



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Moseley

v

Elite Management Midlands Ltd

Heard at: Birmingham

On: 29, 30 November 2017
In chambers 6 December 2017

Before: Employment Judge Broughton

Appearances:

For Claimant: Ms Dickinson, counsel

Respondent: Ms Halsall, consultant

JUDGMENT

The Claimant's claims of unfair dismissal, unpaid wages, unpaid holiday pay and breach of contract succeed.

There will be a remedy hearing on 2 February 2018. The parties are to agree a bundle for the remedy hearing by 19 January 2018 and exchange any further witness statements by 26 January 2018. An updated schedule and counter schedule of loss should be provided.

Employment Judge Broughton
6 December 2017

REASONS

Facts

1. The respondent is a parking services company.
2. It was common ground that the company's principal activity was originally clamping in private car parks. In the beginning the company struggled financially and, for example, made a loss according to their 2010 accounts.
3. The company was set up and owned by Gary Hart.
4. The claimant, Mr Hart's brother-in-law, was made redundant by his previous employer in 2010. I heard unchallenged evidence that he took home about £450 net per week from his previous employment.
5. The respondent offered the claimant a position as Operations Manager and he commenced in that role on 8 June 2010.
6. The claimant became a director of the respondent shortly thereafter and a 30% shareholder a year later.
7. The claimant was paid a starting wage of £450 gross per week. It was his evidence that he agreed with Mr Hart that this would increase to match his previous earnings, £450 net per week, when the company's financial position improved.
8. Mr Hart denied this, albeit he acknowledged that the claimant's pay would have been reviewed and increased based on the company's performance.
9. The claimant took over management responsibility for the operations of the company and engaged Peninsula to provide business support and advice. As a result contracts were put in place for staff, including the claimant. His contract, signed in February 2011, provided for a wage of £450 and 1 week's notice by either side.
10. The company's performance improved showing a profit of over £30,000 in 2011.
11. In July 2012 Mr Hart was sentenced to a lengthy prison term, apparently on conspiracy / counterfeiting charges.
12. It was common ground that, thereafter at least, the claimant was the sole director of the respondent. He had full responsibility for the management of the company and had authority and autonomy to make all necessary management decisions, such as hiring and firing.
13. In 2012, the company's performance improved yet further to show a profit of over £85k. It appears that at some point that year the claimant awarded

himself a pay rise, taking his weekly wage about half way to what he claimed had previously been agreed with Mr Hart. It was common ground that there was no further discussion about this, nor was Mr Hart's express consent sought.

14. The company's profits were maintained over the next couple of years.

15. It appeared that at some point early in the 2015 financial year the claimant increased his pay to £606 gross, resulting in him receiving £450 net, the amount he claimed he had been promised at the outset. Profits rose again in the 2015 accounts to over £125k.

16. In early 2016, following the resignation of an employee, the claimant engaged an agency to recruit a finance manager for the company. Following a recruitment process he engaged Mr Dickinson.

17. Mr Dickinson apparently carried out a review of employee contracts and updated them all. He said one of the reasons for this was to increase the notice provisions to prevent problems if staff resigned.

18. The claimant's contract was also updated, reflecting his increased salary and increasing his notice periods, including a significant extension to the notice he was to receive on dismissal. Mr Dickinson signed the contracts on behalf of the company.

19. Mr Dickinson was apparently under utilised and he proposed providing wider services to the company, to include health and safety and HR. The idea was that the company could save the money they were paying to Peninsula by utilising his services instead. He would come off the payroll and invoice the company for his services.

20. This was agreed and steps were taken to terminate the Peninsula contract, although subsequent events resulted in those contracts continuing.

21. Mr Dickinson had full online access to the company's bank accounts, alongside the claimant.

22. The company posted further increased profits of £144k in the 2016 accounting year.

23. Mr Hart was released from prison in October 2016. Prior to his release it was clear that he considered that there had been a serious breakdown in the relationship between Mr Hart and his sister and her husband, the claimant. It arose for personal reasons that I will not expand on here.

