EMPLOYMENT TRIBUNALS

Claimant: Mr R Marsh

Respondent: First 4 Direct Mail Limited

HELD AT: Manchester **ON:** 26 & 27 November 2017
29 December 2017 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms R Eeley, Counsel
Respondent: Mr J Searle, Counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. The claimant is entitled to nil compensation by way of basic award for unfair dismissal, by reason of his conduct before the dismissal, pursuant to s.122(2) of the Employment Rights Act 1996.

3. The claimant entitled to nil compensation by of any compensatory award, having contributed to his own dismissal to the extent of 100%, pursuant to s.123(6) of the Employment Rights Act 1996.

4. The claimant was not wrongfully dismissed, in breach of contract, and this claim is dismissed.

REASONS

1. The claimant was employed as a Head of Operations by the respondent until his dismissal on 9 February 2017. He complains of unfair dismissal, and also breach of contract, his dismissal being summary. The respondent admits the claimant was dismissed, and contends that it had a fair reason for dismissal, namely the claimant's conduct. It was, however, conceded that the dismissal was unfair, in that no procedure was followed, the claimant not being invited to any meeting to discuss the allegations, of which he was given no advance notice, and was not afforded the right to be accompanied. The respondent, however, denied wrongful

dismissal, contending that the claimant was guilty of conduct which entitled it to dismiss the claimant without notice. Further, whilst the respondent conceded unfair dismissal, it argued that the claimant should be awarded no compensation, whether by way of basic award or compensatory award, on the grounds that the claimant ad in fact committed the misconduct with which he was accused, and it would not be just and equitable to award any compensation. Alternatively it is argued that a fair procedure would have made no, or no more than minimal, difference, and the compensatory award should be reduced by 100%, or some other very substantial proportion, pursuant to the ***Polkey*** principle.

2. Other clams made by the claimant in the claim form had been disposed of before the hearing. The hearing was held on 26 and 27 November 2017, the evidence was concluded, and closing submissions were made. There being insufficient time to deliberate and give judgment, judgement was reserved. The tribunal has deliberated in chambers on 29 December 2017, and now promulgates this judgment.

4. The respondent called Rob Porter , David Nestor, Martin Nestor, and Lorenzo Fardella. The claimant gave evidence, and called Mark Lawrence as his witness. There was an agreed Bundles. There was a statement of agreed facts, and an agreed List of Issues. Having heard and read the evidence, and considered the documents in the agreed Bundle, and having considered the submissions of both parties, the tribunal finds the following relevant facts:

4.1 The respondent company carries on a distribution business, delivering promotional catalogues, leaflets and similar material for its customers. The claimant was employed at the Preston site, which had previously been operated by Vitesse Mailing (Preston) Limited, of which Hafsah Raje was the Director and shareholder. The claimant's employment had originally, from 2010, been with that company, but in or about April 2016 negotiations were held between the respondent and that company for the respondent to acquire the business and the Preston site.

4.2 The respondent company at that time, and thereafter, operated a similar business from its Blackburn site, where its Directors were mainly based.

4.3 Whilst the claimant's continuity of service was disputed in the response, it has since been conceded, and it is conceded that his employment was transferred to the respondent in or about July 2016, when the respondent acquired the business carried on at the Preston site.

4.4 Upon acquisition of the business the respondent made some changes to the manner in which it was run, but it continued to be known as Vitesse Mailing.

4.5 As a by – product of the business the operation would require surplus promotional materials , which then were waste, to be removed from its Preston site. Whilst this was still at that point strictly the property of the respondent's customers, they would give instructions as to how it was to be disposed off, usually by it being treated as waste. It was not usual practice for the customers to be paid any sums for this waste. Up until the transfer to the respondent two waste

contractors , S D Waste Paper Recycling Centre Limited, and Rishtons, were involved in removal of such waste from the Preston site. Such waste has a commercial value, and the previous practice had been that cash payments would be made by these contractors for the removal of the waste. No invoices were raised, no records were kept of such payments, and there was a lack of transparency and audit trail in relation to these transactions , which was of concern to the respondent. Upon transfer, therefore, the respondent reviewed these arrangements. It was decided that such practices would cease, and that only one contractor D S Smith , would be authorised to collect such waste, and that invoices would be raised for the sale of the waste to that firm. The claimant was aware of this change of policy, and that only D S Smith were authorised to collect such waste from then Preston site.

4.6 Consequently no S D Waste collection of such waste from the Preston site had occurred since around July 2016, and only D S Smith had carried out this exercise, in respect of which invoices had been duly raised by the respondent and paid by that company, the respondent thereby effectively selling the waste material to that contractor.

4.7 One of the respondent's major customers was Express Gifts Limited. In January 2017 there was quite an amount of surplus stock from promotions which had finished, or had not required the anticipated volume of product to be delivered, and this surplus stock was located at the respondent's Preston site.

4.8 By e-mail of 27 January 2017 (page 69 of the Bundle) addressed to Mark Lawrence who was a Senior Account manager, responsible for the Express Gifts account, copied to the claimant, Wasyl Gelyczak the Mailings Manager of Express Gifts , gave instructions to Mark Lawrence as to what to do with various items of Express Gifts stock at the Preston site. In that e-mail Express Gifts confirmed that certain items of stock could now be *"recycled\scrapped".* There were different instructions for other items, such as polythene wrapping, and cartons.

4.9 On 7 February 2017 the claimant asked Rob Porter , warehouse manager, to help him load an S D Waste vehicle which would be coming in . He asked him to do this early on Friday 10 February 2017, before the start of Rob Porter's usual shift at around 7.00 a.m. Rob Porter declined, saying that he was unable to do so because of the need to drop his partner off at work, and he could not get in that early. The claimant told him not to say anything to anyone at Blackburn, the Head Office.

4.10 Rob Porter was suspicious that the claimant may be planning to arrange a collection of waste for cash, and he telephoned David Nestor, a Director, at Blackburn to tell him about this. He initially called on 7 February 2017, but it was not until 8 February 2017 that he was able to speak to David Nestor. He told him that the collection was on Friday 10 February 2017, and that he had been asked not to say anything. David Nestor said that he would monitor the situation, and planed to visit the Preston site on 10 February 2017.

4.11 On 9 February 2017 at 6.28 a.m. a S D Waste vehicle arrived at the Preston site. The claimant loaded it with a quantity of waste surplus product from the Express Gifts material on site. No record was made of this collection and removal, and no paperwork was created in connection with it. The claimant did not receive any payment at that time for the waste.

4.12 Rob Porter arrived at work that morning to find that the S D Waste vehicle was on site, and the claimant was loading it with waste. He telephoned David Nestor to inform that the date had changed as the vehicle was on site.

4.13 David Nestor, his co – Director Lorenzo Fardella, and his father, Martin Nestor, who was not a Director, but assisted in the management of the business, were all at the Blackburn site. They met to discuss this information, and telephoned a solicitor for advice.

4.14 They then went to the Preston site, where the CCTV footage for that morning was viewed, and Rob Porter was spoken to.

4.15 At approximately 2.30 p.m., the claimant was calling into a meeting with David Nestor, Lorenzo Fardella and Martin Nestor. He was not told in advance what the meeting was about, not given any paperwork, or told that he could be accompanied in the meeting.

4.16 He was asked what the S D Waste vehicle was doing on site that morning and he said that it was collecting waste. He admitted that he was to receive cash for the waste. When pressed as to how much he was to get he said around £700. Martin Nestor commented that he thought that was very low. The three members of the respondent's management were shocked at what they heard. David Nestor asked who else knew about the arrangement, and the claimant said that Mark Lawrence did.

4.17 Mark Lawrence was accordingly also brought into the meeting. He admitted that he knew about the collection by S D Waste that the claimant had arranged. The tribunal does not find that he also expressly admitted that he was to receive a share of the cash payment to be made to the claimant, but finds that the respondent took his admission of involvement to amount to this.

4.18 David Nestor told the claimant and Mark Lawrence that they were sacked. He told them to get their belongings and leave.

4.19 The claimant pleaded with the management not to dismiss Mark Lawrence, as he was not the instigator of the arrangement. Mark Lawrence, however, was also dismissed at that point.

4.20 Mark Lawrence, as he was collecting his belongings asked for a private word with David Nestor and Lorenzo Fardella. He apologised and said he had made a grave error of judgment. He said that his current financial position had led t him getting involved. He was sincerely sorry, and asked for a second chance.

4.21 Mark Lawrence also sent text to David Nestor later the same day (not in the Bundle) in which he again apologised, and said that he had spoken to the claimant who had offered to sign anything for the decision to dismiss Mark Lawrence to be changed. He went on to refer to his "naivety" getting the better of him. David Nestor did not reply.

4.22 The following day, 10 February 2017, David Nestor telephoned Wayne Dinning at S D Waste, who was reluctant to speak to him, and wished to speak with the claimant. David Nestor made mention of cash being involved, and Wayne became concerned. In due course, however, in this conversation he did confirm that an arrangement had been made with the claimant to collect waste and pay the claimant the cash sum of £700. David Nestor told him that the company would raise an invoice in that sum , and in due course did so (not included in the Bundle, but not challenged).

4.23 By letter of 17 February 2017 David Nestor wrote to the claimant (pages 70 to 73 of the Bundle) confirming his summary dismissal. He set out his reasons, and what evidence he had taken into account in reaching the decision to dismiss. The first item of evidence referred to (page 71 of the Bundle) was the claimant's admission in the meeting on 9 February 2017. The second is CCTV footage , which was referred to as having shown the claimant driving a fork lift truck and loading the S D Waste vehicle. In fact the CCTV footage does not show that, but the claimant admits that he did so. The third was the conversation that David Nestor had had with Rob Porter on 8 February 2017 in which he said the claimant was intending to sell company property. The fourth was David Nestor's conversation with Wayne Dinning at S D Waste , in which the arrangement to pay the claimant £700 in cash for the waste was confirmed.

4.24 The letter goes on to refer to the fact that the claimant was informed, after acquisition of the company by the respondent, that all proceeds of sale from company property must be paid to the company, and only approved and reputable customers and suppliers should be dealt with. Reference was also made to the claimant having been caught doing a similar act, and warned that similar practices would not be permitted in the future.

4.25 David Nestor went on to say how he had reasonable grounds to believe that there had been gross misconduct on the part of the claimant, and the appropriate sanction was dismissal with immediate effect.

4.26 He went on to inform the claimant of his right of appeal, and told him how to exercise that right he said the appeal would be heard, where possible, by someone other than "the person who heard the original hearing", a reference presumably to himself and Lorenzo Fardella.

4.27 The claimant instructed solicitors, who wrote on 2 March 2017 (pages 80 to 82 of the Bundle), alleging that their client had been unfairly and wrongfully dismissed, and stating that their client denied the allegations , and denied that he had admitted them in the meeting on 9 February 2017. They also enclosed a letter dated 20 February 2017 (page 74 of the Bundle) from Wayne Dinning of S D Waste written "to whom it may concern" in these terms:

"Dear Sir/Madam,

We received a phone call on Tuesday the February 2017 from Rodger Marsh at Vitesse Mailing in Preston asking us to collect some pallets of waste paper on behalf of Express Gifts. This collection was arranged for 6.30 a.m. on Thursday 9th February 2017 . We were told that payment for the waste paper was to be made directly to Express Gifts.

At no time during any conversation with David Nestor from Vitesse Mailing did I say that a cash deal had been arranged between Rodger Marsh and SD Waste Paper for the sum of £700.00 and that Rodger Marsh was the recipient.

Rodger Marsh phoned me to say that Express Gifts had authorised payment for the waste paper to be made directly to Vitesse Mailing in order to put an end to the threats that were being made."

4.28 This latter sentence was a reference to David Nestor having threatened to report the matter to the Police.

4.29 The solicitors continued in that letter to argue that the waste that was sold was not the property of the respondent, but of Express Gifts. The letter concluded with a section headed "without prejudice and subject to contract" to the effect that the claimant was willing to reach an amicable settlement and sign a Settlement Agreement . This has not been redacted, and presumably the claimant has waived any privilege that would attach to this portion of the letter.

4.30 The respondent's solicitors replied by letter of 8 March 2017 (pages 83 to 84 of the Bundle) , in which they stated that the letter from the claimant's solicitors would be treated as a appeal, and afforded the claimant a further 14 days in which to advance any further evidence or grounds of appeal. The letter goes on to set out what process would be followed for the appeal.

4.31 By letter of 9 March 2017 the claimant's solicitors replied that the claimant did not intend to appeal the decision. The offer to explore a settlement was repeated.

4.32 David Nestor met with Express Gifts to discuss this matter , though precisely when is unclear. As a result a letter , undated, was provided by Express Gifts (page 68 of the Bundle) . In that letter Express Gifts confirmed that the instruction had been given in the e-mail of 27 January 2017 (page 69 of the Bundle) for the waste to be scrapped or recycled, and that they had had no dealings with SD Waste, directly or indirectly. They also confirmed that they had never previously asked for, or invoiced for any monetary return for scrappage or waste from either the respondent or any other mailing houses.

5. Those, then are the relevant facts. The tribunal has had to determine, and has determined, not merely what the respondent believed the claimant had done, and the reasonableness of that belief, but also what he had actually done. In terms of credibility, the tribunal has found that the claimant's account of both the alleged

conduct, and his reaction upon being confronted about it, is not credible. Whilst the respondent cannot give, and did not seek to give any direct evidence about the incident itself, the basic facts of it were admitted, and were undeniable . In the ensuing meeting there were differing accounts of what was said, and in particular whether the claimant did or did not admit his wrongdoing, and this has been the main factual dispute between the parties.

6. As this is such a fact sensitive case, the tribunal will set out in some detail its reasons for its findings of fact and why the claimant's evidence in many respects has not been accepted.

7. The starting point is what could be termed the incontrovertible basic facts, which the claimant agreed, and has done throughout, which are:

a) Once the respondent took over the running of the business and the site at Preston, no S D Waste collections had been made from mid 2016;

b) Since then , all waste collections had been by D S Smith, and invoices raised for the sale of waste to that firm;

c) Neither Express Gifts, nor any other customer had, prior to February 2017, ever received any payment from any waste collector, or the respondent , for waste collected by waste contactors;

d) S D Waste operated as a cash business and had not previously issued paperwork for waste collected from the Preston site;

e) The claimant told no one in management about his arrangement.

f) The claimant told no one at Express Gifts about this arrangement, or his alleged proposal that Express Gifts would receive any payment for the waste.

8. Those are the bare, admitted facts. Of the remaining contentious facts, there are two of particular significance. The first is that the claimant, when asking Rob Porter to come in early and assist him, also told him to tell no one at head office (which was of course, at Blackburn) about the arrangement, and the second is that when confronted by the Directors and Martin Nestor, the claimant admitted that he was going to receive a cash payment.

9. The claimant has denied that evidence, of course. In the case of Rob Porter, he has alleged that he has lied , and has done so because he has a grudge against the claimant who had denied him a new hi – viz jacket when he had asked for one. He also suggested that Rob Porter himself had in the past received cash payment, though this was before the respondent took over the business. The tribunal accepts Rob Porter's evidence. The claimant does not seek to deny that he spoke to him, and asked him to come in early to assist in the waste collection. The only disputed aspects of the conversation are when the claimant said the collection would be (Friday 10 or Thursday 9 February) and whether the claimant told him not to tell anyone from head office. The tribunal does not consider that Rob Porter made that up, and deliberately added those details to what was otherwise accepted to be a true

account by the claimant. The claimant asked him to participate, and when he said he was unable to do so, the claimant, the tribunal finds, understandably was then concerned that he may share this information with others, as indeed, he did. Even if he was motivated by any grudge, a person can of course be as much so motivated to tell the truth as to tell a lie. The tribunal does not find that Rob Porter was lying, and accepts his account that he was told the collection was going to be on Friday , and to tell no one from head office.

10. The second issue is the alleged admission. Her there is a straight conflict between the claimant and the three witnesses for the respondent, Martin and David Nestor, and Lorenzo Fardella. Whilst the claimant's witness Mark Lawrence gave evidence, he was not present in the initial stages of the meeting when the claimant allegedly made his admission. The tribunal takes the point that superior numbers do not necessarily mean superior credibility, but to find that the claimant did not make the alleged admission would require the tribunal to find that all three of the respondent's witnesses were lying in their evidence to the tribunal. The tribunal does not so find. What came across in the evidence of these three witnesses was the shock and surprise they felt when the claimant did admit what he had done. Their actions at the time, and indeed, subsequently, were consistent with the claimant immediately admitting his wrongdoing. These were experienced businessmen, with disciplinary procedures in place. They had met before going over to Preston to see the claimant. They had taken advice. Had he not admitted what he had done, the tribunal is quite satisfied that the claimant would have been suspended and an investigation started . Enquiries with Express Gifts and S D Waste would have been made. That the claimant, and indeed Mark Lawrence, was summarily dismissed at that stage is entirely consistent with the claimant having admitted what he had done. Further, the claimant's actions in pleading for leniency for Mark Lawrence, but not himself, again are redolent of someone who had "held his hands up", but was seeking to save the job of another person whom he had involved in his wrongdoing.

11. Finally, the tribunal has come to this conclusion because it too has considered the claimant's own account, and has found it lacking in credibility. On his account, without telling anyone apart from Rob Porter, or even discussing it with Express Gifts, or the Directors , for the first time in months, the claimant arranged, at a time of day when there would not be likely to be any Directors from Blackburn on site, a collection of waste by an unauthorised contractor, who had previously dealt in cash , of which there was, and would be, no paper trail or other documentary evidence whatsoever, on the basis that the following day, when the Express Gifts mailing manager was due to attend, he would then tell him about this, and what sum Express Gifts would be likely to receive. No such payment had ever been made to Express Gifts or any other customer in the past, nor was it clear precisely how S D Waste , who had no contractual relationship with Express Gifts, were to make the payment to them. No record of what amount of waste had been received by S D Waste would be available, and the claimant, and presumably Express Gifts, would be wholly dependent upon that firm telling them correctly what weight had been received, and what they were to pay for it . Even then, on the claimant's account , the tribunal wonders whether there was the possibility of the claimant negotiating a "cut", as this would be, on his account, a completely unexpected windfall for Express Gifts, for which he may have expected to get some reward. Whilst he maintained in his evidence that this was an initiative of his own to enhance the business

relationship with Express Gifts, he did not discuss this highly unusual and less than transparent proposal with anyone else in management at either company. Further, whilst the claimant had obtained a further letter from SD Waste dated 23 May 2017 in which David Nestor's account of the telephone call that he had with Wayne Dinning on 10 February 2017, in which he contends that he confirmed the arrangement to pay the claimant £700 in cash, is disputed, the claimant has not called him to give evidence before the tribunal. Whilst the burden of proof of these matters rests upon the respondents, if the claimant seeks to challenge their evidence on this issue, one would have expected him to call the person who could challenge David Nestor's account of this conversation.

12. The tribunal applies the civil burden of proof, and has to decide whether, on the balance of probabilities the claimant's account is true. The claimant's account alone is implausible, and when added to the account of Rob Porter, becomes literally incredible. The tribunal does indeed consider that the claimant changed the day for collection for fear that Rob Porter may "shop" him. The tribunal finds that the claimant's account is not true, he did admit what he had done, for the simple reason that he had in fact done it, and could not, when put on the spot, come up with any alternative account. The tribunal therefore finds that he did indeed arrange a waste collection, from which he intended to benefit by the receipt of a cash payment.

13. Finally, the tribunal has taken account of the valid points raised by Miss Eeley about the respondent's evidence. True it is that the dismissal letter from David Nestor makes reference (point 2 at the middle of page 71 of the Bundle) to the CCTV footage showing the claimant driving a fork lift truck , when it is an agreed fact that it does not. Whilst that has become immaterial, as the claimant admits that he did so, questions are understandably raised as to why the respondent should have made this assertion. It is the tribunal accepts of concern, and may be attributable to a fear that the claimant may (as he did, of course, in some respects) go back on his admission, to suggest that the evidence against him was stronger than it was. It may just be a mistake – not all the Directors viewed the CCTV. The tribunal has not been shown the CCTV so it cannot comment upon how such a mistake may have been made. Overall, however, the tribunal does to consider that this so significantly dents the credibility of the respondent that the tribunal should reject the evidence of all three of its witnesses that the claimant made the admission that they all say he did. The position of Mark Lawrence in all this does not advance the claimant's case much either. He accepts that he was not present in the part of the meeting when the claimant is alleged to made his admission, i.e right at the start. His statement at page 85A , given to the respondent, merely says that when the claimant was asked by Martin Nestor whether he had received a cash payment that morning, he replied no. That was, of course, correct as no payment was made at the time. The issue was whether there was going to be a cash payment. Mark Lawrence's statement does not go on to say that there was any discussion as to whether there was to be a cash payment, nor does he say the claimant rejected any such allegation.

14. Again, there is also some issue as to whether Mark Lawrence himself admitted that he was going to receive cash payment. The respondent contends that he too admitted he was going to get a cash payment. No notes or record of any interviews were kept. Mark Lawrence certainly admitted being aware of the arrangement made by the claimant, but denies that he was going to, or that he

admitted he was going to, receive any cash. The tribunal agrees that there is some discrepancy here as well. The tribunal accepts that the respondent's witnesses believed that Mark Lawrence had made this admission, probably without examining in detail exactly what he was admitting,, and taking his admission of "involvement" as being an admission of greater participation. Ultimately, the respondent did agree to treat Mark Lawrence more leniently, as indeed the claimant had asked it to. To some extent, that perhaps removed the need for his case to be considered and documented as carefully, but at the end of the day the tribunal's view is that the doubts that all this may cast on the respondents evidence are not sufficient for the tribunal not to accept it, when compared with the claimant's account upon the central issues of factual dispute.

15. Another issue raised by the claimant is that the respondent allegedly wanted to dismiss him as there was someone else whom the respondent wished to employ in his place. It is alleged that this was more or less said to him. The tribunal does not so find. The tribunal finds that the claimant was probably told that there were plenty of people who wanted to work for the respondent, but not that he was told that there was someone waiting for his job. The evidence was that no replacement employee started work for some weeks after the claimant's dismissal. The tribunal has no hesitation in accepting that the reason for the claimant's dismissal, fair or otherwise, was his conduct, and no other ulterior motive.

The Submissions.

16. The parties made submissions. As the issues were almost completely factual, it is not intended to rehearse them here. The law was not in dispute, and the only issues were credibility, and what the claimant had , on the evidence actually done.

The Law.

17. The relevant statutory provisions are in the Annexe to this judgment. The most pertinent are those relating to reductions in the basic and compensatory awards. The law upon wrongful dismissal was not disputed by counsel, and the principles of how a court or tribunal should determine when an employer is entitled to dismiss an employee without notice are contained in the cases referred to in para. 31 below.

Discussion and findings: Unfair Dismissal – Polkey and contribution.

18. The respondent having conceded unfair dismissal , and the tribunal having accepted the respondent's reasons for his dismissal, the tribunal's next task is to establish whether there should be any reduction in the awards for contribution , or on the basis of ***Polkey***. In terms of the order of deductions from the compensatory award , ***Rao v Civil Aviation Authority [1004] ICR 495*** held that the tribunal should apply the ***Polkey*** reduction first.

19. Further, in addition to making a reduction from the compensatory award for contribution, the tribunal has a similar, but not identical power, to reduce the basic award on the grounds of the claimant's conduct under s.122(2). The difference between the provisions of s.122(2) in relation to the basic award , and s.123(6) in

relation to the compensatory award, is that for the latter, the conduct must have contributed to the dismissal, whereas for the former, it need not have done so. That said, as the EAT held in ***RSPCA v. Cruden [1986] ICR 205***, whilst the two provisions are differently worded, it would only be in exceptional circumstances that the deductions from the basic award and from the compensatory award would differ.

(i)Polkey

20. Whilst pertinent to the compensatory award only (the received wisdom is that ***Polkey*** deductions cannot be made from a basic award) the tribunal will first consider whether to make any such deduction. The law on ***Polkey*** reductions is well established, and was comprehensively reviewed by the judgment of the EAT in ***Software 2000 Ltd v Andrews [2007]IRLR 568.*** That judgment has more recently been reviewed by the EAT in ***Grayson v Paycare (A Company Ltd by Guarantee) UKEAT/0248/15/DA*** .In his judgment Kerr J., reviewed the judgment of Elias J (as he then was) in that case, and (stripping it of its now redundant references to the repealed Dispute Resolution regulations and associated legislation), he summarises the principles to be applied when considering whether to make a ***Polkey*** reduction, as follows, at para. 21 of his judgment:

"21. Elias J's summary provides a useful reminder that Tribunals need to disentangle in their minds distinct questions that may need to be addressed in particular cases. The following are possible formulations of the questions that may arise in particular cases:

(1) How long the employee would have continued working for the employer, but for the dismissal; this is the question that in ordinary cases must be answered on the balance of probabilities, to assess loss;

(2) Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed;

(3) Is the evidence relied on to support a ***Polkey*** *reduction in compensation too unreliable or vague to be useful, and is the exercise of seeking to reconstruct what would have happened too uncertain to ground any sensible prediction based on it?*

(4) If not, what is the chance - not the probability or likelihood - that that would have happened at a time in the future, and if so at what point in the future might that chance have produced the relevant event, namely the end of the employment?

(5) Has the employer satisfied the Tribunal that there was a chance of the employment terminating in the future, and if so how great or small was that chance? This is commonly expressed as a percentage.

(6) Has the employer satisfied the Tribunal that employment would have continued, but only for a limited fixed period, whether or not for reasons wholly unrelated to the circumstances relating to the dismissal itself?

The respondent's position is that 100 deduction should be made, on the basis that a fair procedure would have made no difference at all. The claimant's position is , as one would expect, that there should be no, or only a modest deduction, or at the very least, a deduction to allow for the time that a fair procedure of suspension, investigation, and convening of a fair disciplinary hearing would take.

21. In assessing whether to make any such reduction, the tribunal inevitably refers to the facts as found. It is a fact found by the tribunal that the claimant admitted , when confronted with the allegations, that he had made an arrangement to receive a cash payment from a waste collector. Having made such an admission, and the offence being so obviously serious, in terms of unjust enrichment of the claimant at the expense of his employer, that a fair procedure would indeed have made no difference. Once there was an admission, what further investigation was required, and what could the claimant have said that may have avoided his dismissal? He has not, subsequently maintained his admission, but advanced mitigating circumstances which might have avoided dismissal, he has merely retracted his admission, and denied the offence.

22. The point is validly made that a fair procedure and investigation would have produced the evidence from SD Waste, at page 74, in which the claimant's account would have been supported, and the alleged admission by Wayne Dinning to David Nestor would have been challenged. That may be so, but the outcome would have been the same. David Nestor would have rejected any such evidence from SD Waste, and would have been entitled to do so, regarding them as complicit in what they knew was an unauthorised transaction.

23. Enquiries of Express Gifts would have been futile, as the claimant says that they were unaware of the arrangement he had made, as he was only going to tell them of it the day afterwards, on 10 February 2017, when the Mailing Manager was to visit the respondent.

24. Accordingly , this is, the tribunal finds, one of those, admittedly rare, cases where to follow a fair procedure in the face of an immediate and unqualified admission, even to allow time for an investigation and a disciplinary hearing, with accompaniment, to be convened, would have been futile, and made no difference. Summary dismissal, the same day, would have been inevitable. The tribunal makes a 100% deduction from any compensatory award. If, however, the tribunal were wrong in that view, at the very most a fair procedure allowing for an investigation and a disciplinary hearing, would have delayed the dismissal by no more than one week.

(ii)Conduct and contribution – basic award and compensatory award.

25. In the alternative, a reduction in any compensatory award on the basis that the claimant contributed to his own dismissal, by as much as 100%, or, if the tribunal does not so find, some lesser per centage , is sought. The test in s. 123(6) of the ERA is whether it would be "just and equitable" to make any reduction, where the

tribunal is satisfied that the claimant's conduct has contributed to the dismissal. The test in s.122(2) is whether the conduct of the claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the basic award. In each instance, the tribunal must make its own findings of the alleged conduct on the part of the claimant.

26. Again, the tribunal bases its decision on its findings of fact, which are that the claimant indeed had made an arrangement with S D Waste to collect waste which was the respondent's to dispose of, and for which it would expect to be paid , for his own benefit. The tribunal so finds as a fact, irrespective of the belief or reasonableness of any belief that the respondent may have had , or been entitled to have in those circumstances,

27. Whilst appreciating that a 100% reduction in the basic award is rare, but there may be cases where the conduct is "so egregious that that is the case" (see ***Lemonious v Church Commissioners EAT 0253/12***) , this is one of them, and the tribunal is satisfied that the claimant's conduct in arranging for the removal of the respondent's property for personal gain , which was then admitted, is such that this is a case in which it would not be just and equitable to make any basic award.

28. Given the ***RSPCA v. Cruden [1986] ICR 205*** principle, and how the claimant's conduct clearly contributed to his dismissal, the tribunal can see no reason to apply a different reduction in the compensatory award, which is similarly reduced by 100%, to nil.. Further, applying ***Rao v Civil Aviation Authority [1994] ICR 495*** , the order of reductions would be for the ***Polkey*** reduction to be made first, and then that for contribution. Had the tribunal, therefore made an award of one week's pay applying ***Polkey*** , that would then have been subject to 100% reduction for contribution in any event.

Breach of Contract – the notice pay claim.

29. The tribunal turns now to the breach of contract claim. The claimant was dismissed without notice, so the burden is upon the respondent to prove, on the balance of probabilities, as a matter of fact, that the claimant was guilty of conduct which was of such a nature that it entitled the respondent to dismiss the claimant for that conduct, that it do so, and that it did not lose its entitlement to do so.

30. The central issue, then, is a factual one – what did the claimant do? This of course, again, requires the tribunal to make its own findings, and not to examine the reasonableness of the belief on the part of the employer. There has been no real argument advanced that the claimant's conduct, if proven, would not amount to gross misconduct (although the epithet "gross" is not actually necessary) so as to justify summary dismissal. The claimant's, and Miss Eeley's, energies have been focused on challenging the conduct alleged, and the alleged confession of it by the claimant.

31. The exercise, in short, is identical to that which the tribunal has had to perform in determining contribution above – to the same burden and standard of proof. The tribunal's findings are that the claimant did indeed arrange the disposal of waste from his employers for potential personal gain. That cannot be, regardless of any express

terms of the contract, anything other than conduct of such seriousness that it satisfies the tests laid down in cases such as ***Briscoe v Lubrizol Ltd. [2002] IRLR 607*** and ***Neary and Neary v Dean of Westminster [1999] IRLR 288*** .

32. The claimant has raised an argument that the waste was not in fact the property of the respondent, in that Express Gifts owned it, and therefore it was not the respondent's to sell. That is, with respect, a specious argument. Firstly, the e-mail from Express Gifts of 27 January 2017 expressly authorises the respondent to dispose of the material. Secondly, even if the waste was not , strictly in law, the property of the respondent, it was not the property of the claimant either. On his own evidence, the claimant had not informed Express Gifts of his intention allegedly to dispose of their goods for their benefit in this way before he did so, so he could have had no authority whatsoever, to make the arrangement that he did. Thirdly, even if he was not, ultimately, to benefit personally (which the tribunal does not find, but in the alternative) at the very least disposing of the waste in this manner was going to deprive the respondent of the payment that it would otherwise have received for that waste when disposed of through its usual and proper channels, by D S Smith. On any view that is serious conduct on the part of a senior employee, meriting summary dismissal.

33. In conclusion, therefore, whilst the claimant was unfairly dismissed, the tribunal makes a nil award in respect of the basic award and the compensatory award. The claimant was guilty of conduct for which the respondent was entitled to dismiss him without notice, and did so. He was not, therefore, wrongfully dismissed.

Employment Judge Holmes

Dated: 29 December 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

8 January 2018

FOR THE SECRETARY OF THE TRIBUNALS

ANNEXE

THE RELEVANT STATUTORY PROVISIONS

s. 98 of the Employment Rights Act 1996:

(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 within 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) A reason falls within this subsection if it–

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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 reason shown by the employer)—

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

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

122 Basic award: reductions

(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce

or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

s.123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

and, in particular:

[(1) to (5) N/a]

(6) 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 amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
