 the claimant brought proceedings against the respondent for unfair dismissal.

2 By a form of response filed on 23 February 2016 the respondent denied any liability to the claimant.

3 By a letter to the parties dated 26 January 2016, the Tribunal issued standard directions in this matter and listed the matter for hearing on 17 May 2016.

4 The parties subsequently asked for a two day hearing and 18 May 2016 was added as the second day of the hearing.

5 The matter came before me for a two day hearing. I completed the hearing late in the afternoon of 18 May 2016 and there was insufficient time to deliberate and announce a judgment. Accordingly this judgment is issued with full reasons in order to comply with rule 62(2) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

6 During the course of the hearing I heard from the following witnesses:-

6.1 Moira Amer ("MA") – the owner of the respondent company and a director and shareholder in it. This witness was the dismissing officer and was also involved in the investigation which preceded the dismissal and the appeal which followed the dismissal.

6.2 Julie Harrison – a machinist employed by the respondent company.

6.3 Nicola Kate Johnson ("NJ") – a machinist employed by the respondent company.

6.4 Marion Marsh ("MM") – a friend of the owner of the respondent company Moira Amer and one who assisted in the investigation into the conduct of the claimant. This witness is now an employee of the respondent company but was not so at the material time for the purposes of this claim.

6.5 The claimant.

The first four witnesses were called on behalf of the respondent. The claimant called no additional witnesses.

Documents

7 I had a bundle of documents before me which was agreed and extended to some 347 pages. Any reference in this judgment to a page number is to the relevant page within that agreed bundle. In reaching my Judgment I made reference only to such documents from the agreed bundle as I was referred to during the course of the hearing.

Factual issues

8 There were some factual issues for me to determine which I do in the course of the following findings of fact. In particular there were factual issues in respect of the words used by MA at the disciplinary hearing in relation to the outcome of the hearing, whether the claimant had had a contract of employment issued to her, whether a sum of £3000 advanced to the claimant in 2012 was a loan or a bonus and whether or not the claimant issued notebooks to the workforce to enable them to record their machinery work in them on a daily basis.

Legal issues

9 **Unfair dismissal claim**

9.1 Has the respondent proved what was the principal reason for the dismissal of the claimant? Did the dismissing officer have a genuine belief in the misconduct of the claimant?

9.2 If so, were there reasonable grounds for that belief and in particular did the respondent act reasonably in treating the claimant's conduct as being gross misconduct?

9.3 If so, at the time of the decision to dismiss had the respondent carried out as much investigation as was reasonable in all the circumstances of the case.

9.4 If so did the respondent follow a reasonable procedure and in particular did the respondent breach paragraph 5, paragraph 9 and/or paragraph 12 of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code")?

9.5 If so, was the decision to dismiss the claimant a decision which fell within the band of a reasonable response?

9.6 If the dismissal of the claimant was unfair for any reason, did the claimant contribute to that dismissal by culpable or blameworthy conduct?

9.7 If the decision to dismiss the claimant was unfair should compensation awarded to the claimant be reduced pursuant to the principles in **Polkey – v- A E Dayton Services [1988] ICR 142**?

9.8 When these proceedings were commenced did the claimant have a statement of terms and conditions of employment issued to her? If not what is an appropriate award pursuant to section 38 of the Employment Act 2002 ("the 2002 Act")?

9.9 If the claimant succeeds, should any award be made to her in respect of Tribunal fees?

10 **Findings of fact**

Having assessed the oral evidence presented before me and having considered the documents to which I was referred and having in particular considered the way in which the oral evidence was given, I make the following findings of fact on the balance of probabilities:-

10.1 The business now carried on by the respondent company was started in 1986 by MA and two others. On 6 December 1993 the respondent company was incorporated and the business was transferred to it and has been run by it since that date. In October 2004 MA bought out the interests of the other two owners and from that date has owned the respondent company and the business it runs. The business of the respondent is the embroidery of logos and other details onto garments which are either supplied by the respondent to customers at their request or supplied by customers to the respondent for embroidery to be added. The respondent is a small business and at the material time for the purposes of these proceedings the business comprised of the claimant, who was in charge of the day to day management of the company, and MA who took a back seat in the administration of the business but who dealt with the banking of cash and other receipts and certain design matters. In addition there were three other employees who acted as machinists. The business of the respondent company broadly comes as to 20% from school clients (typically embroidering the school logo onto sweatshirts and the like), 60% from commercial clients and 20% from retail clients. The respondent company has no written policies or procedures and in particular no written disciplinary policy.

10.2 The claimant began work for MA and her then partners in May 1987 and her employment transferred when the company was incorporated in 1993. The claimant was dismissed on 4 December 2015 after over 28 years' continuous service.

10.3 In 2005 MA made the claimant a Director in the sense that the claimant then became in charge of the administration and running of the small business. At no time did the claimant hold shares in the respondent. The daughter of MA had indicated a wish to take over the business on the retirement of her mother but she decided to leave the business in November 2013 and from that point onwards the claimant was given much more responsibility and virtually ran the business. The tasks retained by MA related to the banking and the checking of the bank accounts and general high level supervision of the company.

10.4 On the instructions of MA, the claimant issued contracts of employment to the staff in or around 2010 but a contract was not issued to the claimant at any time. The claimant did not see it as appropriate to issue a contract to herself.

10.5 In July 2012 the claimant was made a loan of £3,000 by the business authorised by MA. There is a dispute between the parties as to whether this was a loan or a bonus. I conclude that it was a loan as it was described as such on the company bank account when the payment was made on 11 July 2012 (page 22). This was a mark of the regard in which the claimant was held by MA at the time.

10.6 A large part of the school business of the respondent company came from orders from parents at two schools namely Townend Farm School and Bexhill School ("the two schools") both in Newcastle. Difficulties arose with those contracts and the respondent company lost the contract to supply embroidered goods to those schools on 23 May 2014. MA sought unsuccessfully to reverse that decision by contacting the schools (page 77).

10.7 From 2013 after MA's daughter left the business, there was a suggestion that the claimant purchase the business from MA. The claimant asked to see the last three years audited accounts. There was some delay in the provision of those documents. The claimant did not have access to the £50,000 which MA was seeking for the business and the talks eventually came to nothing.

10.8 In September 2015 MA became aware that work was still being done for parents of pupils at the two schools even though the official contract to supply embroidered goods to those schools had been lost. MA came upon this information when she looked through a notebook maintained by the employee NJ in which NJ wrote details of every order which she herself worked on. She did this for her own purposes – it was not a requirement of the respondent company to maintain any such book.

However that notebook which was openly maintained gave rise to suspicions in the mind of MA because she had not seen any invoices to or payments from anyone whom she identified as being connected in any way to the two schools. I find that the notebooks used by NJ were supplied to her by the claimant as manager for her use but that there was no policy of requiring machinist to maintain any such record. NJ did so for her own personal record and in order to identify if she had carried out work on goods in respect of which there might subsequently be a complaint.