24. That breakdown led to Mr Hart wanting the claimant out of the business. He acknowledged this and said he could not bear to even look at him. That said, he claimed that he was prepared to offer him a role working outside "ticketing". The claimant suggested that he was told Mr Hart had found someone to replace him. He said he was prepared to agree to leave if he was paid his entitlements as an employee and a shareholder.

25. On 9 November there was a meeting between Mr Hart, the claimant and a Mr Rudd. The claimant said that he was informed that Mr Rudd had been employed to take over his duties. The respondent denied this, although that is what subsequently happened. It became clear that Mr Hart was not prepared to contemplate the claimant continuing in his previous role.
26. There was some dispute about whether Mr Dickinson was also present but it was clear that he was, at least, in the doorway of the small office.
27. Either in that meeting or subsequently it appears that there was a discussion about possible redundancy and Mr Hart investigated this with his accountants. Mr Dickinson suggested that he was also tasked with taking advice from Peninsula about redundancy.
28. There was a further meeting on 15 November 2016 between Mr Hart, Mr Rudd and the claimant. Again Mr Hart made it clear that he could not work with the claimant.
29. During the meeting Mr Dickinson entered and produced the redundancy letter and calculation that he claimed Mr Hart had asked him to prepare. Mr Hart denied this but there was no apparent reason for Mr Dickinson to have completely manufactured this scenario. I saw several emails between him and Peninsula that appeared to confirm he was acting on instructions and, at that stage, he could not have known that those would ever be seen in an employment tribunal.
30. Whilst there were disputes about the contents of the meeting it was clear that it was about how to move forward, given Mr Hart's perception of the "breakdown in the employment relationship". It must have included some discussion about severance terms and clearly Mr Hart was not willing to meet the claimant's expectations.
31. Mr Dickinson apparently decided to terminate his contract for services that day. He said that the reasons were that he was unhappy about being asked to fraudulently amend company payroll records and he also did not like being involved in what he saw as an unfair redundancy process for the claimant. Whilst those facts were disputed, there was no suggestion that Mr Dickinson had any other reason for terminating his contract, nor that he did not genuinely have those concerns.
32. On 17 November 2016 the claimant and Mr Hart met with the respondent's recovery agent to discuss their schedule of unpaid parking tickets.
33. The claimant's evidence was that when he had employed someone to support court action in relation to these unpaid tickets it had proved to be uneconomic and so, when they left, he had not replaced them. He acknowledged that different companies took different views on when and whether to pursue court action, if at all.

34. Mr Hart claimed that he felt that the large amount of unpaid tickets was unacceptable. As a result the claimant was suspended the following day. Mr Hart suggested in his witness statement that there were other reasons for the suspension but they were not included in the suspension letter, nor, on his case, could they have been known at that time. The suspension letter referred to the suspension being “ongoing”.

35. It was common ground that Mr Dickinson was asked to continue providing his services to the company for a short time to assist with the handover of payroll etc. It was also common ground that he did so. Mr Dickinson claimed that he only agreed to do so on condition that his outstanding invoices were paid. The respondent denied this. One of the invoices presented before me was for the outstanding term of the 12 month contract for services on the basis that the respondent had breached that contract.

36. Mr Dickinson made arrangements to pay his own invoices, including the large termination invoice for over £7000 plus VAT. This was paid on 23 November 2017. His evidence was that he always paid his own invoices and he produced evidence to show that he had emailed in a copy of his contract for the attention of Mr Rudd. He also showed that he had telephoned the office several times before authorising the payment. He claimed Mr Rudd had authorised him to do so, having spoken to Mr Hart. Mr Hart denied this.

37. Despite being suspended, the claimant continued to assist the business as and when required. While assisting with some banking he apparently fell ill and was signed off sick by his doctor.

