



# EMPLOYMENT TRIBUNALS

**Claimant: Mr J Rodbourne**

**Respondent: Fosters Building Contractors Limited**

**Heard at: Leeds On: 21 and 22 April 2022**

**Before: Employment Judge Jaleel**

## **Representation**

**Claimant: Angela Golding (Claimant's mother)**

**Respondent: Charles Foster (Director)**

## RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded and succeeds.
2. The complaint of unpaid holiday pay is dismissed upon withdrawal.
3. The chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed is zero.
4. The Claimant contributed to his dismissal by culpable and blameworthy conduct and any basic and compensatory award shall be reduced by a factor of 50% to reflect his conduct prior to dismissal.

## REASONS

### Introduction

1. This was a complaint of unfair dismissal and unpaid holiday pay brought by the Claimant.
2. However, during the Hearing the Claimant's representative confirmed that he wished to withdraw his claim for holiday pay and was satisfied that he had been paid the correct amount.

3. I had before me a Hearing bundle prepared by the Respondent.
4. During the Hearing it transpired that the Claimant had provided parties with an updated witness statement on 5 April 2022 as well as additional documents totalling 17 pages on 18 April 2022. The Respondent objected to their inclusion within the Hearing bundle.
5. Ms Golding stated that the Judge had been critical of the content of the original statement and he had therefore submitted an updated version. Mr Foster accepted that the Judge criticised the Claimant's 'original witness statement' during the preliminary hearing.
6. I found that the 'updated' statement was in large parts identical to the original witness statement but did expand on the issues that were being considered and assisted with the determination of the matter. Furthermore, the witness statement itself was only 5 pages. The additional documents comprised of 17 pages, 9 of which contained images of a building site and the remainder were of messages between parties. These were known to the individuals.
7. I found that the Respondent had ample time to take account of the updated witness statement as well as the additional documents and neither party was prejudiced by their inclusion in the bundle.
8. Having identified the issues, I took some time to privately read into the witness statements exchanged between the parties and relevant documentation. I heard evidence from the Claimant.
9. I then heard from the Respondent's witnesses:
  - 9.1 Mr Daniel Hardy (Foreman);
  - 9.2 Mr Charles Foster (Director/Owner); and
  - 9.3 Ms Helen-Middleton-Smith (Office Administrator).
10. A signed statement from Mr Kristian Hodgson was also accepted into evidence, albeit on the basis that only significantly reduced weight could be given to this evidence in circumstances where Mr Hodgson was not present be cross-examined by the Claimant.

## **Issues**

11. The Claimant's sole complaint is of unfair dismissal. There is no dispute that his employment was terminated for a reason related to conduct.
12. At a preliminary hearing on 6 January 2022 it had been directed that the Final hearing would decide both whether the dismissal was unfair as well any remedy for unfair dismissal (if applicable). I found that the parties had not adequately prepared to deal with any remedy applicable so I determined that this would be dealt with, if required, at a separate hearing. I confirmed that, on this basis and changed circumstances, I would consider any arguments either that compensation ought to be reduced to reflect the claimant's pre-dismissal conduct

and/or on the basis that, if there had been a defect in procedure, it may not have made a difference to the outcome.

13. The Claimant accepted that the reason for his dismissal was the potentially fair reason of conduct. I identified the issues to be determined and both parties confirmed their agreement as follows:
  - 10.1 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular, whether;
    - 10.1.1 there were reasonable grounds for that belief;
    - 10.1.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
    - 10.1.3 the Respondent otherwise acted in a procedurally fair manner;
    - 10.1.4 dismissal was within the range of reasonable responses .
  - 10.2 If the Claimant's dismissal was unfair, what is the chance, if any, that he would have been fairly dismissed in any event?
  - 10.3 If the Claimant was unfairly dismissed, did he cause or contribute to his dismissal by his own culpable and blameworthy conduct?