10.9 The administration of the respondent company was poor. For some time MA had been asking the claimant to ensure that there was a proper system of recording orders from clients, recording the purchase by the respondent company of goods to meet those orders, recording the embroidery work carried out by the respondent on those goods once purchased or supplied by the customer and then supplying the goods with a delivery note and subsequent invoice to the customer. That system was broadly in place in respect of larger orders but not in respect of smaller orders to private individuals. It was not uncommon for the respondent company to receive payment in cash from customers. If customers came in to collect goods which had been ordered and paid in cash then there was effectively no audit trail. In those circumstances an invoice to the customer was not produced. The system in place was that any cash was put into a cash drawer and it was MA's responsibility to bank the cash which she did on a regular basis. Sometimes the cash drawer would contain a note of the person who had paid over the cash but often that was not the case. The claimant would eventually reconcile cash payments received or at least attempt to do so. She would not infrequently find that there was a surplus of cash in the bank and she could simply not account for its source and so it was not uncommon for the claimant simply to create invoices made out to fictitious clients in order to provide a paper audit for the receipt of the cash. Examples of such invoices are to be found in the bundle at pages 101-104 inclusive. Page 101 is an invoice dated 30 June 2015 made out to "*Lynne c/o Bexhill Academy"* for £1000, Page 102 is an invoice dated 1 July 2015 made out to "*Natalie Brown c/o Town End Academy" for* £711.36, Page 103 is an invoice dated 30 June 2015 made out to "*Natalie Brown c/o Town End Academy"* for £500 and Page 104 is an invoice dated 5 July 2015 made out to "*Jackie Miller c/o Hastings Hill"* for £1560. Those invoices ("the four invoices") total £3771.36 and were all fictitious and created at or around the beginning of July 2015 when the claimant examined the quarterly bank statement received on the respondent's so called "cash account" and she realised cash had been banked for which there was no record of the persons who had paid it to the respondent company. In short, the financial recording in place in the respondent company particularly in respect of cash transactions (of which there were many) was woefully inadequate.

10.10 It was not uncommon for MA as owner of the business to give bonuses to her staff in cash and it was invariably her practice to give the claimant a sum of cash of at least £200 each time the claimant went on holiday and at Christmas. There is no evidence at all that such sums were recorded

for the purposes of income tax and national insurance contributions. The claimant had no responsibility for the preparation or payment of wages: that task lay with MA at all times.

10.11 One of the responsibilities of the claimant became the arranging of the insurance for the business each year and the claimant had a meeting on 7 May 2014 with an insurance broker (pages 72-76) and consequently MA criticised the claimant for the cover which she arranged at that meeting which failed to cover certain potential losses which MA thought should be covered. The claimant had not received any training on what cover MA expected to be provided. The claimant had provided for cover of £500 in respect of cash held on the premises which MA rightly considered to be inadequate.

10.12 In September 2015, MA had occasion to look through the work book of NJ and she noticed that she (NJ) had done work for pupils attending the two schools. She was immediately suspicious because she knew the contract to supply goods to the two schools had been lost and she was not aware that any business was being done for parents of pupils of the two schools. Having had her suspicions aroused, MA asked the witness Marion Marsh (MM) to find out if there was an outlet close to Townend Farm School where the services of the respondent company were being sold. MM made enquiries and discovered on 18 September 2015 that there was a shop named "Robson's Stores" where an employee named Joanne (not the claimant) was taking orders from parents of the children of Townend Farm School and supplying those orders to the claimant who was then making up the orders. She was advised that effectively the claimant was taking orders and supplying the garments duly embroidered to the shop from which they were collected by the parents. The garments were delivered to the shop, according to the information obtained by MM, either by the claimant or by her mother.

10.13 The suspicions of MA were further aroused when she appreciated that the work which had been carried out for the two schools had been carried out on 17 and 18 August 2015 whilst she (MA) was away on holiday and a large amount of work had been carried out on those two days. MA decided that she would not take any further steps in her investigation until the claimant herself went on holiday in the week commencing 5 October 2015 subsequent to MA's own holiday which began in week commencing 28 September 2015.

10.14 On her return from holiday and during the week of the claimant's absence on holiday, MA continued with her investigations and looked again into the notebook of NJ and found that work for Bexhill School had again been carried out during the previous week when once again she (MA) had been on holiday. This confirmed to MA her suspicions effectively that work was being done "*on the side*" by the claimant and that the proceeds of the payments for that work were not being paid into the respondent's accounts but being retained by the claimant. In a nutshell that was the suspicion which formed in the mind of MA and which she then sought to investigate.

MA had no experience of conducting investigations into suspected wrongdoing and so she engaged the services of an independent HR advisor called Jayne Hart ("JH")

10.15 MA was advised by JH that the claimant should be suspended and so JH attended at the respondent premises on Monday, 12 October 2015 and met with the claimant. This was the claimant's first day back at work after her week long holiday. The claimant was suspended from duty on full pay. The claimant was shocked and her immediate reaction was to say whether the suspension related to the "*money in the drawer*" and she was told that the suspension related to suspected financial irregularities. The claimant was written to (page 82) where she was told that her suspension related to "*serious allegations … regarding your conduct in the workplace*" (page 82). The claimant was asked to return her keys and company mobile telephone and she did so after having deleted all her incoming personal text messages.

10.16 An investigation was then undertaken by JH.

10.17 During the course of e-mail exchanges between MA and JH on 16 October 2015 (page 89), MA raised various matters and concluded her message:- "*In my opinion she has abused her position and my trust and I want rid of her without having any comebacks, surely admitting ordering stock, having the work carried out, taking it out of my factory and selling it when she knew I would be off is a good reason*" (page 89). To that message JH replied, "*The issue is we have yet to uncover any evidence that supports that cash has not gone into the bank. We are however uncovering evidence that the recordkeeping and financial management was unsatisfactory. Dependent on how strong the evidence is at the end of the investigation, this itself could be sufficient to take disciplinary action*" (page 90). On 19 October 2015 (page 91) MA wrote to JH in an e-mail seeking her instructions, "*I cannot prove she did not put the money in the drawer and she cannot prove she has, what's the chances of dismissing her on the grounds you suggested of her taking me to a tribunal (sic)?*".

10.18 The investigation of JH began with an interview by JH of MA on 13 October 2015 (pages 93-94). MA recorded that the claimant had told her that they had had around 50 orders from parents for the two schools since the contract had been lost whereas the notebook of NJ indicated that some 148 items had been prepared for parents of those schools in 2015. In addition MA raised with JH the fact that NJ had been permitted by the claimant to provide embroidery on some 98 items of school clothing for her own family and friends. MA had calculated that the cost of the work which NJ had done was around £800 and yet she could not see that the respondent company had received that payment. She had asked NJ who had confirmed that she had made the payment in cash to the claimant. In addition MA had gone through NJ's notebook and found evidence of 44 other orders for parents of the two schools during 2014 and early 2015 (page 99 in the bundle). Of greatest concern to MA was the uncovering of the four invoices (pages 101-104) which together totalled £3,771.36.