38. The claimant wrote to Mr Rudd on 16 December 2016 asking to take his holiday instead of sick leave and for the remainder to be carried over. It was common ground that it was the practice of the company to allow holiday to be carried over or paid in lieu and I saw evidence that this had happened for the claimant in the past.

39. The claimant only received statutory sick pay and raised further concerns on 19 and 23 December 2016.

40. On 30 December 2016 Mr Rudd replied saying that the claimant had been suspended for 2 weeks before going on sick leave. The respondent argued that the suspension was only ever intended to be for 2 weeks and that Mr Hart had said as much to the claimant.

41. I did not hear from Mr Rudd but do not accept this version of events. The context of Mr Rudd’s letter was a response to the claimant’s requests for pay. He was justifying only paying sick pay, not suggesting that the suspension had been lifted. The original suspension was ongoing.

42. The letter raised further allegations in relation to Mr Dickinson’s appointment, his transfer of funds to himself, the claimant’s pay and that of his son, as well as the pay of Mr Hart’s daughter.

43. Mr Rudd also referenced the family dispute and appeared apologetic about the allegations.
44. On 3 January 2017 the claimant's wife returned to work with the respondent and informed the company that the claimant was fit to return.
45. The claimant believed he remained suspended and did not return to work. The respondent did not ask where he was or chase him to return suggesting that they, too, knew he was still suspended.
46. The respondent continued to seek the return of all company property. I note that when this was first requested Peninsula had advised that this could be considered to evidence prejudgment of the investigation.
47. The claimant confirmed his understanding that he remained suspended on 17 January 2017.
48. On 19 January 2017 the respondent wrote to the claimant suggesting that his suspension was now without pay. It was accepted before me that they had no right to do so. This seemingly further confirms that prior to this the claimant was still suspended and not on unauthorised absence as claimed by the respondent.
49. On 3 February 2017 the claimant was invited to an investigation meeting to be conducted by a Peninsula consultant.
50. The investigation took place on 8 February 2017. The allegations were put and the claimant was able to give his explanation and version of events.
51. There was no evidence of any further investigation following that meeting. Specifically, it did not appear that there was any attempt to speak to Mr Dickinson, the claimant's son, any other employees, the debt collection company or the recruitment agency.
52. There did not appear to be any investigation regarding when the claimant's pay increased or whether other employee contracts were reviewed the previous year.
53. An investigation report was produced on 14 March 2017. It concluded by recommending disciplinary action on most of the allegations.
54. Some of it illustrated that the investigator did not really understand the respondent's business. For example, it referenced POPLA appeals in the context of unpaid parking tickets but that was a completely different, and prior, process to debt collection. It also appeared to suggest that the claimant's pay only increased by reason of the revised 2016 contract. That contract merely confirmed what the claimant's pay had been for some time.
55. On 5 April 2017 the respondent wrote to the claimant inviting him to a disciplinary hearing in relation to the allegations to be taken forward. There was

no mention of pursuing the allegation in relation to the wages of the claimant's son.

56. The claimant prepared a detailed statement in response to the allegations. He also provided his narrative about the real reason for the respondent wanting him out of the business and made allegations about the whole situation being prejudged. I was not referred to any evidence that those matters were ever investigated.

57. The disciplinary hearing took place on 10 April 2017 before another Peninsula consultant and the claimant was accompanied by his wife. The claimant had the opportunity to fully defend the allegations.

58. There was little evidence of any further investigation by the respondent, although it did appear some further questions were put to key individuals.

59. A disciplinary hearing report was produced on 17 May 2017.

60. The allegation in relation to authorising his own pay rise and doing so by arranging for Mr Dickinson to amend his contract was upheld as gross misconduct.

61. The allegation that the claimant was negligent by not obtaining references for Mr Dickinson and that this resulted in an unauthorised payment to him of £8858.64 (including VAT) was also upheld as gross misconduct.

62. The allegation in relation to not collecting parking fines owed was also upheld, but only as negligence amounting to serious misconduct.

63. The allegations in relation to not making payments to Mr Hart's daughter were not upheld due to insufficient evidence.

