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EMPLOYMENT TRIBUNALS

Claimant: Mr D McQueen

Respondent: Goodwin Tyres Ltd

Heard at: East London Hearing Centre

On: 24 and 25 April 2019

Before: Employment Judge Jones (sitting alone)

Representation

Claimant: In person

Respondent: Mr Goodwin, Mr Anthony and Ms Shearing

JUDGMENT

1. The judgment of the Employment Tribunal was given in open court on 25 April. These written reasons are provided on both parties' request. The judgement of the Tribunal is that: -
 - (1) The Claimant was unfairly dismissed.
 - (2) The Claimant contributed to his dismissal by 20%.
 - (3) The percentage chance that the Claimant would have been dismissed had a proper procedure been followed was 15%.
 - (4) The compensation is uplifted by 25% to reflect the Respondent's failure to follow the ACAS Code of Practice.
 - (5) The Respondent is ordered to pay the Claimant the following compensation for his unfair dismissal;
 - (6) Basic Award

Claimant's employment was from October 2014 – August 2018 –
3 years and 9 months

The Claimant was 36 at the time of his dismissal

The Claimant is entitled to 1 weeks' pay for each full year of
 employment = £482 x 3 = £1,446.00

Less 20% for the Claimant's conduct before dismissal
 - £289.20 = £1,156.80

Total Basic Award of £1,156.80

(7) Compensatory award

Loss of wages for 22 weeks

Net wages - £382.56 x 22 = £8,416.32

Plus £7.32 x 22 = £161.04 (Respondent's pension
 contribution) = £8,577.36

Less earnings in mitigation – November – to end of
 January – 8 days' work at £80 per day = £640
 + 1 day's work at £480
 (August to November) = £1,120.00

= £7,457.36

Less POLKEY reduction of 15% (£1,118.60) = £6,338.76

Plus 25% uplift under
 section 124A Employment Rights Act 1996 +£1584.69

£7,923.45

Less 20% for contributory conduct (£1,584.69) = £6,338.76

Plus - loss of statutory rights - £250.00

Less POLKEY reduction of 15% (37.50) = £212.50

Plus 25% uplift under
 section 124A Employment Rights Act 1996 (£53.12) £265.62

Less 20% contributory conduct (265.62 x 20% = £53.12)
 = £212.50

Total compensatory award £6,551.26

2. **The remedy due to the Claimant for his successful complaint of unfair dismissal is a Basic Award of £1,156.80 + Compensatory Award of £6,551.26.**
- (8) The Respondent is ordered to pay the Claimant the sum of £7,708.06 as the total compensation for his unfair dismissal.**

REASONS

1 The Claimant brought a complaint of unfair dismissal against his employers, Goodwin Tyres, which at the time was run by Douglas Goodwin and James Anthony. The Claimant began his employment in 2014 and continued until his dismissal in the summer of 2018.

2 This judgment and these reasons were given in open court on 25 April 2019. The Respondent requested written reasons as Mr Goodwin was not able to attend court on the second day and to enable both parties to have an opportunity to study the judgment and reasons.

Evidence

3 The Tribunal heard from the Claimant and had a signed witness statement from his partner, Sarah Quinn. The Tribunal had live evidence from Douglas Goodwin and his wife, Dawn Goodwin and from James Anthony. The Tribunal was informed that sometime last year Mr Goodwin retired and the business transferred to Mr Anthony. All staff were TUPE transferred over to him and continue to be employed.

4 From the evidence of the witnesses and the bundle the Tribunal drew the following conclusions:

Findings of Fact

5 The Claimant was employed by the Respondent as a tyre fitter and began working in October 2014. The firm is a small company which had been in existence for over 50 years. Mr Goodwin was over 70 years old at the time of the termination of the Claimant's employment.

6 Unfortunately, the Claimant and Mr Goodwin did not get along well with each other. The Claimant had a better working relationship with Mr Anthony who at the time was the other partner in the business. Mr Anthony confirmed in evidence that the Claimant was a good worker and that he did not have a problem with the work he produced. No disciplinary procedures were taken against the Claimant during his employment and he was never issued with any warnings.

7 Ms Shearing's evidence was that she was aware that warnings were drafted for him the Claimant but that for his benefit, the Respondent decided not to give them to him. I was not shown any of the draft warnings and the Claimant was not aware of

them. Mr Goodwin and Mr Anthony's evidence was that he had not been given any warnings prior to the incident that led to his dismissal.

8 The Claimant and Mr Goodwin would get into arguments/altercations on a regular basis. They would argue about things such as where he stored his bike when he got to work - as he regularly cycled to work. The evidence was that the arguments between the Claimant and Mr Goodwin were never about the quality of his work or his interaction with a colleague or customer. The Tribunal was not told that anything was done about the fact that they argued regularly and their colleagues in the workplace simply considered that it was a case of them not getting along. The Tribunal was not told that it was considered a disciplinary matter.

9 The Tribunal also finds that the Claimant was not always the person to start the arguments and Ms Shearing agreed that at any one time, when one of their altercations ended, either of them could justifiably feel aggrieved at the other. It was a difficult working relationship. However, Mr Goodwin was frequently out of the workplace travelling or unwell, which meant that over the period of the Claimant's employment they did not see each other and argue every day, although it was a regular occurrence.