10.19 A copy of the interview notes between MA and JH (pages 92-94) were subsequently shown to the claimant who made her own comments on them (pages 105-106) and those comments indicate the claimant saying that MA was aware of the four invoices before she went away on holiday and that she knew the claimant had produced them in order to account for cash which had been banked in the company bank account which was otherwise unable to be accounted for.

10.20 On 14 October 2015 JH met with the claimant (pages 107-109). The claimant was asked to describe (page 107) the ordering process and it was described by her in the following terms:- "*Joanne said that she would take an order, maybe on scrap paper, put it in the order book, get materials, make up a sample, get customer approval, get the girls to embroider the garment, arrange collection or delivery with customer. For ongoing customers she would send an invoice or get the cash or card payment. If it was cash then there was no invoice. That cash goes in the top drawer in the office, that she would just put the cash in. I asked Joanne how she would know the order had been paid for. Joanne replied its difficult I know. People wouldn't get the goods if they had not paid for them. Maybe a few would take the goods and pay later. There would be a note somewhere to say that they had paid or that the money was outstanding. Joanne said there was (sic) no records to prove what cash goes into the bank unless Moira knows. I just know who has paid and who hasn't*". During that interview the claimant confirmed that to get informal orders from parents of Townend Farm pupils she contacted Emma at the school and a lady called Joanne who worked in the local shop. This confirmed the enquiries already made by MM. The claimant confirmed that she was providing the uniforms slightly cheaper than the supplier which the school was then using. The claimant was asked why she had instructed NJ to carry out the work on those orders whilst MA was on holiday and she replied that she had waited until MA was on holiday "*as she was doing them cheaper*". The claimant explained that she wanted desperately to have the contract back from the school and thought that word of mouth would get back to the school. The claimant was asked if she could point to entries in the books of the company to show where goods which had been ordered to meet the orders from parents of the pupils at the two schools had been ordered and paid: the claimant could not do so. The claimant was asked about the work carried out by NJ for her family and friends. The claimant did not disagree that 98 items had been carried out and that cash had been received but went on to say that MA would not know about that at that stage as the claimant had not yet raised an invoice in respect of the receipt of that cash as the next quarterly bank statement had not yet been received. Subsequently the claimant was asked to confirm the contents of the notes of that meeting and she did so by adding points (pages 110-113).

10.21 JH decided to have a joint meeting with MA and the claimant on 19 October 2015 and that is minuted at pages 114-119. Subsequently the claimant was given the opportunity to approve the minutes of that meeting

and made amendments to them (pages 120-124). During the course of that interview, the claimant was asked how she knew that cash in the bank related to the specific orders which had been supplied by the respondent and the claimant replied that she did not know. She explained that she worked with a three month delay as bank statements were received every three months and when it was received she would endeavour to reconcile the bank statement to invoices but if there was then a surplus of cash which had been banked, then she would create effectively fictitious invoices to balance the books. The claimant commented that she felt unprepared for that meeting as she had been told it was simply to discus the ordering processes for the two schools whereas it was much wider than that.

10.22 Having reviewed the results of her investigation JH produced a report for the respondent (pages 125-129). The report set out the steps which had been taken to investigate the matter by JH. JH concluded that the cash receipts for the garments being sold to the parents of the two schools and also to the family and friends of NJ could not be accounted for in the business. She concluded that it was impossible to account for the source of the cash kept in the cash drawer. In her conclusion JH noted that the claimant had the responsibility for the day to day running of the respondent company. It was clear that the claimant had not discussed in detail the work which she was carrying out for parents of the two schools subsequent to the loss of the contract at Easter 2014. It was noted the claimant had stated that she had had the work carried out on the orders relating to the two schools and the NJ family and friends whilst MA was on holiday because she was doing it at a lower price and knew that MA would not like that. It was noted the business did not have financial controls in place to substantiate the level of cash sales or what sum was in the office drawer at any given time. The reconciliation of cash by the use of false invoices not only provided no internal financial audit control but raised concerns relating to taxation issues. JH concluded that the awareness of the claimant in respect of financial procedures was not at a level that she would expect. There was a dispute as to whether or not MA had told the claimant to ensure that any cash being put into the cash drawer was suitably labelled and her final conclusion read:-

"*I cannot evidence dishonesty in the ordering of the uniforms and the cash associated but I can evidence the clear lack of financial awareness from Joanne. Had financial practice and a clear audit trail been in place the orders for Bexhill and Townend could be clearly traced. The practice of raising false invoices is very concerning and should be addressed immediately. This relates to Bexhill, Townend and Hastings Hill. My conclusion is that financial irregularities exist due to the insufficient level of financial management by Joanne. Evidence points to negligence in her role as a Director. This has led to a situation where the relationship and trust from both parties has been clearly damages. The question has to be addressed as to whether this negligence is a breach of trust and confidence. As a Director Joanne has a duty to exercise reasonable care, skill and diligence. It is essential that there is trust, it is also essential that*

the other Director (Moira) can have confidence in her opposite's reliability to do the job".

10.23 When MA received that report she was not impressed. She dispensed with the services of JH. She decided to continue the investigation herself.

10.24 On 30 October 2015 MA conducted a more formal interview with NJ (pages 133-134). NJ confirmed that the orders from the parents of the two schools came on scraps of paper with the details of pupil names and sizes and the like and she returned those scraps of paper to the claimant once she had completed work on the orders. She also confirmed that the work she had carried out for her own family and friends had been paid for in cash and no invoice raised. During this period MA carried out further checks and discovered other matters in relation to the management of the business which she did not agree with (pages 138-139).

10.25 MA took advice from a lawyer at this time and received various leaflets as to how to conduct an investigation and a subsequent disciplinary hearing. There was no evidence that MA read or appreciated the contents of either of those documents. In addition she was made aware of the ACAS Code. MA spoke to her accountant Mr Robinson of Mitchells on 27 November 2015 (page 170). Mr Mitchell wrote to MA, "*I think both this sheet and the original from Nicola should be combined resulting in cash income in the region of £11,387 (£4,109 plus £7,278). There has only been three £200 put into the bank account so the potential shortfall could be as high as £8,187 (£11,387 less £3,200 from my e-mail on Nicola)*". An attempt was made to prepare a sheet showing the work carried out by NJ either for her family and friends or for the two schools. The financial records of the company were such that it was impossible to draw any firm conclusion from that exercise.

10.26 MA contacted the two schools and confirmed that those schools had not received any invoices from the respondent company in 2015 and the conclusion MA drew from that was that the claimant had been selling school uniforms to people she knew locally without putting the transactions through the company books.