## **Facts**

14. The Claimant was employed by the Respondent as an apprentice bricklayer via Craven College. He was employed from 12 September 2018 until 6 May 2021.
15. Mr Hardy, a foreman also acted as a mentor to the Claimant. He has worked with the Respondent for 13 years and has assisted a number of apprentices during this time period.
16. On 5 May 2021, the Claimant was using his mobile phone whilst on top of scaffolding and was reprimanded by Mr Hardy. He asked him to put his mobile phone away on two occasions. The Claimant did not heed the warnings and was involved in a verbal altercation with Mr Hardy. The Claimant was using his phone to communicate with Ms Middleton-Smith regarding pay. The Claimant accepted that he did not listen to Mr Hardy and instead tried to explain that he was using his phone to contact Ms Middleton-Smith. The Claimant felt he had a valid reason for using his mobile phone. The Claimant had used his mobile phone previously whilst working on site.
17. Mr Hardy informed Mr Foster of the incident. His phone call to Mr Foster lasted around 2 minutes. He advised Mr Foster to have a 'conversation' with the Claimant "...as his foreman he had no respect for him, did everything I could...". I accepted that he did not instruct Mr Foster to remove the Claimant from site or sack him.
18. Mr Foster attended the site around 10 minutes later and proceeded to speak with Mr Hardy, this conversation lasted a few minutes. Mr Foster then discussed the matter with the Claimant which lasted around a minute and advised him to leave the site.

19. Mr Foster states that he did not dismiss the Claimant when he met him on site on 5 May 2021. His sole intention at the time was to get him away from the site and to meet with him the following Monday 10 May 2021.
20. The Claimant thought he had been dismissed for arguing with Mr Hardy. He became aware that he was dismissed for using his mobile phone when he received the letter of termination titled 'Letter of Termination – Gross Misconduct' dated 10 May 2021.
21. I found that Mr Foster decided to dismiss the Claimant by the end of the day on 5 May 2021. He did not have a placement for him anymore and he stated in cross-examination that his 'actions were too much'. Mr Foster in his own words had "gathered evidence I needed" and had decided to dismiss the Claimant, "In my mind it was over for Jack". I found that Mr Foster told the Claimant to leave the site on 5 May 2021 and consequently decided to dismiss him later that afternoon. Mr Foster decided to dismiss the Claimant for gross misconduct arising out of an altercation with his colleague and using his mobile telephone whilst on scaffolding. The dismissal was only effective on receipt of the letter of termination dated 10 May 2021.
22. There were 5 persons on site at the time of the incident; no other person intervened. The matter was not discussed during break time. I found on the balance of probabilities that the altercation was such that it did not present itself as a heightened out of the ordinary event. This is also supported by the fact that other colleagues were not required to become involved.
23. Mr Foster then left site and went back to the office.
24. He proceeded to contact Mr Hardy, Chris and Jordan (the Claimant's colleagues) later that day to discuss events. He was unable to recall how long he spoke to each individual for. Mr Hardy advised Mr Foster that he was unwilling to teach the Claimant any longer. Chris and Jordan are said to have told Mr Foster that they had heard Mr Hardy confront the Claimant for using his mobile phone on scaffolding but he was told to 'fuck off'. I found on the balance of probabilities that the Claimant used foul language towards Mr Hardy.
25. The Claimant states that Mr Hardy's mood was affected on the day due to hurting his knee at the gym as well as due to recently having a new baby. Mr Hardy denied injury or any impact upon his mood on the specific day. I was unable to make a positive finding in this regard. This is dealt within the conclusions section below.
26. The Claimant states that Mr Hardy was using his phone on the day in question to contact his wife on two occasions whilst on scaffolding. Mr Hardy would use his phone on site; in his duty as a foreman he is required to contact third parties such as planning, suppliers and architects. Mr Hardy accepts that he used his phone but states this was on his break and when he was not on scaffolding. Again, this is dealt within the conclusion section below.
27. Mr Hardy does not have the authority to remove persons from the site.