10 The Tribunal finds that Mr Goodwin lived at 22BR which was across the road from the workshop which was at 111GL. There was a building next to Mr Goodwin's home which he also owned and which was also part of business premises. The Claimant and the other fitters occasionally had to go there to work or to collect tools or do other work.

11 As the Claimant and Mr Goodwin were having regular altercations, Mr Goodwin told the Claimant that he did not want him to come over to the work at 22BR as it was his home as well as part of the business. However, the Tribunal finds it unlikely that the Claimant was barred from going there or that it was made clear that he was barred from going there. Although Mr Goodwin did not like him going there, Mr Anthony confirmed in evidence that the Claimant had to go to 22BR to collect tools and that there were tools and equipment there that he had to use to perform his work duties. He continued to go to 22BR without any issue being made of it by Mr Goodwin or Mr Anthony.

12 The Claimant was invited to a meeting on 4 January 2018. Present at the meeting were the Claimant, Ms Shearing and Mr Anthony. It is likely that the Claimant's tardiness was discussed at the meeting. He was frequently late for work in the morning but the Tribunal does not find that he was given a verbal warning about it. There was no record of a verbal warning produced by the Respondent.

13 Ms Shearing was the Respondent's bookkeeper and admin person. She had undertaken a Level 2 NVQ course in employee relations or something similar, which enabled her to put in place some procedures for the Respondent – such as issuing written contracts. It is likely that if there had been a verbal warning at that meeting she would have ensured that it was recorded.

14 It is also likely that at that meeting the Respondent discussed with the Claimant the state of the business. He was told that the business was not doing well and that they were looking at various options as to how to improve the financial situation.

Ms Shearing commented that the Claimant was one of the more expensive employees and it is likely that she gave the Claimant the impression that if the situation did not improve he would be one of the first 'out of the door'. Mr Anthony and Ms Shearing also had a meeting that day with a fitter called Brad but it is not known what was said to him. It is likely that the Claimant left that meeting feeling a little less secure in his employment and concerned for the future of the business.

15 The Tribunal finds that the Claimant and the other fitters had the use of a kitchen area at 111GL which was the main address at which the business operated. However, that space was not clean and was near to a noisy compressor which spewed out lots of dust and dirt. The Claimant had previously complained about the state of the kitchen and had occasionally eaten in his car rather than eat there. The Tribunal heard about a dead rat being found in the kitchen area.

16 On 31 July the Claimant was looking for a quiet place to eat his lunch away from the workshop. He decided to go to the business premises next door to Mr Goodwin's residence at 22BR. It was empty. It is unlikely that he knew that at that exact time there was an important meeting going on inside Mr Goodwin's home between the business owners about the future of the business. There was no evidence from which the Tribunal could conclude that he knew about the meeting, that he knew the subject matter of the meeting or that he knew that he would be discussed at the meeting. The Respondent denied that he was discussed at the meeting.

17 The Claimant was there when the meeting ended. Mr Anthony came out of Mr Goodwin's home and returned to the workshop. Ms Shearing also came out of the house and left. Mr Goodwin then came out of his home, saw the Claimant in the premises next to his home and instantly became annoyed. His evidence today was that it upset him every time the Claimant came over to that side. Another altercation broke out between them. Mr Goodwin confirmed in his evidence that it was he who spoke first asking the Claimant what he was doing there. It is likely that he did so aggressively and loudly. It is possible that he wondered if the Claimant had heard any of the meeting that had just taken place. It is likely that Mr Goodwin told the Claimant sternly that he should not be there, and that he did not want him there. As the Claimant knew nothing of the meeting he was taken aback and stated that he did not know what Mr Goodwin was talking about and that he was just eating his lunch. Mr Goodwin insisted that he should leave. The Claimant accused him of being a bully. It is likely that this was a heated discussion.

18 I find it likely that Mr Goodwin headed across the road to the other part of the business and that the Claimant followed him. Mrs Goodwin heard the argument, opened the door of her home at 22 BR and called after her husband to see if he was ok but he did not answer as he was arguing with the Claimant and they were walking away from her. It is unlikely that he heard her. The Claimant did not see or hear Mrs Goodwin. The Tribunal finds it likely that at this time they were both were arguing, shouting and swearing at each other.

19 This continued at the premises across the road. They ended up in a room with Mr Anthony. It is likely that both the Claimant and Mr Goodwin were trying to explain to Mr Anthony what had happened and were talking over each other.

20 The Tribunal also finds that it is likely that this is a work environment in which swearing was not unusual. Mr Anthony confirmed that there was sometimes swearing in the workshop.

21 Mr Goodwin said something that led the Claimant to believe that he was being dismissed. The Tribunal finds it likely that he did so and the Claimant responded to tell him that he could not do that. Both parties agreed that the Claimant said those words. The Tribunal finds it likely that the Claimant did not use the word 'Tribunal' at this point but that he said that there were rules and it was not possible to sack someone without following the rules. It is not clear what Mr Goodwin said to make the Claimant think that he was about to or was trying to sack him. It is unlikely that he talked about 4 weeks' notice. The Respondent's case today was that they had never dismissed an employee before the Claimant and that this was all new to it so if that is the case, Mr Goodwin would be unlikely to talk about giving 4 weeks' notice before he had checked with anyone else. Nevertheless, something was said which led the Claimant to believe that the Respondent was thinking of terminating his employment.

22 Mr Anthony intervened in the argument at this point and spoke to the Claimant. He persuaded him to go home and take the rest of the day off. He told him that when things had calmed down he would try to resolve matters between the Claimant and Mr Goodwin. The Claimant then left the premises.

23 After the Claimant left, Mr Goodwin telephoned Ms Shearer who had left work after the meeting and told her what had happened. They agreed to meet with Mr Anthony the following day. Later that evening, Mr Anthony telephoned the Claimant and indicated that he was going to try to sort matters out on the following day. Mr Anthony hoped that he could come to a solution that would see the Claimant remain in employment. Mr Anthony did not tell the Claimant, as set out in the Response, that an investigation was taking place or that he would be invited to a disciplinary hearing to respond to any allegations. That never happened.

24 On 1 August, Mr Goodwin met with Ms Shearer and Mr Anthony at Mr Goodwin's home. They discussed what they believed had happened on the previous day. They did not speak to the Claimant to get his version of events. Mr Anthony tried to convince the meeting that the Claimant should be retained in his job. Mr Goodwin's position in the meeting was that the Claimant's continued presence was contributing to his stress and he wanted his employment terminated. When the Tribunal asked the 3 individuals who were in the room in the meeting on 1 August, what was the reason for dismissal, three different answers were given. Mr Goodwin's answer was that he was fed up with arguing with the Claimant. Ms Shearer's answer was that Mr Goodwin made the decision to dismiss and she and Mr Anthony agreed with it as it was causing Mr Goodwin stress. Mr Anthony stated that the Claimant was dismissed as it – i.e. the arguments with Mr Goodwin - could not continue.

25 Ms Shearer was clear today that in the end, the decision to terminate was made by Mr Goodwin. Both Mr Anthony and Ms Shearing agreed with him that if it was affecting his health they would agree with him that the Claimant's employment should be terminated. They agreed with Mr Goodwin's decision. There was no consideration of other alternative sanctions that could be imposed or any other action that could be taken to address the difficult working relationship that existed between the Claimant

and Mr Goodwin. There was no decision that the Claimant had committed gross or other misconduct.

26 The meeting ended with a decision that Ms Shearer would telephone the Claimant after the meeting to let him know that he had been dismissed.

27 Although the Respondent's Response to the claim stated that Ms Shearer called the Claimant that evening to conduct a disciplinary hearing, she was clear in her evidence today that she called him to let him know that he had been dismissed. This was another instance where the Respondent's written Response was totally at odds with the Respondent's evidence in the hearing. At the beginning of the telephone call with the Claimant, Ms Shearer asked him what had happened between him and Mr Goodwin. In doing so she was not conducting an investigation. Her evidence today was that she was simply opening the conversation with that question rather than going straight to telling him about the decision that had already been made.

28 The Claimant explained his version of what happened the previous day. Given that a decision had already been made to terminate the Claimant's employment, which Ms Shearer agreed with; she simply listened to his explanation. She asked him whether he would take part of the responsibility for what had happened. She then told him that he had been dismissed. It is likely that the Claimant was shocked at this, particularly in the light of the telephone conversation he had had with Mr Anthony the previous evening. It would have been quite a contrast from that to then receive a phone call from the Respondent the next day informing him that he had been dismissed and before he had been given an opportunity to explain what had happened. It is likely that the Claimant became angry. He agreed in evidence today that he terminated the call. There is an allegation that he swore at Ms Shearer before hanging up the call and I find that it is likely that he did so but that it was out of earshot of his partner, Ms Quinn, as he had already gone out of the room they had been sitting in, to take the call.

29 Ms Shearer's evidence today was also that she asked the Claimant for his explanation of what had happened so that she could make a record for any possible tribunal hearing. However, there was no note from that telephone call produced at this hearing.

30 The Tribunal finds that the Respondent wrote to the Claimant on 2 August to inform him of his dismissal. The reason for dismissal given in this letter was because he swore and acted aggressively towards senior members of staff; which would not be tolerated. The letter does not refer to any disciplinary process. The Claimant was paid 3 weeks in lieu of notice pay in addition to his outstanding holiday pay.

31 I find that the Claimant appealed against his dismissal in a letter dated 8 August in which he also informed the Respondent that he had started the ACAS early conciliation process.

32 An appeal hearing was held on 18 September with Ms Shearing, Mr Anthony and the Claimant with a representative of the Respondent's solicitors attending as note taker. At the appeal meeting, the Claimant handed in a statement setting out his grounds of appeal. There was a short discussion between them and it was agreed that

the meeting would be adjourned so that the Respondent could consider the document that the Claimant had produced.

33 The Respondent wrote to the Claimant on 27 September to inform him of its decision on his appeal. Ms Shearing wrote that the partners in the business had decided that there was an unsolvable personality clash between the Claimant and Mr Goodwin and on that basis, they were not going to reinstate him. Ms Shearing confirmed that due to the nature of the incident and the hostility shown by the Claimant to her on the telephone on 1 August the Respondent considered that it had acted appropriately.

34 The Respondent business has since been taken over by Mr Anthony and Mr Goodwin has retired. The Respondent confirmed that the business is now a limited company – called Goodwin Tyres Limited.

35 Mr Anthony confirmed that all the employees, rights and liabilities were transferred under TUPE to the limited company.

36 The Respondent had a staff handbook which was in the bundle. It was not known when this was given to the Claimant. About 2 years after he began his employment he was offered a written contract and he refused to sign it. The handbook states that it is given to employees at the same time as the contract.

37 The Respondent's handbook referred to persistent lateness as a disciplinary offence. The Claimant acknowledged today that he was frequently late to work but made up the time at lunchtimes or evenings as arranged between him and Mr Anthony. The letter of dismissal did not refer to lateness as being a reason or part of the reason for his dismissal.

38 The handbook also referred to a disciplinary procedure. It described the action that will be taken when disciplinary rules are breached. It stated that no disciplinary action will be taken until the matter has been fully investigated. It also stated that at every stage of the process the employee would be given an opportunity to state their case and be represented or accompanied if they wished, at the hearings, by either a trade union representative or a colleague.

39 The procedure then set out a list of possible punishments that could be imposed such as a Stage 1 first warning, a stage 2 final written warning and dismissal or other action short of dismissal – such as a deduction in pay or demotion. There was a definition section on gross misconduct in which gross insubordination, bullying, and incapacity for work are mentioned. In the appeal hearing with the Claimant, Ms Shearer was adamant that the Claimant had not been dismissed for gross misconduct and she reminded him that he had been paid 4 weeks' pay in lieu of notice. Lastly, the handbook gave the employee a right of appeal against any disciplinary decision.

40 The Claimant lives with his partner, Ms Quinn, and two step-children. One child is disabled. The Claimant shares the care for that child and this means that he cannot work on Saturdays. When he applied for the job at the Respondent he informed it that

he would not work on Saturdays and the Respondent employed him with that condition in place. He had not been asked to work on Saturdays.

41 The Claimant was aware that other employers in the tyre trade were likely to ask him to work on Saturdays. He has not applied for work in that trade, although that is where his experience lies. He had been thinking for some time that he would like to change jobs and he took this opportunity to take out a franchise as a locksmith. The Claimant has started his business as a franchisee and has undertaken the training necessary to run it. The work is coming in slowly. The Claimant has also worked occasionally with his cousin who does building work.

Law

Unfair dismissal

42 The law on unfair dismissal is contained in the Employment Rights Act 1996 (ERA). A dismissal can be fair. The Respondent has the burden of proving the reason for dismissal and that it is a potentially fair one. Misconduct is one of the potentially fair reasons for dismissal and the Respondent submitted that the Claimant was dismissed for gross misconduct/misconduct. It was not the Respondent's case that the Claimant had been dismissed for some other substantial reason.

43 The Tribunal considered the principle set out in the seminal case of *BHS v Burchell* [1980] ICR 303, where a three-stage test was outlined for tribunals in assessing complaints of unfair dismissal. The employer must show that: -

- a. he believed the employee was guilty of misconduct;
- b. he had in his mind reasonable grounds which could sustain that belief, and
- c. at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

44 This means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it, which has been reasonably tested through an investigation.

45 If the Tribunal concludes from all the evidence that this is the case; then the next step is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the tribunal should be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish the reason for the dismissal and that it is a fair one, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within "the range of reasonable responses" of a reasonable employer.

46 The law was set out in the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439 where Mr Justice Browne-Wilkinson summarised the law by pointing to the words of section 98(4) themselves and then stated that the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (i.e. the members of the tribunal) consider the dismissal to be fair as the tribunal must not substitute its decision as to what was the right course to adopt for that employer. He stated that in many (though not all) cases there is likely to be a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonable take another. The function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal it is fair: if the dismissal falls outside the band it is unfair.

47 In the case of *Linfood Cash and Carry Ltd v Thomson* [1989] IRLR 235 the EAT stated that the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which it did. The Tribunal is not entitled to interfere simply on the ground that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way the employer did.

48 In the case of *Sainsbury's Supermarket v Hitt* [2003] ICR 111 it was confirmed that all aspects of the *Burchell* test fell to be determined by the range of reasonable responses test.

49 If the Tribunal comes to a decision that there was misconduct and that the Respondent had come to that decision through a reasonable process, the tribunal must also decide whether dismissal was a fair and reasonable sanction, in the particular circumstances of this case.

50 The Court of Appeal in *Taylor v OCS Group* [2006] IRLR 613 has stressed that tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. For example, where the misconduct which founds the reason for the dismissal is serious, a tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

Applying law to facts and Judgment

As the Respondent accepted that it had dismissed the Claimant, the Tribunal's first decision is what was the reason for dismissal?

51 As the Tribunal said at the start of the hearing, the burden is on the Respondent to prove the reason for dismissal.

52 Was the reason for dismissal the Claimant's misconduct on 31 July? The evidence was that the Claimant and Mr Goodwin had engaged in many verbal altercations before this one. They argued frequently.

53 On this occasion, it is the Tribunal's judgment that Mr Goodwin came out of the meeting and started an argument with the Claimant which then escalated from there.

54 It is also the Tribunal's judgment that they both felt aggrieved at the end of the argument.

55 The Claimant was asked to go home and duly did so – hoping that the matter would get sorted out and he could retain his job.

56 The Tribunal found no evidence to support the Respondent's surprising suggestion during their submissions yesterday that the Claimant deliberately provoked Mr Goodwin with the intention of getting the sack. The Claimant wanted to work and has dependants for whom he is financially responsible. I had no evidence in the hearing from which I could conclude that that he wanted to be dismissed. Also, the Claimant was not to know that the Respondent would react in the way it did and dismiss him for arguing with Mr Goodwin, this is especially so in circumstances where they had argued before and no disciplinary action had been taken against him.

57 Had the Claimant committed misconduct warranting dismissal by being in the wrong place to have his lunch? The Tribunal found above that he was asked to stay away from the part of the business that operated on that side of the road. However, he had to go there to collect tools and to work and it is likely that even after he was asked to stay away, Mr Goodwin saw him there on occasion. The Claimant was not in Mr Goodwin's home. He was in a part of the building that was used as part of the business. It is likely that it was used as space for storage or something similar. Mr Goodwin said to the Claimant that it upset him every time he sees him over there. The Tribunal was not told why the mere sight of the Claimant upset Mr Goodwin as it had on previous occasions and as it did on 31 July. The Claimant had not been banned from No. 22BR but had been asked to stay away. To go there would not have been an offence warranting dismissal unless the Respondent had previously told him that it would be or that he would be subject to disciplinary action if he ever went there again.

58 It was not clear why the sight of the Claimant that day made Mr Goodwin so angry that he did not hear his wife speak to him to ask after his welfare.

59 The Claimant believed that the conversation he had had with Ms Shearer and Mr Anthony on 4 January when he was told that he was the most expensive employee

may have had something to do with the way he was quickly dismissed after the incident on 31 July, as opposed to the reason being simply his conduct. I had to consider whether that was the reason for his dismissal.

60 The Respondent's case was that the Claimant was difficult and that he was always arguing with Mr Goodwin. The Claimant and Mr Goodwin stayed out of each other's way. Even though they did not get on, the Claimant remained employed for 4 years. On 31 July 2018 they clashed, as they had done before. On those previous occasions the Claimant had not even been given a verbal or written warning. It is likely that both the Claimant and Mr Goodwin were shouting at each other on 31 July and that they both swore at each other during what was likely to have been a heated argument. Mr Anthony's evidence was that swearing was not uncommon in the business. It is not clear to the Tribunal why on this occasion, swearing and shouting constituted conduct that warranted dismissal. However, it is the Tribunal's conclusion that the Claimant's conduct that day was part of the reason for his dismissal along with the previous incidents.

61 Taking all of those facts into consideration, it is this Tribunal's judgment, that there was no evidence, apart from what was said at the meeting on 4 January, that the Respondent dismissed the Claimant because he was the most expensive employee.

62 It is this Tribunal's judgment that at the meeting on 1 August the Respondent considered a set of circumstances, mainly the incident on 31 July, but also previous incidents and Mr Goodwin being tired of the situation; and concluded that it had to terminate the Claimant's employment for his conduct on 31 July.

63 The Claimant was dismissed for misconduct.

The second question for the tribunal is: Did the Respondent believe and did it have reasonable grounds for believing, after adequate investigation, that the employee was guilty of misconduct?

64 It is this Tribunal's judgment that no investigation was done into the incident on 31 July before the decision was taken to dismiss the Claimant.

65 No-one asked the Claimant for his version of events so that it could be considered at the meeting. No-one sought out any other witnesses who may have heard something – this was a loud argument that crossed the street – it is likely that the other fitters working that day heard something. The Claimant was not given an opportunity to defend the charge that he had committed misconduct by either being in the room at No. 22BR when he had been asked not to or by eating lunch there. The Respondent could have investigated whether the Claimant had been attempting to listen to the partners' meeting or had simply been eating his lunch at the incorrect time. He was not given an opportunity to defend the charge that he had unreasonably argued with Mr Goodwin or that this argument was different in some way to those that they had had previously or the 'last straw' for Mr Goodwin.

66 When Ms Shearer telephoned the Claimant, it was after the decision had been made to terminate his contract. She was not conducting an investigation. She called him to inform him of his dismissal.

67 Mr Anthony tried to get the Claimant back to work and advocated for him at the meeting. Mr Anthony did not put the Claimant's version of what happened to the meeting. The Claimant was not given an opportunity to do so himself.

68 An investigation would have given the Respondent an opportunity to obtain the full facts of what had happened then and in the past. It is clear that the decision to dismiss was partly based on the fact that this was not the first time that they had argued but it was not clear what had happened on those previous occasions. Were the previous occasions different from the incident on 31 July? Why had the Claimant not been given any warnings for the previous occasions that they had argued – if it was considered that behaving in such a way could cause him to lose his employment?

69 The purpose of warnings in a disciplinary process, as stated in the Respondent's handbook, is to give the employee a warning that if his conduct does not change – he will suffer serious consequences. A failure to give a warning sends an entirely different message to an employee – that the conduct is acceptable or at least, not that serious. Failing to give warnings to an employee is not of benefit to them if at a later date that same conduct will be taken into account to dismiss him.

70 A thorough investigation could have clarified whether the issue was the Claimant's failure to obey a lawful instruction or his personality or Mr Goodwin's attitude towards him or some other matter.

71 A proper investigation would have been able to deduce whether the kitchen facilities were actually inadequate and needed to be addressed. Was the Claimant simply eating his lunch? What facilities are there for staff to do so? Are other members of staff allowed to go to 22BR and if not the Claimant, why not? Why did Mr Goodwin react so strongly to seeing the Claimant there that day? Was there something else going on for him that day which might make this a one-off incident?

72 It is this Tribunal's judgment, that at the time that it made the decision to dismiss the Claimant, the Respondent did not have a reasonable belief – arrived at – after a reasonable investigation - that the Claimant was guilty of misconduct or what that misconduct was.

73 If it was simply that he argued with, shouted and swore at Mr Goodwin on 31 July – the Respondent has failed to prove that it had a reasonable belief arrived at after a reasonable investigation that this occasion was different from previous occasions or that it was more serious, or that, even though the Claimant had never been given a warning about his conduct previously, on this occasion, it warranted dismissal. The Respondent could not have had a belief that on its own the conduct on 31 July warranted dismissal as they were adamant that the Claimant was not dismissed for gross misconduct.

74 The Respondent failed to follow any procedure. The Respondent had not given the Claimant an opportunity to respond to the charge of misconduct before proceedings to dismiss him.

75 It is this Tribunal's judgment that the Respondent had not followed a reasonable procedure and had not followed the process set out in its own handbook.

The next decision for the Tribunal is whether dismissal was an appropriate sanction to impose given all the relevant circumstances.

76 The Claimant was good at his job. The Tribunal was not told about complaints from customers or of any difficulties that he had with his colleagues, apart from Mr Goodwin who at the time, was the proprietor of the business but was in the process of reducing the time he spent in it. Mr Anthony confirmed yesterday that the Claimant did good work.

77 The Claimant was described in the Respondent's response document as an 'able fitter'.

78 Although he had had arguments with Mr Goodwin in the past – the Claimant had a clean disciplinary record.

79 He was not given the benefit of the procedures set out in the Respondent's handbook.

80 There had been no disciplinary hearing, no investigation and no consideration of whether any other of the sanctions listed in the handbook would have addressed any conduct issues that the Respondent had with the Claimant.

81 The Claimant denied that he had ever been given a verbal warning about his timekeeping, his attitude towards work, the storage of his bicycle or the allegation of playing one partner against the other as made in the Respondent's response. The Respondent's witnesses all confirmed that he had never been given any warnings. The dismissal letter refers solely to the conduct on 31 July.

82 In circumstances where there has been no investigation, where the reason for dismissal could simply have been a clash of personalities in the business and where that clash was not new but had been evident for years; it is this Tribunal's judgment that dismissal would not have been part of the band of reasonable responses open to this employer.

83 At the time it made the decision to dismiss the Claimant, it did not have any information on the Claimant's explanation on why he was at 22BR or whether there were any mitigating factors. Mr Goodwin made the decision because he did not want the Claimant coming in and in his words '*winding him up*'. An employee should be heard before a decision is taken to dismiss him. He never got a chance to speak in his defence before a decision was taken to terminate his employment. The Claimant had been employed for 4 years and had a clean disciplinary record. In the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or his explanation and/or mitigation. That did not happen in this case.

84 The Tribunal took into account the fact that the Respondent is a small business and did not have any HR or legal support in dealing with the incident on 31 July. It is this Tribunal's judgment that the Respondent chose to deal with the matter without seeking professional help. It did seek the services of a solicitor when it was served with the Claimant's ET1 claim form and could have chosen to do so earlier. Also, the Respondent had procedures in its own handbook that it could have followed but failed to.

85 It is this Tribunal's judgment that the circumstances of this dismissal, i.e. the Claimant had argued with Mr Goodwin before, there had been no investigation into the particular circumstances of this particular argument and why the Respondent considered it to be more serious than the earlier incidents and the Claimant had not been given any opportunity to consider the evidence against him and address those in a disciplinary hearing; meant that the option of terminating his contract was not within the band of reasonable responses open to the Respondent.

86 It is this Tribunal's judgment that the Claimant has been unfairly dismissed. The Respondent had not acted fairly and reasonably in all the circumstances.

87 The Claimant has succeeded in his claim.

88 The Claimant is entitled to a remedy.

Remedy - Law

89 In a successful unfair dismissal claim where the Claimant was not seeking reinstatement nor re-engagement, any award by the tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

90 This is set out in **Section 119 of the ERA** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling then the amount of the award is restricted to it. The Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute. This is where one or more of the following circumstances exist in the particular case: i.e. the claimant's conduct before dismissal makes a reduction just and equitable (see below), the employee has unreasonably refused an offer of reinstatement, the employee has been dismissed for redundancy and already received a redundancy payment or the employee has been awarded an amount in respect of the dismissal under a designated dismissal procedures agreement.

91 Section 3 of the Employment Act 2008 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution. This is enshrined in section 207A and Schedule 2 to TULR(C)A 1992. The relevant code is the ACAS Code of Practice of Disciplinary and Grievance Procedures.

92 Section 207A(2) provides that an employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures.

Compensatory award

93 This is set out in **Section 123 of the ERA**. It is intended to compensate the claimant for losses arising out of the dismissal, so far as that loss is attributable to action taken by the Respondent. It is not to be used to punish the Respondent. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost i.e. company car, health benefits, pension, travel allowances etc. In addition, the Tribunal can compensate the Claimant for any additional expenses occasioned by the loss of employment i.e. expenses incurred in seeking alternative employment. The compensatory award can take into account losses extending into the future. The Tribunal has to make findings of fact based on the evidence before it, in order to determine how much and for how long it would be just and equitable to award to the Claimant compensation for such future losses.

94 The Claimant is under a duty to mitigate his/her loss and the tribunal would need to consider whether this has been done in deciding on which losses will be compensated. This refers in particular to the duty on the Claimant to make diligent searches for alternative employment following dismissal.

95 The tribunal can make reductions from the compensatory award.

POLKEY

96 The House of Lords in the case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 held that it is not permissible for a tribunal to speculate whether a lapse in procedure in fact made any difference, and in so doing, forgive the lapse if with hindsight the employee would have been dismissed. The employer is to be judged by what he actually did, against the backdrop of his state of knowledge at the time of dismissal.

97 However, evidence that the Claimant would have been dismissed even if a fair procedure had been followed will be relevant and taken into account when assessing what compensation to award the Claimant. The tribunal should normally make a percentage assessment of the likelihood of a fair dismissal and apply that when assessing compensation. Another approach open to the tribunal is to fix a date by which it is confident on a balance of probabilities that the employee would have been dismissed anyway and to limit compensation to the period up to that date. (*Contract Bottling Ltd v Cave* [2015] ICR 146 in which Langstaff P accepted that either method might be applied and confirmed that the percentage method was likely to remain the normal practice.

98 If the Tribunal finds instead that it is not clear how the application of a fair procedure would have affected the Claimant's employment then no **Polkey** reduction should be made.

Contributory fault

99 The Respondent submitted that the Claimant contributed towards the situation that led to his dismissal.

100 Section 123 of the ERA also provides that if the tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. In deciding whether to reduce compensation the tribunal should focus on the employee's conduct and only consider the actions of others in so far as they are relevant to the assessment of the culpability of the employee's conduct.

101 If a tribunal finds that there was conduct on the part of the employee that was or could be regarded as blameworthy, then it is bound in assessing the compensation to consider contributory fault irrespective of whether it has been raised by the parties. The Tribunal must give the Claimant an opportunity to give evidence on the matter and the tribunal must specify the behaviour, action or conduct which it is taking into account.

102 In the case of *Steen v ASP Packaging Ltd* [2014] ICR 56 the EAT stated that the application of section 122(2) and 123(6) of the ERA (i.e. the power to deduct from the basic and compensatory awards) required the tribunal to do the following: (1) identify the conduct which it considers gives rise to possible contributory fault (2) ask whether that conduct is blameworthy (3) ask itself whether that conduct caused or contributed to the dismissal to any extent. If so, the tribunal should then consider to what extent the award should be reduced and, to what extent it is just and equitable to reduce it.

103 Lastly, in the case of *Parsons v Airplus International Ltd* UKEAT/0023/16 (unreported) the EAT confirmed that the tribunal must make a judgment as to whether the conduct was a legal contributing factor or an effective cause of the dismissal. That is, whether dismissal was a direct and natural consequence of the conduct.

Remedy considerations

104 The Claimant has been unemployed since his dismissal but has started his own business. He is now self-employed. He has done some occasional work with his cousin.

105 The Claimant is a qualified tyre fitter and he has not disputed the Respondent's contention that there were jobs as a tyre fitter that he was could have applied for in the period of time since his dismissal.

106 The Claimant has a commitment to assist in the care of his disabled step child which means that he is unable to work on Saturdays. That would have affected his search for employment and it would have made it more difficult for him to secure new employment in the same field. It may have taken some more time for him to have found another suitable job. The Claimant has decided instead to start a franchise as a locksmith. He is entitled to change his job and to be commended on the decision to take out a franchise and start his own business. However, it is not the Respondent's responsibility to pay him until that business begins to pay.

Contributory conduct

107 It is this Tribunal's judgment that the Claimant contributed to the situation that gave rise to his dismissal. On 31 July he engaged in an altercation with Mr Goodwin that continued after they had both left No. 22BR crossed the road, entered the other building and in front of Mr Anthony. Having heard the evidence, it is apparent that the Claimant swore and shouted at Mr Goodwin. Even though he had not had a warning about this type of conduct before, he would have known that it was not appropriate in a work environment. He therefore contributed to the situation. In my judgment, that conduct contributed to the Respondent holding the meeting on 1 August. However, it was the Respondent's decision to proceed without conducting an investigation. It was the Respondent's decision to dismiss the Claimant without conducting a disciplinary hearing. The Claimant and Mr Goodwin had argued before and it is likely that they had sworn at each other before. Dismissal was not a direct cause or natural consequence of his misconduct. His misconduct was a contributing factor to his dismissal.

108 It is this Tribunal's judgment that the Claimant's contribution towards the situation that led to his dismissal is at 30%.

Polkey consideration

109 The next question for the Tribunal is whether there should be a **Polkey** reduction in this case. The Respondent submitted yesterday that even if it had gone through a procedure before dismissing the Claimant, it is likely that the procedure would have concluded within the 3 weeks' notice period that the Claimant was paid. The Respondent submitted that he should therefore not be entitled to any compensation, even if he were unfairly dismissed.

110 The Claimant submitted that he did not know what would have happened if the Respondent had gone through an investigation and disciplinary procedure.

111 Even though the Respondent considered that the Claimant's conduct warranted dismissal, it did not consider it to be gross misconduct but simply misconduct.

112 The Claimant and Mr Goodwin had argued before. They had regular altercations when they happened to be at work together. It is highly likely that there had been shouting and swearing on those occasions too. Yet, it was not considered serious enough on any of the earlier occasions for the Claimant to have been issued with any form of warning. The incident on 31 July was the first time that the Respondent took this matter seriously enough to take some action.

113 What would have happened if the Respondent had taken some legal advice and followed its own procedures as set out in its handbook or followed the ACAS Code of Practice?

114 It is difficult to predict what would have happened. However, in the light of the fact that no disciplinary action was taken in relation to the earlier occasions it is unlikely that if it had taken legal advice and proposed to conduct the disciplinary procedures set out in its handbook that the Claimant would have been dismissed. There was also the

fact that Mr Goodwin retired soon after the incident. The parties agreed that the Claimant was a good fitter and got on well with Mr Anthony who took over the business. It is not clear what differences these facts would have made as they were not considered at the time.

115 It is this Tribunal's judgment that, in this instance, that the Claimant would have been given a warning and would have retained his employment.

116 On the other hand, it was also clear that Mr Goodwin wanted the Claimant out of the company. The incident on which the disciplinary action would be based started with him shouting at the Claimant as soon as he saw him. The evidence was that on this occasion, the Claimant had done anything to provoke him. The Claimant's presence made Mr Goodwin angry. Given those factors, there is a slim possibility that there would have been a fair dismissal at some point in the future as Mr Goodwin wanted him out of the business.

117 It is this Tribunal's judgment taking all the above into account that it is appropriate to make a small deduction to reflect that chance in this case. My judgment is that there should be a deduction of 15% in this case.

118 This Tribunal's judgment is that the Claimant will be awarded 5 months' pay and that deductions of 30% and 15% need to be made to reflect the Claimant's conduct on the 31 July and the likelihood that he would have been fairly dismissed at some point in the future.

119 The Claimant was paid 3 weeks' notice pay to 24 August.

120 Therefore, the Tribunal's judgment is to award him an additional 5 months' pay from the date of the end of the notice pay. The period covered is 24 August to 25 January = 22 weeks.

121 From the Claimant's schedule of loss, the Tribunal can see that the Claimant has claimed additional sums representing the Respondent's contributions to his pension as well as his own contributions. However, on calculating the amounts in the payslip, it is clear that the Respondent's payment towards his pension is the only additional payment. The rest are normal deductions from his wage. The pension pot which the Claimant built up while he was employed with the Respondent is with Standard Life and will be kept until he reaches retirement age. The Tribunal's judgment is therefore to award the Claimant the pension contributions that he has lost from the Respondent together with his loss of wages for 22 months.

122 As mitigation, the Claimant worked approximately a total 8 days with his cousin between November and the end of January 2019 and was paid at £80 per day. This amount is deducted from his loss of wages.

123 The Tribunal does not award the Claimant any future loss. The Claimant has made a decision not to apply for any fitter jobs. He has not sought employment in the field in which he is experienced. He has done odd jobs and has started a franchise. The Claimant is entitled to change the field in which he works but the Respondent does not have to compensate him until the locksmith business begins to earn him a living.

124 The Respondent failed to follow its own procedure as set out in its handbook. It also failed to comply with the ACAS Code of Practice. There was no investigation, no disciplinary hearing and no attempt to consider the Claimant's explanation before the decision was taken to dismiss him. In arriving at the decision to dismiss, the Respondent failed to consider any alternative sanctions or Mr Goodwin's part in the argument. The Claimant is entitled to an uplift because of the Respondent's failure to comply with the Code.

125 The Tribunal awards the Claimant the highest amount that can be awarded as an uplift under section 124A of the Employment Rights Act. That is an uplift of 25%. This was awarded because the Respondent made no attempt to follow any procedures in dismissing the Claimant. There was no discussion with the Claimant about what happened on 31 July. Mr Anthony spoke to him that evening to tell him that he would try to keep him in work and after the directors' meeting, there was another telephone call to inform him of his dismissal.

126 The Respondent made no attempt to follow any procedure in addressing the incident that occurred on 31 July. The Respondent failed to even look at its own handbook and did not attempt to follow the procedure stated in it. The Claimant's remedy is uplifted by 25% to reflect the failure to follow the ACAS Code of Practice.

Remedy Calculations

127 The Claimant's entitlement is as follows: -

Basic Award

Claimant's employment was from October 2014 – August 2018 –
3 years and 9 months

The Claimant was 36 at the time of his dismissal

The Claimant is entitled to 1 weeks' pay for each full year of
employment = £482 x 3 = £1,446.00

Less 20% for the Claimant's conduct before dismissal
- £289.20 = £1,156.80

Total Basic Award of £1,156.80

Compensatory award

Loss of wages for 22 weeks

Net wages - £382.56 x 22 = £8,416.32

Plus £7.32 x 22 = £161.04 (Respondent's pension
contribution) = £8,577.36

| | | |
|--|---|------------------|
| Less earnings in mitigation – November – to end of January – 8 days’ work at £80 per day = £640 + 1 day’s work at £480 (August to November) | = | £1,120.00 |
| | = | <u>£7,457.36</u> |
| Less POLKEY reduction of 15% (£1,118.60) = | | £6,338.76 |
| Plus 25% uplift under section 124A Employment Rights Act 1996 | | <u>+£1584.69</u> |
| | | £7,923.45 |
| Less 20% for contributory conduct (£1,584.69) = | | <u>£6,338.76</u> |
| Plus - loss of statutory rights - | | £250.00 |
| Less POLKEY reduction of 15% (37.50) = | | £212.50 |
| Plus 25% uplift under section 124A Employment Rights Act 1996 (£53.12) | | £265.62 |
| Less 20% contributory conduct (265.62 x 20% = £53.12) | | |
| = | | <u>£212.50</u> |
| Total compensatory award | | <u>£6,551.26</u> |

128 The Respondent is ordered to pay the Claimant the total sum of £1,156.80 + £6,551.26 = £7,708.06.

Employment Judge Jones

30 July 2019