10.27 Having completed her investigation, MA decided to proceed and sent an e-mail to the claimant on 1 December 2015 (page 171) inviting her to a disciplinary meeting to take place on 4 December 2015. It was stated that the purpose of the meeting was to discuss issues set out in various copy documents which would be delivered to the claimant that day. It went on, "*These documents provide details of your job performance and conduct which I believe to be unacceptable when viewed in the light of the company's requirements and standards*". The claimant was told of her right to be accompanied and told that she could potentially face dismissal.

10.28 The papers delivered to the claimant in readiness for that hearing were those detailed at pages 173-258 of the bundle. Broadly the documents

provided by the company were the same as had been provided to JH and considered by her during the course of her investigation.

10.29 Many of the papers forwarded to the claimant were handwritten notes made by MA which endeavoured to show the number of school garments acquired by the respondent company and those which had been properly invoiced to other schools such as New Penshaw Academy and other schools where it could be shown from the company records that invoices had been raised. It was attempted to show that there was a large shortfall of goods purchased by the respondent company which could not be accounted for. The information supplied was supplied in a way which was not readily understandable. It was detailed by MA to the Tribunal in her witness statement but provided to the claimant in such a way as frankly to be incomprehensible and in a way in which it would not permit of proper or reasoned response. Some of the documents supplied to the claimant (pages 216-228) were copies of notes made by the claimant to show orders she had placed with suppliers. MA considered it significant that these notes prepared in September 2015 did not in anyway in particular refer to the names of the two schools. I find that that is not surprising given that the respondent had no contract with the two schools at that time and any work being done in respect of pupils at those schools was being done on a private basis for individual parents and was not referred to through the schools and the school was not in any way involved in the contract or its payment. Documents at pages 232-253 purported to show how invoicing was done properly by the respondent company in relation to its other schools who were customers of the respondent. On pages 254-257 were examples of invoices to the respondent company by suppliers supplying school wear to the respondent which would then be embroidered and supplied to its customers. The invoice at pages 256-257 was for a sum of £1,953.65 and included a large number of items some of which MA concluded would have been supplied by the claimant to the parents of the two schools who had placed orders direct with the respondent company.

10.30 A disciplinary hearing took place on 4 December 2015. It was attended by the claimant and her representative Julie Harrison and by MA and her friend MM. The meeting was minuted by Marion Marsh (pages 259-268) and subsequently a typed copy was prepared of the minutes (pages 269-272). In addition, the claimant's representative wrote her own notes of the meeting (pages 273-279). In addition the meeting was recorded surreptitiously by the respondent and a transcript of the recording is found at pages 280-290. There was an issue between the parties as to whether at the outset of the meeting MA told the claimant that she was to be dismissed or potentially to be dismissed. I accept that in fact the words used were that there was potential for dismissal and that there was not an overt statement that dismissal would result - although it did.

10.31 During the course of the disciplinary hearing the claimant was asked if she could recall a conversation with MA when she had stated that she was trying to get the two schools back into contract with the respondent and

the claimant said that she could not recall any such conversation. It was asserted by MA that some 150 items had been prepared for parents from the two schools. The claimant stated that she did not realise that so many garments had been prepared. The claimant was asked why the names of those schools did not appear in any order book and the claimant asserted that the only paper trail was the NJ workbook.

10.32 The question of the cash received and banked by the respondent was raised with the claimant. MA asserted that when she returned from holiday in September 2015, there was some £3,000 in the cash drawer but the claimant asserted that it was between £4,000 and £5,000. The claimant asserted that her recordkeeping was good. Issues in respect of customer details not being recorded on the respondent's computer were raised. Various jobs carried out for customers were raised with the claimant and she was asked to comment on them. The claimant asserted that she did not think she had to include MA in all the decisions she made in respect of pricing. An issue was raised in relation to a company called Elite Fitness and the fact that there was an unpaid invoice outstanding since August 2015. The claimant was asked about creating false invoices and the claimant stated that she always created false invoices to cover cash and that she had always done it that way as MA well knew. The claimant asserted that she made up fictitious names when she had sums of cash which she could not account for and had used the name of MA's daughter and indeed the claimant's own name from time to time "*as a joke".* The claimant explained the delay in invoicing was because she got bank statements three months late. It was put to her that she could have checked the bank account online at any time. It was said by MA that the matter boiled down to there being no paper trail for the goods supplied to the parents of the two schools since the contract was lost in March 2014. The claimant asserted the paper trail was in fact NJ's workbook. The claimant was asked about the work which she had allowed NJ to carry out for her family and friends and confirmed that when NJ had paid cash to her she did not give any receipt. The claimant denied that she had run the company down. After 50 minutes the meeting adjourned for 25 minutes to enable MA to consider the matter. When the meeting resumed MA advised the claimant that she was dismissed summarily for gross misconduct and advised her of her right of appeal.

10.33 By letter of 8 December 2015 (pages 292-293) the respondent confirmed the dismissal of the claimant and the letter includes the following, "*The reason for the termination of your employment was gross misconduct specifically in connection with the work which you had had done by Nicola Johnson for Townend Farm and Bexhill Schools. This was deliberately done in such a way that I would not be able to know about it (although by a fluke I happened to find out when I came across a personal record of the garments which had been created by Nicola for her own use). No documentary records of any kind were created for all of this work, unlike all of the legitimate business done by the company, and there was no record or any evidence of payment having been received by the company. It is clear that over 200 garments were bought and embroidered by the*

company for the use of children at those two schools during the course of this year but that they and/or the proceeds of their sale effectively disappeared. One way or the other this is theft. All of the evidence also shows that there had been appalling mismanagement of the company's affairs when you were in charge. Apart from the work for and money from the two schools as set out above, you also allowed Nicola to have about £800 of private work done again with no documentary records or evidence of payment to the company: you had no system at all to account for the cash received by the company: you did business with actual and potential customers of the company without setting up any proper documentary records of what was discussed or agreed: you were charging prices to certain customers which were commercially suicidal and made no sense at all: and you even produced invoices which you admitted to have been false. This mismanagement was so colossal and so damaging that it deserves to be treated as gross misconduct …". Having again referred to the two separate allegations of misconduct in relation first to the two schools and secondly in relation to the running of the company the letter continued: "*Each of the two matters was so important as to justify your dismissal".*

10.34 On 13 December 2015 the claimant wrote a lengthy letter of appeal to the respondent (pages 296-302) which particularly alleged breaches of paragraph 5 of the ACAS Code and paragraph 9 and paragraph 12 and also took issue with various other statements contained in the letter of dismissal.

10.35 The claimant was advised that her appeal would be heard on Monday, 21 December 2015 and that it would be taken again by MA with MM in attendance.

10.36 The appeal meeting was minuted and MM prepared handwritten notes (pages 321-324) which were subsequently transcribed (pages 325-326). The appeal hearing lasted only 20 minutes. The claimant did not engage in the discussion and said nothing to support her appeal. The meeting ended shortly after it began and on 22 December MA wrote to the claimant an e-mail which included:- "*I paid very close attention to all of the arguments put forward in your appeal letter and made some further enquiries into the points you made, you did not make any new points at the appeal meeting and you did not expand on any of the points you made in your appeal letter, your opinion to everything I said was "irrelevant". I have given the whole matter a lot of additional thought and my decision to your appeal (sic) is to be rejected and you remain dismissed without notice for gross misconduct …*". With that the process came to an end and the claimant instituted these proceedings before the Tribunal for unfair dismissal.