28. Mr Foster does not attend site daily as he is involved in back office work.
29. The usage of mobile phones at height is considered a health and safety issue by Health and Safety inspectors and could result in severe consequences for a company.
30. There is no evidence to suggest a meeting was arranged by Mr Foster with the Claimant on Monday 10 May 2021. The Claimant tried to arrange a meeting with Mr Foster for 6 May 2021; he attended the office, he also messaged Mr Foster but a meeting was not facilitated. I would have expected Mr Foster to remind the Claimant that a meeting had already been arranged to take place on 10 May 2021. This was not the case.
31. I found that “banter” would take place on work sites which included items being thrown at each other, verbal innuendo as well as the use of inappropriate language including swearing. Mr Hardy was not offended by the alleged offensive language used by the Claimant.
32. The Respondent states that the Claimant has been given previous warnings regarding mobile telephone use on site, and he had also been removed from a site due to his conduct at the end of March 2021. Mr Foster states that the Claimant was spoken to verbally about his conduct. The Claimant disputed the incidents relating to his conduct. He accepted that he had been advised to put his mobile phone away on previous occasions but this was not considered as a disciplinary sanction (but common practice on site). I found that there is no evidence to suggest that the Claimant’s alleged previous conduct resulted in disciplinary action by way of documented formal warning(s). I expected any issues of concern albeit conduct or other to be recorded in the Claimant’s personnel file as well as his college Learning Development records, this was not the case.
33. I found that the Claimant had not been advised that if he continued to use his mobile phone on site this would lead to summary termination of his employment.
34. Mr Foster discussed the matter with his brother and co-owner on 10 May 2021. The Claimant was sent a letter of dismissal dated 10 May 2021.
35. The letter confirms that the Respondent had issues with the Claimant’s attitude in general and use of mobile phone at work. In respect of the incident that took place on 5 May 2021 it is stated:

***“...Last week you were asked to stop using your mobile whilst you were on the scaffolding, you ignored this request and when asked again your response was to start arguing with your foreman, resulting in you using inappropriate language towards him.***

***The decision to terminate your employment given the gross misconduct of your actions was made.***

***Our contract clearly states that the use of mobiles is not permitted whilst working on site, but to use your phone whilst upon scaffold is not acceptable at all...***

36. The letter stated that the Claimant's employment was terminated effective from 6 May 2021. As set out above, I found that Mr Foster had concluded that the Claimant's actions constituted gross misconduct on the afternoon of 5 May 2021 but only communicated his dismissal by way of letter dated 10 May 2021. The Claimant's effective date of termination is therefore on receipt of the letter of termination and not prior to this.
37. The Respondent's disciplinary procedure includes the convening of a disciplinary meeting and explains the sanctions that are available. There is also a section on the right to appeal and the procedure sets out the circumstances which allow for dismissal without any notice i.e. gross misconduct.
38. The Respondent's disciplinary rules confirm that personal mobile phone usage is considered as misconduct.
39. The Respondent's disciplinary rules also contain a list of examples of conduct considered to be gross misconduct. The use of a mobile phone is not expressly included in the examples provided by the Respondent. I accept that the list does not cover every possibility but is intended to indicate the type of misconduct that could lead to summary dismissal.
40. The Respondent's position is that the usage of a mobile telephone on scaffolding is a health and safety risk. An 'unsafe act exposing self or others to severe injury' is considered to be gross misconduct as per the Respondent's disciplinary rules.
41. The 'flagrant failure to follow the Employer's documentary procedures, policies or codes' and 'gross insubordination' is also highlighted as an example of gross misconduct.
42. The Respondent's site induction document was signed by the Claimant. The site rules state that:

***Mobile phones must not be used on site. Mobile phones must not be used whilst operating vehicles, plant and equipment anywhere on site.***

43. The Claimant was aware of the Respondent's disciplinary procedure and policies.
44. The Respondent has periodic contact with Craven College 3-4 times a year as well as being involved in completing notes and progression of an apprentice (the Claimant) via the Learning Development Plans.
45. The Learning and Development plans relating to the Claimant's apprenticeship do not contain criticism of his employment with the Respondent. Any criticism is related to his engagement/conduct at college and/or his college portfolio work. There is a historical email dated 30 January 2021 relating to concerns over mobile phone usage but again this is related to time spent in college and not his place of work.

46. I found that mobile phones were being used regularly on site. This included taking and receiving personal phone calls. No formal disciplinary hearings and/or sanctions had been invoked against any persons. I also found that Mr Hardy would have to remind people to put their phones away on a daily basis (sometimes repeatedly). In his evidence he stated that previous to the Claimant he saw no need to escalate any incident of mobile phone usage. Mr Foster was aware that workers were told to put their phones away on site.
47. There are a number of picture images which confirm that the Claimant has prior to the incident in question used his mobile telephone whilst on scaffolding. The Claimant used his mobile phone to take photographs on site under instruction from Mr Foster, this includes taking images whilst on top of scaffolding. The Claimant did this to highlight perceived health and safety issues and sent the images to Mr Foster. Mr Foster did not admonish or advise the Claimant against using his phone in these circumstances.
48. The Claimant used his mobile phone on site as did his colleagues. He has been told to put his mobile phone away on previous occasions but he had not received a formal warning and/or disciplined. If anyone was seen using their phone they were told to put it away and get on with their work.
49. I found that the Claimant would be required to use his phone in order to take images of work completed as part of his apprenticeship course requirements at college.
50. Ms Middleton-Smith was aware of the situation regarding the Claimant on the afternoon of 5 May 2021 but was not involved in any decision making regarding his dismissal. She was instructed to write the dismissal letter by Mr Foster and his brother. She was aware of mobile phones being used on site and stated that no one has been formally disciplined and/or dismissed as a result. A verbal telling off was seen as a sufficient deterrent and akin to a verbal warning.

### **The Law**

51. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.
52. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

*" [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) – depends upon 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 shall be determined in accordance with equity and the substantial merits of the case”.*

53. In a case of misconduct, a tribunal must determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard see **British Home Stores Ltd v Burchell [1980] ICR 303** and **Boys and Girls Welfare Society v MacDonald 1997 ICR 693 EAT**.
54. The tribunal must not substitute its own view. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.
55. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In **Boys and Girls Welfare Society v MacDonald** the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in **Burchell** where there was no real conflict on the facts.
56. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects. Guidance on how to approach that issue is set out in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568**.
57. Under Section 122(2) of the ERA any basic award may be reduced when it is just and equitable to do so on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6). There is no requirement for the conduct or action of the claimant in question to amount to gross misconduct for it to be relevant conduct or action for the purposes of s122 or s123 ERA 1996. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily amount to a breach of contract. In **Hollier v Plysu [1983] IRLR 260** the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the



employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

## **Conclusions**

### **Application of the law to the facts**

58. Applying these principles to the facts as found, I reach the following conclusions.
59. The Respondent alleges conduct as its primary reason. It is for the Respondent to establish the reason for dismissal. The Claimant accepted that the reason for his dismissal was the potentially fair reason of conduct.
60. I found that the Respondent genuinely believed that the Claimant had committed an act of gross misconduct and that his employment was terminated for that reason. Mr Foster decided to dismiss the Claimant for gross misconduct arising out of an altercation with his colleague and using his mobile telephone whilst on scaffolding.
61. I then turn to the question of whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. I find that it did not and the dismissal was outside the range of reasonable responses.
62. The reasonableness of the investigation, the reasonableness of the grounds for believing in misconduct and the fairness of the procedure all overlap and I consider them together. I find that the Respondent's approach was unreasonable in particular for the following reasons, based on the above findings of fact:
  - 62.1 I found that a reasonable investigation did not take place. The Respondent accepts that it did not hold a formal disciplinary process before dismissing the Claimant. Whilst Mr Hardy, an experienced foreman and mentor to the Claimant, reported the incident and this was consequently backed up by two colleagues, the Claimant had no input into the fact finding, investigation or subsequent decision to terminate his employment. There is no evidence of statements being taken by Mr Foster and/or other persons. An investigation meeting and/or disciplinary hearing was not scheduled and the Claimant had no evidence disclosed to him prior to the termination of employment. The Claimant was unable to give his version of events.
  - 62.2 I have borne in mind that the Claimant admitted to the wrongdoing i.e. he used his mobile phone whilst on scaffolding and ignored Mr Hardy's instructions. However, it remains that a reasonable investigation was paramount prior to reaching an outcome. The Claimant was deprived of the opportunity to present his version of events and any mitigating factors for the Respondent to consider prior to making a decision. Mr Foster has sought to apportion weight to Mr Hardy's statement on the day in question and within a few hours decided that he would terminate the Claimant's employment. Mr Foster accepted that he would spend the majority of his time in his office and it was therefore paramount that he carefully collated and considered evidence of all those involved and present on site. Had Mr Hardy interviewed and afforded the Claimant an opportunity to defend

himself he would have been able to make findings in respect of his contentions and any mitigating factors. For example he could have investigated if Mr Hardy was using his phone whilst on scaffolding as well as his state of mind that particular day. These are issues I am unable to make a positive finding upon but would be relevant to the issues at hand.

- 62.3 There is a wholesale failure on part of the Respondent to take account of the practice of using mobile telephone phones on site; the Claimant's colleagues were told on a daily basis and sometimes repeatedly to put their phones away. This is particularly relevant given that no other worker has been dismissed by the Respondent for using their mobile telephone whilst on site despite this being a regular daily occurrence. Further, it demonstrates that formal disciplinary sanctions including dismissal has not been invoked by the Respondent for the failure of the Claimant's colleagues to follow instructions and/or adhere to site rules.
- 62.4 I was not told of any alternative to dismissal that were considered by the Respondent. There were other sanctions which a reasonable employer would consider such as giving a final written warning. It was unreasonable not to consider alternatives to dismissal.
- 62.5 None of these matters were corrected on appeal, because no appeal took place. The letter of termination did not give the right of appeal to the Claimant. The ACAS Code of Practice calls for an appeal without unreasonable delay. I was not given any adequate explanation as to why the Respondent failed to inform the Claimant of his right to appeal the decision. Its approach in this regard was wholly unreasonable and meant that none of the previous shortcomings were rectified.
63. I have reminded myself that it is not for me to substitute my view, either as to procedure or as to substance. On balance, given the findings of fact above, I find that in the circumstances dismissal was not in the range of reasonable responses for the employer to take. There was no consideration on behalf of the Respondent to take account of the practice of using mobile telephone phones on site. The Respondent failed to consider the Claimant's version of events at all. No reasonable employer faced with these circumstances would dismiss the Claimant for the reason given. Dismissal in the circumstances was wholly unreasonable. Dismissal was not within the range of reasonable responses of a reasonable employer.
64. I am satisfied that the matters set out above were outside the range of what was reasonable in terms of investigation, grounds for belief and procedure. In those circumstances no reasonable employer would have dismissed the Claimant and his claim of unfair dismissal succeeds.

#### **Further findings of fact: Polkey and contributory fault**

65. It is therefore necessary, for the purposes of deciding whether there is a chance that the Claimant would have been fairly dismissed in any event, and whether he contributed to his dismissal, to make findings about whether he actually committed misconduct.

66. I start by observing that I found the Claimant's evidence generally to be credible. He made concessions in cross-examination where appropriate and presented as a witness doing his best to give an honest and accurate account of events.
67. The Claimant accepted that he used his mobile phone whilst on scaffolding. I found that he did this to contact Ms Middleton- Smith regarding pay queries. He was keen to stress that this was not a personal call to family member but a work related matter.
68. The Claimant refused to follow the instructions of Mr Hardy who told him to put his phone away on two occasions. During the altercation the Claimant told Mr Hardy to 'fuck off'.
69. I found that the Claimant's conduct as set out above can qualify as misconduct under the Respondent's disciplinary rules document. The Claimant was aware of the disciplinary rules. There is no distinction between using a mobile phone on ground level or at height. Furthermore, the Claimant failed to heed instruction and refused to put his phone away.
70. However, I also found that there was a practice of using mobile telephones on site. Mr Hardy would tell workers to put their phones away on a daily basis. Instructions were repeatedly ignored as phone usage remained a daily occurrence, often more than once. In cross-examination Mr Hardy confirmed that he only escalated the matter to Mr Foster as a result of the Claimant failing to follow his instruction.
71. The Claimant had also used his phone whilst on scaffolding previously to communicate with Mr Foster. Mr Foster did not warn or discipline him for his conduct at the time.
72. In cross-examination Mr Hardy confirmed that was not offended by the Claimant given the manner in which they addressed each other on site. This was not a working environment akin to a teashop. Colleagues would address each other directly using expletives without offence being caused. Mr Hardy was not offended by the language used by the Claimant.
73. I also found on the balance of probabilities that the altercation was such that it did not present itself as a heightened out of the ordinary event. This is supported by the fact that other colleagues were not required to become involved.

**Chances of a fair dismissal in any event: Polkey**

74. I turn to the question whether there is a chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed. As set out above, I find that there was fundamental unfairness in this process at a number of levels and that the sanction of summary dismissal was outside the range of reasonable responses in the circumstances. I have to consider whether, on the balance of probabilities, there is a chance that the Claimant would have fairly been dismissed if a fair procedure had been followed. If so, how big is that chance?

75. The shortcomings in the Respondent's approach were wide ranging as set out above, there were failures to gather evidence regarding the altercation, to disclose evidence, to allow the Claimant to represent himself and to properly consider and make findings about the Claimant's and Mr Hardy's conduct on the day in question. The Respondent would have to consider mitigating factors and any alternatives to summary dismissal. Any reasonable and fair procedure would, necessarily, have entailed proper consideration of whether there was a practice and custom of using mobile telephones on site and how this had been handled historically. This would also involve consideration of the culture of bad language that was prevalent on site. There is no evidence of any disciplinary sanction for usage of mobile phones and instead workers were simply told to put their phones away and carry on with their job. Further this instruction has been ignored as workers have continued using their mobile telephones on site repeatedly without disciplinary sanction. The Respondent would no doubt have also considered the fact that the Claimant had sent images via his mobile telephone to Mr Foster whilst on scaffolding without being rebuked or disciplined.
76. The Respondent would also have to take account of the fact that Mr Hardy only escalated the matter as a result of the Claimant's failure to follow his instruction. This undermines the argument both pertaining to the use of inappropriate language and the use of a mobile telephones on site. No one has been dismissed for this previously.
77. Had there been such a consideration, it seems to me inevitable that a different approach would have been taken. There are a number of cumulative steps, each of which if corrected, might have led the Respondent to come to a different view from the one it had.
78. I find, applying the legal principles referred to above, that on the balance of probabilities there is no chance that the Claimant would have been fairly dismissed.

**If the dismissal was unfair, did the claimant contribute by culpable conduct?**

79. I turn then to consideration of the Claimant's conduct and how it ought to affect any award of compensation.
80. The Claimant clearly did use his mobile phone for personal use whilst on scaffolding. The Claimant's conduct in this regard was blameworthy conduct. This conduct contributed to his dismissal. Further the Claimant refused to put his phone away despite being told to do so on two occasions. Had the Claimant put his mobile phone away the situation may have been resolved bearing in mind the accepted practice on site. The Claimant's conduct towards Mr Hardy was also blameworthy conduct. This conduct also contributed to his dismissal.
81. I accepted that the use of a mobile telephone at height and on top of scaffolding can carry its own degree of risk to the individual and workers. However, whilst the Claimant was culpable of wrongdoing I must also take into account the practice of using mobile telephone phones on site.
82. I have made a clear finding that what the Claimant did was culpable and blameworthy. In my view this falls into the category of the Claimant being 50% to

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blame. He knew he should have complied with the policy and he did not comply with it, but at the same time he also ignored Mr Hardy's instructions.

83. In the circumstances, I consider that any basic and compensatory award should be reduced by a factor of 50% to reflect the claimant's blameworthy conduct contributing to his dismissal.
84. The matter is listed for a remedy hearing later this year which will take place in due course. Separate case management orders will also be sent to the parties in connection with the same.

Employment Judge Jaleel  
Date 27 June 2022

RESERVED JUDGMENT & REASONS  
SENT TO THE PARTIES ON  
Date: 5 July 2022