64. An allegation of overpaying the claimant's son was also upheld as gross misconduct.

65. This report also contained significant errors. For example, it stated that the claimant issued himself with a new contract and this is what increased his pay. It referenced the claimant's son's contract which I did not see. It also suggested that the claimant paid Mr Dickinson's termination payment, which was not the evidence before me.

66. Nonetheless the report recommended dismissal without notice.

67. On 22 May 2017 Mr Hart signed a letter to the claimant on behalf of the respondent adopting the recommendations of the disciplinary report. The claimant was dismissed without notice and offered the right of appeal.

68. The claimant sent a detailed letter of appeal on 26 May 2017. He did not receive an acknowledgment until he was sent a letter dated 21 September 2017 inviting him to an appeal hearing with another Peninsula consultant.

69. The appeal took place on 29 September 2017 and an appeal report was produced on 16 October 2017. Some of the allegations were upheld and some were not but, overall, the recommendation was for the appeal to succeed. The reason given was that the delay had resulted in procedural unfairness.

70. That recommendation was not adopted by the respondent and the claimant was unaware of the outcome until disclosure in these proceedings.

The issues and the law

71. The claimant claimed unpaid wages for the period from 4 January 2017 to the termination of his employment. Before me the respondent conceded unpaid wages from 19 January 2017, being the period of unpaid suspension. The issue was whether the claimant was absent without authorisation prior to that date once his sick note expired, or whether he was entitled to full pay for the intervening period due to an ongoing suspension.

72. The claimant claimed unpaid holiday pay for 2016 and 2017. The respondent conceded that the claimant had an entitlement for 2017, albeit there was some dispute over the calculation under the Working Time Regulations 1998 ("Regulations"). In relation to 2016 the claimant claimed under his contract or, in the alternative, under the Regulations. He suggested that he was unable to take his leave due to his suspension followed by his sick leave towards the end of 2016. The respondent suggested that he had not sought to exercise his right to leave in time and so the entitlement was lost.

73. The claimant argued that he was dismissed in breach of contract and that he was, therefore, entitled to notice pay. It is for the respondent to prove that the claimant was guilty of gross misconduct entitling them to dismiss without notice. If the claimant was dismissed in breach of contract, there was also an issue in relation to the notice to which he was entitled given the disputes over the correct contract and the applicable notice period.

74. Under s.98 Employment Rights Act 1996 it is for the employer to show the reason for dismissal. Conduct is a potentially fair reason. Whether the dismissal is fair or unfair requires the tribunal to have regard to the reason shown by the employer and whether, with regard to that reason, in the circumstances the employer acted reasonably or unreasonably in treating it as sufficient for dismissing the employee. This test shall include consideration of the size and administrative resources of the employer and be determined in accordance with equity and the substantial merits of the case.

75. Burchell v British Home Stores [1980] ICR 303 is authority for the proposition that the employer must show that they had a genuine belief in the misconduct. That belief must be formed on reasonable grounds following a fair investigation. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss.

76. The appeal hearing is relevant to whether or not the disciplinary process as a whole was fair.

77. I also have to have regard to the ACAS Code on disciplinary and grievance matters at work.

Decision

Unpaid wages

78. In relation to the unpaid wages I prefer the claimant's evidence. I do not accept that he was told by Mr Hart that he was suspended for only 2 weeks. That would be unusual. Moreover, had that been the case the suspension letter would have said as much.

79. The reference to being suspended for 2 weeks in the letter of 30 December 2016 was to reflect what had actually happened up until that point in time. It was in the context of explaining why the claimant had not received full pay whilst he was off sick.

80. The claimant was suspended on an ongoing basis. Accordingly he remained suspended when his sick leave came to end. If the respondent genuinely believed otherwise they would have enquired why he had not returned to work and taken steps to inform him that they considered that he was absent without leave. They did not. Instead the only contact was to repeat requests for the return of company property. This position was further confirmed when the claimant wrote stating his understanding that he was suspended and received the response that he was then suspended without pay.