11 **Submissions – the claimant**

The claimant made oral submissions which are briefly summarised as follows:-

11.1 The claimant began work in 1987 and never had any training. The claimant accepts that her recordkeeping was inadequate but she was doing what she had always been told to do.

11.2 The claimant did issue notebooks to members of staff for them to record the work they were doing.

11.3 It was unfair for MA to be the decision maker at both the disciplinary hearing and then the appeal hearing and that is why the claimant did not engage at the appeal hearing.

11.4 It is clear from all correspondence that MA had predetermined that the claimant was to leave her employment and she said as much in e-mail correspondence with JH. JH stated that there were no grounds to dismiss but MA having predetermined that she was to be dismissed went ahead anyway having found what she unreasonably considered to be reasons to do so.

11.5 Many of the documents provided to the Tribunal were not produced to the claimant during the course of the disciplinary process.

11.6 The dismissal was unfair and predetermined.

12 **Submissions – the respondent**

On behalf of the respondent Mr McFetrich made the following oral submissions which are briefly summarised:-

12.1 The respondent's witnesses were all transparently honest and clearly told the truth. MA did the best she could with the confusing documents.

12.2 There were two main issues to consider, gross misconduct and incompetence. There were effectively two reasons for dismissal and both were equally important and both were made out. However if only one of them is made out then the claim of unfair dismissal should be dismissed. Only if both reasons fail should the claimant succeed.

12.3 The respondent is a company with very small resources and it did the best investigation it reasonably could. The respondent took account of the ACAS Code of Practice and MA tried to get things right.

12.4 The claimant was correctly suspended at the outset and no attack is made on that decision which was common practice.

12.5 At no time did the claimant request other witnesses to be interviewed. The fact that customers were contacted by the claimant does not mean that MA was lying. The investigation by the company was thorough and reasonable. Advice was taken from the company accountant and representatives of the two schools were spoken to. In all the circumstances the investigation was reasonable. The invoices created by

the claimant are accepted as false. A false invoice is fraudulent and the claimant knew the invoices were false.

12.6 The claimant did not engage with the respondent at the appeal hearing and that matter cannot be laid at the door of the respondent. It was conceded at pages 84-89 of the bundle were not before the claimant at the disciplinary hearing.

12.7 The investigation carried out by JH was not binding on the respondent.

12.8 It is clear that MA had not made up her mind before the end of the disciplinary hearing and that she approached the matter with an open mind. The claim of unfair dismissal should be dismissed. If the Tribunal finds that the dismissal was unfair then contributory fault by the claimant has been massive. It will be entirely unjust for the claimant to receive any compensation. The claimant accepted manufacturing four invoices to a very considerable sum and the respondent simply could not trust the claimant again. The claimant was dishonest and has not told the truth and her employment simply cannot be continued by the respondent.

12.9 It was the claimant's responsibility to issue contracts of employment but it cannot be denied that the claimant did not have a contract of employment but if the claimant is entitled to any award then the award under the 2002 Act should be for the lower amount and not the upper amount.

12.10 The Tribunal's concerns in respect of any illegality tainting the contract should not be pursued further.

13 **The law**

13.1 I have reminded myself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case".

13.2 I have noted the decision in **British Home Stores Limited v Burchell [1978] IRLR379** and reminded myself that it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal. In answering this question I note that the burden of proof lies with the respondent to establish that belief on the balance of probabilities. I remind myself that the other two limbs of the Burchell test, namely reasonable grounds on which to sustain that belief and the necessity for as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which the belief was formed, go to the question of reasonableness under section 98(4) of the 1996 Act and in relation to section 98(4) matters, the burden of proof is neutral. In considering the provisions of section 98(4), I must not substitute my views for those of the respondent but must judge those matters by reference to the objective standards of the hypothetical reasonable employer. I have noted the words of Mummery LJ in **The Post Office-v-Foley and HSBC Bank plc –v- Madden 2000 EWCA Civ 3030:**

"In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not".

13.3 I have reminded myself of the decision in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** where the Court of Appeal made it plain that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to any other procedural and

substantive aspects of the decision to dismiss a person from his employment for misconduct reason.

13.4 I have noted the decision of **A v B [2003] IRLR405** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee.

I have noted the guidance of Elias J:

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him".

13.5 I have reminded myself of the decision of **Taylor v OCS Group Limited [2006] IRLR613** and particularly noted the words of Smith L.J. at paragraph 47:

"The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that an early stage, the process was defective and unfair in some way they will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

13.6 I reminded myself of the provisions of Section 123(6) of the 1996 Act – *'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportionate as it considers just and equitable having regard to that finding'.* I note that for a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant. I have noted the provisions of Section 122(2) of the 1996 Act and the basis for making deductions from the basic award.

13.7 I have reminded myself of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. I note that the Polkey principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. I have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** I recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. I note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. I note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a Polkey deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault.

13.8 I have reminded myself of the guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274 :**

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".*

13.9 I have considered the question of what amounts to gross misconduct and in that regard have reminded myself of the decision in **Sandwell & West Birmingham Hospitals NHS Trust –v- Westwood UKEAT/0032/09/LA** where gross misconduct was described as being either deliberate wrongdoing or gross negligence – otherwise very considerable negligence.

13.10 I reminded myself of the guidance in **John Lewis plc –v- Coyne 2001 IRLR 139** to the effect that there are two aspects to dishonesty. – one objective and one subjective. The Tribunal must consider whether what was done was dishonest according to the standards of reasonable and honest people and secondly whether the claimant himself must have realised by those standards that what she was doing was dishonest. I reminded myself of the words of Bell J in that case:

"…But the test of dishonesty is not simply objective. What one person believes to be dishonest may in some circumstances not be dishonest to others. Where there may be a difference of view of what is dishonest, the best working test is in our view that propounded by Lord Lane CJ in the R v Ghosh *[1982] QB 1053 75 Criminal Appeal Reports at 1054. In summary, there are two aspects to dishonesty, the objective and the subjective, and judging whether there has been dishonesty involves going through a two-stage process. Firstly, one must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. Secondly, if so, then one must consider whether the person concerned must have realised that what he or she was doing was by those standards dishonest. In many, but not all, cases where actions are obviously dishonest by ordinary standards, there will be no doubt about it…"...*

14 Conclusions

14.1 I have first considered whether the respondent has proved the reason for dismissal. In answering this question I must consider whether I am satisfied on the balance of probabilities that the respondent has shown that the dismissing officer (MA) had a genuine belief in the misconduct of the claimant.

14.2 In this case the respondent advances two reasons for dismissal and asserts in the letter of 8 December 2015 that both independently justify dismissal. I must consider whether this is a case of the respondent advancing two reasons which alone could separately justify summary dismissal or whether the respondent regarded the charges as cumulative in the sense that both of them together formed the reason for dismissal. In the former case, I must consider whether the respondent has shown pursuant to section 98(1)(a) of the 1996 Act which was the principal reason for the dismissal. In the latter case, both reasons together form the reason for the dismissal and so it is not necessary to consider which of the two formed the principal reason for dismissal as together they form the only reason for dismissal.

14.3 In the letter dated 8 December 2015 (page 292) the respondent states that misconduct relating to the two schools was so grave as to justify dismissal as was the conduct in relation to the way the affairs of the respondent company were conducted. Each of the two matters "*was so important as to justify your dismissal*" says the dismissal letter. Thus I must consider

each reason separately and apply the requirements of section 98(4) of the 1996 Act to each reason separately for the respondent asserts that each alone is sufficient to dismiss. I must also consider whether in that case the respondent has shown which was the principal reason for the dismissal of the claimant.

14.4 In relation to the alleged misconduct in respect of the two schools, I am satisfied that MA and therefore the respondent genuinely believed that the claimant had failed to account for all the proceeds received from the work which had been carried out during 2015 (and indeed since the loss of the contract in 2014) in respect of supplying goods to parents of pupils of the two schools. Therefore the respondent has proved that reason. In fact, I am satisfied that MA had formed this view at a very early stage and certainly by the time she wrote her email to JH on 16 October 2015 (paragraph 10.17 above) and all that she did thereafter was directed to proving what she already believed. In acting in that way, MA lost her objectivity and so acted as no reasonable employer would act.

14.5 In respect of matters to be considered pursuant to section 98(4) of the 1996 Act in relation to this reason, there was considerable confusion caused by the approach of MA in this matter. Time and again reference was made to the fact that work was being done for the two schools. In fact it was perfectly plain that that was not so. The contracts with the two schools were lost at or around Easter 2014 and there never was any suggestion that any work carried out thereafter by the respondent was work placed by either or both of the two schools. What happened was that the claimant used her discretion as manager of the respondent company to seek to effectively undercut the new official supplier of uniforms to the two schools and she did that by employing the services of an agent in Robson's Stores. Accordingly the issue MA had was not that the claimant was carrying out work for the two schools but that she was carrying out work for parents of pupils at those two schools and had failed to account for the numerous articles which had been ordered by and supplied to those parents and paid for in cash. The failure of MA to make that clear also caused unreasonable confusion in all that followed.

14.6 Whilst I am satisfied that MA held the genuine belief referred to at paragraph 14.4 above, I am not satisfied that she carried out a reasonable investigation into those matters or that she had reasonable grounds for that belief at the point of dismissal or that a reasonable procedure was followed. I deal with those matters together.

14.7 The essential element of this allegation was that the claimant had failed to bank cash received in respect of the supply of goods to the parents of the pupils at the two schools from 2014 onwards but in particular during 2015 and in particular again for the work carried out in August and September 2015. The respondent did not produce any bank statements or show to the claimant the results of any reasonable investigation into the bank statements showing the amount of cash which was received into the bank accounts of the respondent compared to the amount of cash which the

respondent calculated should have been received. The reason for that failure no doubt was that the systems in place in the respondent company to evidence the receipt of cash were so inadequate as to make any investigation into such matters almost impossible. All that was obtained and made available to the claimant in this regard was a letter from the respondent's accountant (page 170) wherein certain conclusions were drawn as to the shortfall of cash but no documentary evidence was produced to the claimant allowing her the opportunity to comment on those crucially important conclusions which had been drawn. No reasonable employer would have acted in that way and would have drawn the conclusions this respondent did in those circumstances.

14.8 Any reasonable employer (having decided to carry on the investigation after the inconclusive report of JH) would have seen the claimant again in an investigatory meeting in accordance with paragraph 5 of the ACAS Code and put the matters of concern directly to the claimant. The matters alleged against the claimant in this regard were so serious as to make that a step that any reasonable employer would have taken. The ACAS Guide to the ACAS Code makes it plain in relation to investigating matters that the more serious the matter being investigated the more thorough the investigation should be and that "*it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against".* In this case the allegation of theft was extremely serious yet everything points to a hurried investigation by MA wherein she failed to keep an open mind and sought instead to set out to prove what she already believed to be the case. That resulted in the formulation of a disciplinary charge against the claimant which breached the requirements of paragraph 9 of the ACAS Code as it simply failed to contain sufficient information about the alleged misconduct to enable the claimant to prepare to answer the allegations against her. The claimant was left to trawl through 84 pages of documents in an attempt to understand what it was that was alleged against her. No reasonable employer would have acted in that way.

14.9 Furthermore the procedure adopted in providing what information was given to the claimant was unreasonable. Documents were supplied to the claimant which were frankly incomprehensible. A detailed spreadsheet analysis of sums which allegedly had been received in cash (pages 84-88) was not at any time shown to the claimant prior to her dismissal and indeed even if it had been, its meaning was far from plain. The investigations into what were said to be missing garments evidenced at pages 205 and pages 230 and 231 were supplied but are frankly incomprehensible. Those and many other documents were sent to the claimant on 1 December 2015 in advance of the disciplinary hearing on 4 December 2015 and the claimant was told that the disciplinary hearing was to *"discuss the issues set out in various copy documents which will be delivered to you today".* Those copy documents numbered some 84 pages but simply failed to set out in any understandable way what allegations it was that the claimant was facing. In acting in that way, the respondent acted as no reasonable employer would act in making allegations of the

utmost gravity against any employee - let alone an employee with 28 years service.

14.10 Furthermore it is clear that the respondent through MA had reached a predetermined view that the claimant was to be dismissed and that led MA to reach her decision without conducting a reasonable investigation. I reach the conclusion that MA had predetermined the outcome in this matter because of the contents of her e-mail correspondence with JH as early as October 2015 (paragraph 10.17 above) and also when she simply disregarded the eminently reasonable conclusion reached by JH after a proper investigation to the effect that she could not evidence dishonesty by the claimant in the ordering of the uniforms and the cash associated with it. Whilst MA was entitled not to accept that conclusion, any reasonable employer would then move on to conduct an investigation which was substantively and procedurally reasonable in order to evidence reasonable grounds for the belief which had already been established in the mind of MA. For the reasons set out above MA failed in that regard.

14.11 I do not lose sight of the size and administrative resources of the respondent. They are very small indeed. The fact that MA acted as investigating officer, disciplinary officer and appeal officer is not of itself unreasonable because of the size of the respondent company. However, with that conflation of roles comes a high danger of prejudgment and the application of a predetermined outcome. That is precisely what occurred in this case. It could have been avoided by bringing in an independent external person to conduct one or more of the three processes. In failing to do so the respondent did not act unreasonably provided it guarded against the inherent dangers in not doing so. Everything in this matter indicates that those dangers were not avoided and instead points to prejudgment and predetermination by MA weeks in advance of the disciplinary hearing on 4 December 2015. No reasonable employer would have acted in that way and that is sufficient in itself to render unfair the dismissal of the claimant for this reason.