81. Accordingly the claimant's claim for unpaid wages succeeds in full. It was, quite rightly, conceded before me that the respondent was not entitled to suspend without pay. He is entitled to his wages from 4 January 2017 until the effective date of termination of his employment.

Holiday pay

82. It was common ground that the respondent operated a policy whereby employees could carry over holiday or receive a payment in lieu of untaken holiday.

83. The claimant had asked to take his holiday in December 2016 but received no response.

84. In those circumstances the claimant was entitled to carry over his holiday entitlement in accordance with the respondent's custom and practice. Under his contract of employment he was entitled to be paid for any holidays accrued on termination.

85. As a result I do not need to go beyond the contract in relation to the claimant's claims for holiday pay for holidays accrued in 2016. The claimant took,

and was paid for, 8 days in 2016 and so was entitled to carry over the remaining 20 days of his entitlement. He was entitled to be paid in lieu of that accrued holiday on termination.

86. In any event I would have accepted that he had an entitlement to carry over his holiday, having been unable to take it whilst off sick in December 2016, in accordance with established European case law. As the sole director of the company at the time he did not need to seek approval from anyone to take such holiday and so it would be fanciful to suggest that he should have given himself notice to take holiday some weeks earlier.

87. It was, rightly, conceded before me that the claimant was entitled to be paid in lieu of his statutory minimum entitlement to holiday pay for 2017, to be calculated in accordance with regulation 15 of the Regulations.

Unfair dismissal

88. In relation to the unfair dismissal claim I find that the real reason for the dismissal was Mr Hart's view of the breakdown in the relationship between himself and the claimant. It was not, therefore, conduct as claimed by the respondent.

89. Mr Hart admitted that he wanted the claimant out and could not stand the sight of him. That is the case whether or not he offered him a much lower level role "ticketing". It was reasonable for the claimant to refuse such an offer, if any.

90. I also accept the evidence of the claimant and Mr Dickinson that Mr Rudd was appointed to effectively take over the claimant's role. There was no other role for him and that is what actually happened.

91. As a result the claimant's fate was already decided in November 2016 and any process that involved Mr Hart or, indeed, Mr Rudd could not be fair. To some extent I need go no further.

92. The whole situation was prejudged. There was no possibility of the claimant ever being allowed to return to work, certainly not in his previous senior role. That is further evidenced by the respondent immediately requiring the return of all company property and the subsequent decision to suspend him without pay.

93. Mr Hart seized on the claimant's failure to pursue court action in relation to unpaid parking tickets as a reason to suspend him. Further allegations were added thereafter.

94. I have already found that the real reason for the dismissal was not conduct. However, even with regard to the potential conduct reasons there were significant failings.

95. Mr Hart, for example, was adamant that a material part of his reasoning was the fact that he believed that the claimant was working elsewhere, competing

with the respondent's business, having taken over responsibility for one of the respondent's sites. There was no evidence of that and it was never put to the claimant, either in internal proceedings or before me.

96. The allegations in relation to Mr Hart's daughter were not upheld by the Peninsula consultant. I need not consider them further save to say that Mr Hart's evidence was that he had upheld them notwithstanding the findings of the disciplinary report. It seems to me that this merely confirms my findings on the questionable nature of the whole process in this case.

97. The allegations in relation to the pay of the claimant's son were not relied on by Mr Hart, according to his oral evidence, even though they were upheld in the disciplinary report. They were, in any event, recommended to be overturned in the appeal report. The claimant had responsibility for hiring and firing and setting the wages of staff. He was entitled to employ his son and pay him a wage he considered appropriate based on his skills, experience and responsibilities. The wage paid was, I heard, not substantially more than that received by his predecessor. It was not excessive for someone dealing with parking appeals.

98. The allegations in relation to the recruitment of Mr Dickinson and the payment of his termination invoice were not relied on by Mr Hart in accordance with his oral evidence before me.

99. In any event, there was no suggestion that Mr Dickinson was known to the claimant prior to his recruitment. The claimant had engaged recruitment agents and believed they would carry out necessary checks.

100. Whilst the claimant claimed before me that he had, in fact, seen Mr Dickinson's reference that was not something that he argued in his defence in the internal proceedings. Whether he saw it at the time or not the reference produced before me would not have made any difference to the claimant's decision to recruit Mr Dickinson.

101. Nonetheless, the failure to obtain a reference could hardly be classed as so negligent as to amount to gross misconduct. No reasonable employer would have done so.

102. Moreover there was no evidence that the claimant had any involvement in the payment of Mr Dickinson's termination invoice. The claimant was suspended at the time and the payment was put through by Mr Dickinson. Whether he had authority to do so was a matter between Mr Dickinson and the respondent.

103. No reasonable employer could conclude that the alleged failure to obtain a reference for Mr Dickinson caused the loss of £8858.

104. There were, therefore, only two allegations that were both upheld in the disciplinary report and by Mr Hart who appeared to be the only person with authority to dismiss, albeit he did so in consultation with Mr Rudd.

105. The first was in relation to the unpaid parking tickets. It was the claimant's evidence in the internal proceedings and before me that he took a commercial decision based on his experience and the evidence from the debt collection company. He said that around 30% of companies took a similar view.

106. This did not appear to be challenged, nor was there any evidence of any investigation into this assertion.

107. It seems to me to be a matter of legitimate commercial disagreement. The claimant could justify his decision. He had employed someone to pursue the unpaid tickets beyond the attempts of the debt recovery company by commencing court action. His evidence was that the actual recovery barely covered their wages. This was not challenged.

108. The respondent relied on the fact that £2000 was recovered while the claimant was suspended but someone must have been responsible for the work involved and, over the period concerned, that level of recovery would appear to confirm the claimant's view that it would not cover the costs, including wages.

109. It was also clear that the consultants investigating this matter did not really understand the process. The schedule of losses relied on included all the costs of the debt recovery agents. It did not include commissions that would often be repayable to the respondent's customers. Most importantly it did not include the internal and external costs that would be required to be expended to recover the debts. They appeared to confuse parking appeals with the debt recovery process.

110. When Mr Hart had left the business in 2012 it was principally focussed on clamping. He had little experience, therefore, of the new PCN regime. That said, it was, of course, open to Mr Hart to disagree with the claimant's approach. No reasonable employer, however, would conclude that the claimant was negligent or committing misconduct by taking the approach that he did.

111. I note in this regard that the claimant was a 30% shareholder in the respondent. He received significant dividends regularly based on the profitability of the company. It was in his interests to pursue debts he considered to be economically recoverable.

112. Moreover, since becoming a director responsible for the day to day operations of the company the claimant had turned it around from a loss making enterprise to one which, for its size, made considerable and increasing profits. Little or no meaningful consideration appeared to be given to these points.

113. In any event this allegation was only upheld as serious misconduct and was not, therefore, grounds for summary dismissal.

114. The final allegation was in relation to the claimant's pay. It was, of course, impossible for Mr Hart to objectively judge this issue given that it was

largely a case of his word against that of the claimant in terms of what they had agreed. It was Mr Hart who had made this one of the allegations.

115. Much was made of the claimant's 2016 contract in the disciplinary proceedings but that appears to have missed the point. By that stage the claimant's pay had already increased and so the contract merely reflected the reality. It also increased his notice entitlement but that was not part of the disciplinary case against him.

116. There was no evidence to contradict the suggestion that other contracts were reviewed and amended at the same time. It was unclear who else could have signed the contracts on behalf of the company given that Mr Hart was incarcerated.

117. In any event, the real issue was the pay increase. The claimant's case was that it had always been agreed that his pay would increase to £450 per week net once the company finances could support it. He said this was to match his previous earnings. Mr Hart denied this but acknowledged that the claimant's pay would have increased with company performance.

118. I prefer the evidence of the claimant. His evidence was consistent throughout. Mr Hart's was not. Mr Hart had recently been released from a lengthy prison term for an offence of dishonesty. The claimant was unlawfully suspended without pay.

119. More importantly, however, the claimant's assertion fitted the facts. If he was simply increasing his pay because he could then it seems to me unlikely that he would have increased it to £606 per week and, indeed, that he would not have increased it more as company performance improved.

120. When company performance improved he seemingly increased his pay half way to his target wage. When that improvement was sustained he took it to a level that secured £450 net per week. Due to taxation changes that net amount had slightly increased by 2016.

121. No alternative reason was suggested by the respondent as to why the claimant would have chosen such an odd gross figure. As a result it seems to me that the most likely explanation was that provided by the claimant. Specifically that he had agreed the same with Mr Hart.

122. As a result, whilst it may, perhaps, have been reasonable for the consultants to disagree with me and prefer the evidence of Mr Hart, based on the band of reasonable responses test, it was not reasonable for Mr Hart to do so. On my findings he knew that he had agreed the relevant pay rise and so could not possibly find that the claimant had committed gross misconduct. The claimant did nothing wrong in acting on that agreement and in ensuring that his contract subsequently reflected that agreement.

123. In any event the claimant was left with complete autonomy to run the company during Mr Hart's incarceration and he delivered a profitable enterprise to him on his release.

124. The company performance would, perhaps, have justified such an increase sooner. It would, perhaps, have justified further increases. The claimant did not increase his pay beyond that which he had agreed with Mr Hart.

125. Accordingly, there was no genuine belief in the final allegation.

126. As a result the dismissal was not for the reason claimed. The reasons given were largely not genuine. There could be no reasonable belief. The sanction was not within the band of reasonable responses.

127. There were also failings in the investigation identified above, such as those at paragraphs 51 and 52. These would, potentially, have been enough to render the dismissal unfair on their own, although the respondent is a relatively small employer and had engaged external help.

128. There were additional procedural failings. Specifically,

- a. in relation to the considerable delays (6 months between suspension and dismissal much of which was unpaid and a further almost 5 months before the appeal report)
- b. the failure to give an outcome of the appeal and/or action the recommendations from the appeal

129. In light of all of the above the dismissal was both substantively and procedurally unfair.

130. There was no evidence before me to suggest that a fair dismissal would, or could, have resulted from any procedural failings being rectified. Given that the respondent is a small employer and the attempts to follow a fair process by engaging external consultants, giving the claimant the opportunity to be heard and accompanied and allowing an appeal I do not consider this to be a case where it would be just and equitable to increase any award for failure to comply with the ACAS code.

131. That does not, however, preclude any other arguments that may be made at a remedy hearing in relation to contributory fault, the possibility of some other dismissal / termination of employment or, indeed, in relation to the claimant's other work activities.

132. In light of my findings on substantive unfairness above the respondent has failed to satisfy me that the claimant was guilty of gross misconduct as alleged. As a result he was entitled to notice.

133. I note that the claimant's notice period was extended in his 2016 contract. I accept that this was part of a company wide review. I accept that it was

Mr Dickinson's idea and that it was wise and reasonable for the claimant to have a longer notice period than more junior staff.

134. I also accept that Mr Dickinson and the claimant made an error. Mr Dickinson acknowledged that he had failed to increase the notice required from the employee to 3 months to match that required by the employer.

135. In fact the written 2016 contract appeared to provide for more than 3 months' notice from the employer. That also appears to have been an error. It would be a most unusual provision providing for statutory notice in addition to 3 months' notice. Mr Dickinson appeared to accept this. Moreover, in his appeal the claimant stated that his notice period was increased to 3 months.

136. It appears clear to me that that was the intention of the parties. That would amount to reasonable notice. That was the contract. The claimant is entitled to 3 months' notice pay.

137. Given that the respondent has breached many of the claimant's rights to which the claim relates, I may need to consider whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.