14.12 Accordingly I conclude that the respondent through MA did not have reasonable grounds for the genuine belief held by MA that the claimant had stolen the proceeds of sale of some of the items supplied to the parents of pupils at the two schools and neither had a reasonable investigation been carried out nor in any event had a reasonable procedure been followed. The ACAS Code was breached in respect of paragraph 5 and paragraph 9.

14.13 I move on to consider the separate reason for dismissal advanced namely the mismanagement of the respondent company by the claimant. In this regard I note from the letter of dismissal that the matters relied on were the way in which the claimant allowed NJ to have work done in August 2015 without documentary record or evidence of payment, the fact that there were no proper systems in place to evidence the receipt of cash, that new and potential customers were not properly recorded within the

company books, that pricing systems were commercially suicidal and that false invoices were produced.

14.14 I am satisfied that the respondent through MA held a genuine belief that those matters were established and that they related to the claimant's conduct. However, as with the first reason advanced for dismissal, I am satisfied that MA had formed this view before the disciplinary hearing on 4 December 2015 and that she set out at that hearing to establish what she already believed. Again in acting in that way, MA lost her objectivity and so acted as no reasonable employer would act. I move on to consider the questions posed by section 98(4) of the 1996 Act in respect of this reason for dismissal.

14.15 I am not satisfied that these matters were properly set out to the claimant in advance of the disciplinary hearing so that the claimant came to that hearing knowing the allegations she was to face. In point of fact it is quite clear that she did not know that she was facing such allegations at the disciplinary hearing on 4 December 2015 and those are not the actions of any reasonable employer. The papers produced to the claimant, whilst alluding to such matters, did not make it plain that those were allegations that she was facing and the information which was provided was not evidence of a reasonable investigation into such matters. A reasonable employer would have set out those allegations in a way that would have made it clear what allegations of mismanagement the claimant was to face. Instead in this case, the claimant was sent a muddled mass of papers extending to some 84 pages and told that she was to face a disciplinary hearing to *"discuss the issues set out in various copy documents which will be delivered to you today".* This did not give the claimant sufficient information about the allegations of misconduct she was facing and breached paragraph 9 of the ACAS Code. No reasonable employer would have acted in that way.

14.16 Furthermore in this regard also, I am satisfied that the respondent did not approach the hearing with an open mind. MA had determined that the claimant was to be dismissed and simply moved to dismissal with that predetermined intention without following a reasonable procedure. No reasonable employer would have so acted.

14.17 In relation to the mismanagement allegations, it is clear that in the course of the disciplinary hearing, the claimant did accept some of the matters put to her. In particular she accepted fabricating the four invoices in order to balance the cash surplus evident in the company bank account at the end of June 2015. In addition the claimant accepted that the work done for the family and friends of NJ was not evidenced by paperwork and that the system for recording the receipt of cash was inadequate. However, she asserted that MA was aware of the practice she adopted to account for surplus cash and I accept that that was so. MA was involved in the management of the respondent company to a significant extent and her attempts to distance herself from those matters and seek to advance them as reasons to dismiss were not convincing and were not the actions of a

reasonable employer. In respect of the matters where the claimant was at fault, I conclude that the penalty of summary dismissal was not in any event within the band of a reasonable response given the undoubted knowledge of those practices by MA and her involvement in them.

14.18 Accordingly I conclude that the requirements of section 98(4) of the 1996 Act were not met in respect of the second reason advanced for the dismissal of the claimant.

14.19 Given that I reach the conclusion above in respect of the questions posed by section 98(4) of the 1996 Act in respect of both reasons advanced for dismissal, it is not strictly necessary to consider the question of whether the respondent has established which was the principal reason for dismissal in this case. There is no doubt that the respondent advanced the two reasons as individually justifying the dismissal of the claimant. That was made plain in the letter of 8 December 2015 and also in the submissions made to me by Mr McFetrich on behalf of the respondent. In those circumstances it is for the respondent to prove which was the principal reason for dismissal in accordance with section 98(1) of the 1996 Act. The respondent has failed to do so. It is not clear which of the two reasons put forward was the principal reason. In those circumstances the application for unfair dismissal succeeds without any necessity to consider the matters required to be considered under section 98(4) of the 1996 Act.

14.20 Accordingly for the above mentioned reasons, the application for unfair dismissal is well-founded and the claimant is entitled to a remedy.

Findings in respect of breach of the ACAS Code

14.21 I have considered in detail the ACAS Code. Paragraph 5 requires that a respondent should carry out necessary investigations of potential disciplinary matters without delay. The period of investigation in this matter was excessive and did not involve any investigation meeting with the claimant once the initial investigation report had been rejected. Paragraph 9 requires that an employee should be notified of the disciplinary case to answer in writing and that that written information should be sufficient to inform the employee of the alleged misconduct or poor performance. I am not satisfied that the information provided to the claimant in this case gave her sufficient information to enable her to have full information about the alleged misconduct either in respect of the two schools or the mismanagement of the company and in particular I find a breach of paragraphs 5 and 9 established. I do not accept that there was a breach of paragraph 12 of the Code as asserted by the claimant in her letter of appeal against dismissal.

14.22 I have considered the overall impact of those two breaches and I am satisfied that it is appropriate to increase any award of compensation due to the claimant by 8%. The claimant did have a disciplinary hearing and was offered an appeal and therefore the breach of the code was not a

complete breach and I consider that an increase of 8% is appropriate to reflect the breaches of the Code which occurred in this case.

Findings in respect of a Polkey deduction

14.23 I consider that the absence of information about cash receipts into the business from June to October 2015 in relation to the allegation of dishonesty in relation to the two schools is such as to mean that I could not attempt to speculate what the outcome would have been if the claimant had had a proper opportunity to explain the entries in the bank statements and the receipts of cash from June 2015 onwards. I note in particular that the claimant did at the end of June 2015 attempt to raise invoices (in a thoroughly improper way – a point to which I shall return below) to reconcile the cash received at that time and I am not satisfied that the claimant would not have carried out that same procedure at the end of September/October had she had the opportunity to do so. I consider that to speculate as to whether or not the claimant would have been dismissed in respect of the allegations of dishonesty is too difficult to admit of any sensible conclusion.

14.24 However in relation to the allegations of mismanagement of the company, I am prepared to assess the percentage chance of a fair dismissal taking place for those reasons. I take account of the fact that the claimant admitted that she had created false invoices in order to account for cash receipts of some £3,700 at the end of June 2015 and that this was something she evidently thought was a proper discharge of her senior responsibilities in this company. Furthermore there is evidence that the claimant allowed NJ to carry out work for her family and friends again with no proper documentary record or evidence of payment to the company. There is evidence that the claimant also carried out a charging policy in respect of certain customers which was not commercial to say the least. Had those matters been properly put to the claimant and had she had an opportunity properly to explain them, then I consider, having assessed her evidence to me at the Tribunal, that there is a chance that she would have faced a fair dismissal for those reasons and that that dismissal would have been without notice. I conclude that the chance of a fair dismissal is 25% and I will therefore make that deduction from remedy to reflect that possibility. Had MA not been aware of those practices, I would have concluded that the chance was higher than that but, given the knowledge of MA, I conclude that the chance of a fair dismissal for this reason is 25%.

Findings in respect of any award pursuant to section 38 of the 2002 Act.

14.25 I am satisfied that when these proceedings were commenced the claimant did not have any statement of terms and conditions of employment issued to her which complied with sections 1 and 4 of the 1996 Act.

14.26 I am satisfied that the claimant had been asked to issue such statements to the staff in 2010 but had not thought it proper to issue one to herself.

Therefore there is not a wholesale disregard of this requirement by the respondent but what I accept was an oversight to issue such a statement to the claimant. In those circumstances I conclude that the appropriate award to the claimant pursuant to section 38 of the 2002 Act is an award of the minimum amount namely two weeks gross pay of £355.76 per week.

14.27 I do not consider that there are exceptional circumstances which would render such an award unjust or inequitable pursuant to section 38(5) of the 2002 Act.

Findings of fact in respect of contributory conduct

14.28 I am unable to reach any conclusion that the claimant has acted dishonestly in this case. It is clear that the respondent believes that the claimant had acted dishonestly. The claimant denies it. Given the inadequate way the respondent put those matters to the claimant I am simply unable to reach a conclusion on the balance of probabilities that the claimant acted dishonestly. I am supported in that conclusion by the conclusion of the JH report.

14.29 However, in respect of the way the claimant conducted and carried out her duties in respect of the respondent company, the claimant did act culpably and was blameworthy and that conduct did lead to her dismissal. The claimant accepted preparing false invoices in order to vouch for a large sum of cash - £3,771 – at the end of June 2015. This was not the first time she had acted in that way. I take account of the fact that this was something which had been carried out and condoned by MA for some months but nonetheless the claimant was responsible for the management of the company and in acting in that way in respect of cash receipts the claimant was culpable and blameworthy. Furthermore in carrying out work for customers which was at an uneconomic and uncommercial price the claimant was culpable and blameworthy.

14.30 In failing to advise MA of her actions in respect of NJ's work for her family and friends and her work in endeavouring to recover the contracts from the two schools through undercutting, the claimant was culpable and blameworthy and that action contributed to her dismissal. The claimant allowed herself to effectively run a company where the management and financial recording systems woefully inadequate. Whilst the claimant inherited such procedures from MA when she was placed in charge of the company in 2013, that does not excuse her continuing to run the respondent business in that way. The claimant was in charge of the business and had responsibilities to ensure that it was run efficiently and effectively and she failed to do so. The claimant was culpable and blameworthy and that conduct on her part led to her dismissal and I would place that level of contributory fault at 45%.

14.31 Furthermore the claimant failed to engage properly with the appeal process. The claimant wrote a comprehensive and compelling letter of appeal but then simply refused to engage in the appeal process. In that regard the claimant was culpable and blameworthy and that action also led to her dismissal (in the sense of a failure to allow the appeal) and I place that level of contribution at 5%.

14.32 Accordingly there will be a deduction of 50% from remedy in respect of culpable and blameworthy conduct of the claimant.

Findings of fact in respect of remedy

14.33 The claimant was paid £18,500 per annum at the date of dismissal which equates to £355.76 per week gross and £280.62 net per week. The claimant had the use of a mobile telephone. The cost of that phone to replace after dismissal was £35 per month and I therefore add £8.07 per week to her net pay to reflect the loss of that benefit.

14.34 The claimant obtained employment on 24 January 2016 and from that point onwards she had a loss of £121.62 on salary and £8.07 for the mobile phone until 13 May 2016.

14.35 I am satisfied that as from 13 May 2016 on the claimant's evidence she obtained a pay increase from her present employer and from that point onwards there has been no loss. Accordingly I will calculate compensation due to the claimant on the basis that her losses ceased on 13 May 2016 shortly before the hearing before me.

14.36 The claimant did not receive any state benefits after her dismissal.

14.37 The claimant was aged 47 at dismissal and had worked for 28 years. I take account of the provisions of section 119(3) of the 1996 Act and calculate the basic award of compensation for unfair dismissal to be 23 x £355.76 = £8,182.48.

14.38 In relation to a compensatory award I award the claimant the loss of her earnings from 4 December 2015 until 24 January 2016, namely 7 weeks at a total loss of £288.69 (£280.62 plus £8.07) per week namely £2,020.83. From 24 January 2016-13 May 2016 I award the claimant a weekly loss of £129.69 (£121.62 plus £8.09) for a period of 16 weeks namely £2,075.04. I award £450 for loss of statutory rights.

Calculation of compensation – tabular form

14.39 **Basic award**

23 x £355.76	£8,182.49
Less 50% contributory conduct	£4,091.25
Net award	£4,091.24 (A)

Compensatory award

4 December 2015-24 January 2016 7 weeks @ £288.69	£2,020.83
24 January 2016-13 May 2016 16 weeks x £129.69	£2,075.04 £4,095.87
Loss of statutory rights	£ 450.00
TOTAL	£4,545.87
Add 8% - section 207A Trade Union & Labour Relations (Consolidation) Act 1992 – breach of ACAS Code	£ 363.66 £4,909.53
Less 25% **Polkey** reduction	£1,227.38 £3,682.15
Add award under section 38 of the 2002 Act	£ 711.52 £4,393.67
Less 50% contributory conduct	£2,196.83
TOTAL	£2,196.84 (B)

Overall summary –

Basic award (A)	£4,091.24
Compensatory award (B)	£2,196.84
TOTAL AWARD	£6,288.08

14.40 The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

14.41 I consider it appropriate to award the claimant the fees she has had to pay to issue this claim (£250) and the hearing fee (£950) namely £1,200.

14.42 Accordingly the total amount due from the respondent to the claimant is £7,488.08 which sum is payable forthwith. I am satisfied that the amount awarded for the compensatory award does not breach section 124(1ZA) of the 1996 Act.

Final Comments

14.43 During the course of the hearing I heard evidence that certain payments had been made by MA to the claimant and other staff without deduction of income tax and national insurance contributions. I considered whether this illegality tainted the contract of employment to such an extent that I should not allow the contract to be enforced. I conclude that that is not so. The payments were small and occasional. The claimant was not aware of any

illegality and did not participate in it. The respondent company must ensure that there is no repetition of such behaviour.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....22 June 2016.....
JUDGMENT SENT TO THE PARTIES ON

.....22 June 2016.....

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL