



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Thorpe

**Respondent:** Hi-Spec Facilities Services Ltd

**HELD AT:** Manchester

**ON:** 10 February 2020 and  
6 April 2020 (in  
chambers)

**BEFORE:** Employment Judge Slater

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr S Forde, director

# JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded.
2. The respondent is ordered to pay to the claimant compensation for unfair dismissal of £2863.40.
3. The Recoupment Regulations apply to this award. The grand total of the award is £2863.40. The prescribed element is £615.76. The period of the prescribed element is 24 July 2019 to 7 August 2019. The excess of the grand total over the prescribed element is £2247.64. The annex to this judgment explains the operation of the Recoupment Regulations.

# REASONS

## Claims and issues

1. The claimant claimed unfair dismissal. The issues were discussed and agreed at the outset of the hearing to be as follows:

- 1.1. Has the respondent shown a potentially fair reason for dismissal? The respondent said the claimant was dismissed because of his misconduct. The claimant challenged the reason for dismissal, saying he thought he had been dismissed because he had been transferred to the respondent's employment by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and was employed on better terms than other employees. I needed to consider whether the reason given by the respondent for the claimant's dismissal was the real reason for his dismissal and, if it was, whether the respondent had a genuine belief in his guilt.
- 1.2. If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? I need to consider whether the belief in the claimant's guilt was (a) based on reasonable grounds; and (b) formed after a reasonable investigation. I need to consider whether the procedure followed and penalty of dismissal were within the band of reasonable responses.
- 1.3. If the dismissal was unfair, in a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed had a fair procedure been followed?
- 1.4. If the dismissal was unfair, has the claimant contributed to the dismissal by his conduct?

2. The claimant had ticked the boxes on the claim form to say that he was seeking reinstatement or re-engagement. He told me that he was no longer seeking reinstatement or re-engagement. He had been able to obtain new work quickly at no less pay. He told me that he was seeking by way of a remedy, if successful, compensation consisting of the basic award, 2 weeks' loss of earnings and compensation for loss of statutory rights.

## Evidence

3. The claimant had not prepared a witness statement. However, he had sent an email (p.84 of the bundle) which, together with the details of claim on the claim form, we agreed would be treated as the claimant's witness statement.

4. I heard evidence from the following witnesses for the respondent:

Mark Hilton, business manager, who was the appeal manager;

William Brown, contract manager, who was the person who conducted the disciplinary hearing;  
Colin Sackfield, area supervisor, who took minutes of the disciplinary and appeal hearings.

5. I heard evidence from the claimant only for the claimant. The claimant also asked me to read a statement signed by 2 other employees, Michael and Paul. They did not attend to give evidence. The respondent agreed that I could read this and give it such weight as I considered appropriate.

6. There was a bundle of documents.

**Facts**

7. The respondent has contracts with various clients to provide general cleaning, window cleaning and grounds maintenance for social housing. They have contracts for work around the country from Birmingham to Newcastle. Your Housing Group is one of the clients. The respondent has more than 1000 employees around the country. The respondent has more than 20 contracts, including a number of contracts around the Manchester area, where the claimant worked. The respondent has 40+ employees working doing cleaning on contracts in the Liverpool and Manchester areas.

8. There were no conduct rules for employees included in the bundle of documents and Mark Hilton told the tribunal that he did not look at any conduct rules when dealing with this matter. He considered it clear that employees should not be approaching residents and giving them their number. He thought there was a rule that employees should not get involved with residents and should be polite. He was not sure what the relevant rules say.

9. The claimant began his continuous employment working for another company and was transferred to the respondent's employment by operation of TUPE in 2018. The claimant gave evidence which was not challenged that his contractual terms were more favourable than those of at least some other employees of the respondent.

10. The claimant, after he transferred to the respondent's employment, remained working on a contract for Your Housing Group, in the Manchester area. He was a mobile cleaner.

11. Mark Hilton informed the tribunal that he had checked the claimant's training records and he had received training on how to conduct himself on site, including being respectful to tenants. He accepted that the training did not tell employees that they should not give out their telephone number, saying the training did not go into that amount of detail.

12. On 2 July 2019, the claimant pushed a note through the door of H, a tenant of Your Housing Group, which read as follows: "Give me a call or add me on Facebook James Thorpe [telephone number was given]". The claimant denied in the disciplinary process that he knew that H was a housing client at the time. The claimant cleaned the communal areas of a nearby block of flats. H lived in a house. The claimant gave evidence that the houses are a mixture of housing association

houses and privately owned houses. I accept this evidence, which is consistent with what is the case on many former council housing estates, as a result of the right to buy policy.

13. The claimant accepts, with hindsight, that he should not have given H his phone number. I also accept that he did not understand, at the time, that it was something for which he could be dismissed.

14. H texted the claimant on 2 July 2019 at 13.02. Over a period of 14 minutes the following exchanges took place:

H: "Who this you've left a note through my door."

Claimant: "You look like a woman who likes mysterious, let's see if you know who I am from Facebook picture [with 2 emojis denoting crying with laughter]."

H: "No don't know who you are."

Claimant: "I see you every Wednesday when I clean the flats on cedar"

H: "Find it very weird n I have a partner."

Claimant: "Didn't know you had a partner, I thought I'd try my luck as thought you was nice, sorry to of bothered you"

15. H contacted Your Housing Group shortly after this text exchange. She sent them a copy of the note the claimant had pushed through her door. At 13.28 on 2 July 2019, Daniel McGrath of Your Housing Group sent an email to Vincent Clark of Your Housing Group, writing as follows:

"Tenant [H, address] has come home today to this note pushed through her door. When she texted the number the person advised they are a cleaner in her block and come round on Wednesday. However it seems he has come out of his way to post the note through the door. [H] feels a little uneasy by this. If you could get in touch with the contractor if possible and advise what has gone on today if possible."

16. Vincent Clark was the respondent's principal contact with Your Housing Group. He contacted his manager the following day about the email from Daniel McGrath. He wrote that this was totally unacceptable and that he felt that they should request the operative be removed from that section of the contract and asked his manager how she felt about this. Later that day, Vincent Clark emailed Bill Brown, the respondent's contract manager, asking that he forward to Mark Hilton, the respondent's business manager, the email about the incident. He wrote that they required this operative to be removed from the contract.

17. Mark Hilton gave evidence that he understood that they were being required to remove the claimant from the contract pending investigation of the incident. Bill Brown gave evidence that he understood that they were being required to remove the claimant permanently from the contract.

18. On 4 July 2019, Bill Brown emailed Vincent Clark asking if it would be possible for him to get a written statement from the tenant to assist them and informing him that Bill Brown was suspending the claimant pending their investigation. Vincent Clark's manager responded that one of the Your Housing Group's legal coordinators was going to contact the customer to take a statement.

19. The respondent was asked by the client not to contact H because she was upset.

20. On 4 July 2019, Bill Brown met with the claimant, together with Colin Sackfield, area supervisor. Bill Brown told the claimant that he was being suspended with immediate effect on full pay. Bill Brown read to the claimant the email from Vincent Clark which said that they required the operative to be removed from the contract. Bill Brown did not give the claimant any details of the allegation against him. However, the claimant phoned Mark Hilton during the meeting and had a conversation on the speakerphone. Mark Hilton told the claimant that there had been a complaint made saying that he had been harassing a resident. The claimant denied this. The claimant said he had given her his phone number. Mark Hilton asked why he had done this and did he think it was a professional thing to do while he was at work. The claimant replied that he was a single guy and she was a nice looking girl and he hands his number out to anyone and that's just the kind of guy he is. Mark Hilton told him that, due to a complaint, they would have to investigate the incident and act on it.

21. By letter dated 5 July 2019, Bill Brown confirmed the claimant's suspension and gave him notice of a disciplinary hearing on 11 July 2019. Subsequently the disciplinary hearing was postponed and relisted for 23 July 2019 to enable the claimant's trade union representative to attend. In the letter requiring the claimant to attend a disciplinary hearing, the allegations were set out as follows:

- "Allegation of inappropriate, unprofessional behaviour
- Intimidating communications to resident on clients site
- Break down in trust and confidence
- Third party pressure from client as a result of your conduct
- Bringing the company into disrepute by your action".

22. Bill Brown informed the claimant that the possible consequences arising from the meeting might be a disciplinary sanction or dismissal. He advised the claimant of his right to be accompanied at the hearing.

23. The claimant received a subsequent letter in very similar terms but with a new hearing date of 23 July 2019.

24. Bill Brown considered that dismissal was a possible sanction because the claimant put the tenant at unease in her own home; the tenant had felt threatened and intimidated and could have gone to the police. As found below, he was also advised by Mark Hilton that, if the claimant was guilty, he should be dismissed.

25. DB, a legal coordinator for Your Housing Group, spoke to H by telephone and wrote a file note of her conversation on 5 July 2019. This recorded the note that the claimant had put through the tenant's door and the text exchanges, save that the last 2 texts in the conversation were not set out in the file note which stated, incorrectly, that H had ignored the message "I see you every Wednesday when I clean the flats on Cedar" and then reported it straight away. The note also recorded the following:

"The following day 03 July 2019 JT was cleaning the flats over the road and was smiling and trying to catch [H] attention. [H] states this has made her

extremely uncomfortable as she has never had a conversation with him and feels on edge. [H] has checked fb and recognised JT as the same person as cleans the block. She also confirms that the other male who was with him didn't do any wrong and she does not wish to complain about him."

26. Bill Brown received a copy of this note on 5 July 2019. However, the claimant was not shown it until the disciplinary hearing on 23 July 2019. Bill Brown never thought of sending it to the claimant in advance.

27. On 5 July 2019, Vincent Clark wrote to Bill Brown and Mark Hilton. He wrote that he expected a full account and resolution by Monday's meeting. He wrote this must include operative training regarding contacting residents of Your Housing Group, a full report and the respondent's terms/process/procedure of operative insubordination and escalation procedure to be logged with Your Housing Group. He also asked to be told what apology and mitigation would be offered to the Your Housing Group resident, suggesting a very large bunch of flowers or gift card would be the bare minimum.

28. Mark Hilton had a meeting with Vincent Clark, after the respondent had been provided with a copy of the statement taken from H. Vincent Clark told Mark Hilton that the claimant was not to come back on the contract.

29. The disciplinary hearing took place on 23 July 2018. Bill Brown conducted the meeting and Colin Sackfield took notes. The claimant was accompanied by a Unison representative. Bill Brown gave the claimant a copy of H's statement. Bill Brown said his boss had asked him what the claimant was doing chatting girls up during work time. The claimant said he did not know she was a Your Housing client until afterwards because it was not somewhere that he cleaned. Bill Brown asked if the claimant found it acceptable to post his number through girls' doors in work's time. The claimant said he did not know he could get into trouble for giving girls his phone number on his dinner break. He did not realise it was a serious offence. Bill Brown said that H had reported it to Your Housing Group. The claimant said he had apologised. He said the main issue was what she had told Michael the following week, that someone had left slime for one of her kids and she had told Paul and also [a woman in a flat where he did clean]. Bill Brown said that H said she felt threatened. The claimant said it did not say that in the statement.

30. Michael and Paul are other employees of the respondent who work on the Your Housing Group contract.

31. Bill Brown said he was leaving the room so that the claimant could talk with his union representative.

32. When Bill Brown re-entered the room, he said "Right unfortunately the housing association don't want you on contract". The claimant said H at first had said she was not going to take it further and asked if they could not go and speak to her. Bill Brown said he could not and the claimant could not. Bill Brown said he could only act on what the housing association had requested and that was that they did not want the claimant on the contract, they did not want him on the site and he had no other jobs for the claimant to go to. He informed the claimant that he had the right to

appeal. He said: "because of the stance on this there is no other job there for you I have no other contract I can move you to".

33. The claimant said he did not know what was classed as gross misconduct and that he had never had anything to say what was classed as gross misconduct. Bill Brown said that H had taken it that the claimant was stalking her. The claimant asked how and said she had not been to the police and, if he was stalking her, she would go to the police.

34. The claimant's trade union representative said: "and so the organisation itself high spec have not investigated it they have got all this from Your Housing Your Housing have gone to her and she's made a complaint and given a statement and they have passed on to you that they don't want James on the site and that led to the decision from yourselves that he's sacked for gross misconduct." Bill Brown agreed that was right.

35. The claimant said he was shocked; he did not know he could get sacked for giving a girl phone number in his break.

36. The claimant's trade union representative said:

"So James position is that he left his phone number for someone during his lunch as I think you seen a picture of the text, the conversation went on she said she wasn't interested he said fine sorry for bothering you she then made a complaint which the statement isn't something James went looking for she's approached the other people that work on that contract and she's said this is all a mistake and that she thought James had left things for the kids and thought that was really weird realised afterwards that it wasn't and has stated that she doesn't want this going any further and that she is not concerned about it."

37. Bill Brown said that she had not been in touch with Your Housing to that effect.

38. Bill Brown said that posting his phone number through a female's door is overstepping the mark. "It's the way she's reacted you've seen the statement and your housing don't want you on site."

39. The claimant said they could change their mind and asked Bill Brown whether he had asked them. Bill Brown replied: "no we've not we've only took their stance on it." Bill Brown is recorded in the notes as saying: "All I can tell you is what Mark Hilton told me and that's because of this incident to finish you as from immediate effect and that you do have the right to appeal." He is also recorded as saying "alls I can tell you is I've done what I've got to do and alls you can do is lodge your appeal and take it from there there's nothing I can do its out of my hands."

40. Bill Brown said in evidence that he considered that the claimant's conduct was so serious that he had no alternative but to dismiss the claimant. He said that H was intimidated by the claimant and frightened of going out. There is nothing in the emails and notes taken of conversations with H to suggest that H was frightened of going out. Bill Brown said he understood that the complaint must be serious because the client had insisted that the claimant be taken off the contract.

41. Bill Brown said there was no other vacancy the claimant could have taken but, even if there had been, he would not have kept the claimant on in case he did the same again. He did not look at whether there were any vacancies elsewhere but said he knew they did not have any vacancies; he knew his own contracts and that nothing was available. Bill Brown deals with a lot of the contracts in the Manchester area but not all of them. He did not look at whether anyone else had vacancies in the Manchester area.

42. Mark Hilton's evidence was that he did not tell Bill Brown to dismiss the claimant but would have discussed possible outcomes with him.

43. Mark Hilton told the tribunal that, from the statements he read from H, he had no doubt the claimant needed to be removed from the contract.

44. Bill Brown said in evidence that Mark Hilton had not told him what to do; he meant to say that Mark Hilton had advised him to suspend the claimant and that could lead to dismissal. He said Mark Hilton advised him that, if the claimant was found guilty, it had to be dismissal. He did not say that Colin Sackfield incorrectly recorded what he said in the meeting and Colin Sackfield confirmed that he wrote his note as he did because that is what Bill Brown said. I find that the note is correct as a record of what Bill Brown said. From Bill Brown's oral evidence at the hearing, it is clear that he understood from Mark Hilton's advice that, if the claimant was found to have posted his number through H's door, the sanction had to be dismissal. Since the claimant admitted posting his number through H's door, I find that Bill Brown understood from Mark Hilton that he had to dismiss the claimant. I find that Bill Brown did not give any independent consideration to whether the offence was sufficiently serious to merit dismissal because, acting on the advice from Mark Hilton, he understood that he had to dismiss. I find that he did not give any consideration or make any enquiries as to whether the claimant could be redeployed elsewhere for the same reason.

45. On 25 July 2019, Bill Brown wrote to the claimant confirming his dismissal with effect from 23 July 2019. He wrote as follows:

"I write to confirm the outcome of our [sic] meeting as follows:

- Allegation of inappropriate, unprofessional behaviour  
I consider this point upheld, as by your own admission you did post the note through the residents door during your lunch break whilst wearing company uniform, ultimately resulting in a formal complaint being made by the resident directly to our customer.
- Intimidating communications to resident on client site  
I consider this point upheld, as from our investigations into this matter statements made by the offended party in reporting the incident confirmed that she was "feeling uneasy". Further you had clearly come out of your way to post the note with your number through her door, in my opinion there was no other reason to be there at that time and you have no responsibilities with regards to your work schedule for the block in which this incident occurred.



The residents statement also confirms following the note and after being told she had a partner you continued to attempt to catch her attention making her “extremely uncomfortable and on edge”

- Break down in trust and confidence  
I consider this point upheld as clearly your actions in this matter have caused a breakdown in trust and confidence between employer and employee
- Third party pressure from client as a result of your conduct  
I consider this point upheld as your actions have resulted in a serious failure of trust and confidence with the client (Your Housing Group) and they have requested your removal from site.
- Bringing the company into disrepute by your action  
Yours actions on all points raised have clearly brought the Company into disrepute

“After investigating the allegations raised and the serious nature of your actions in this matter my decision is that the allegations are upheld and can see no mitigating circumstances to your behaviour. I am therefore writing to you to confirm the decision that you be dismissed for gross misconduct with immediate effect and conclude that due to a breakdown in trust and confidence between employee, management and client we could not see a positive way forward under the circumstances.”

46. Bill Brown informed the claimant of his right of appeal.

47. The letter said nothing about there being no alternative employment with the respondent available for the claimant.

48. The claimant appealed against the decision and was informed of an appeal hearing to take place on 20 August 2019. The respondent postponed the appeal until the claimant’s trade union representative was available.

49. There is a document in the bundle, entitled statement from H, which was referred to at the appeal hearing. There was no evidence in the witness statements explaining how this came to be produced. It is written in the third person and apparently signed by H, Bill Brown and two others on 30 July 2019. Mark Hilton believed the statement had been taken by Bill Brown. The statement includes a statement that the claimant used to sit outside in his van and made her feel uneasy as he used to stare at her as she was walking by. It included an assertion that Michael had asked another tenant, a friend of H’s, to ask H to withdraw her statement since the claimant had a mortgage and now no job. H is reported as saying that she would not be changing her statement. H is reported as saying that she felt the claimant was stalking her. The statement includes an assertion that Michael knocked on the door of the other tenant, asking her for this statement.

50. The appeal meeting was held on 29 August 2019. The meeting was conducted by Mark Hilton with Colin Sackfield taking notes. The claimant was again accompanied by his Unison representative. The claimant asserted that the decision to dismiss him had been made by Bill Brown, saying that Bill Brown told him that it

came from Mark Hilton to dismiss him. Mark Hilton said he was not at the meeting so it was not him who made the decision.

51. The claimant agreed that he had put his number through H's door but said it was in his dinner break. He accepted that he was in the works vehicle and in company uniform at the time. Mark Hilton produced a statement which he said was from H and showed it to the claimant. This was a statement dated 30 July 2019, written in the third person and apparently signed by H and others. Mark Hilton did not know how this statement had come into existence. He was not sure why it had not been provided to the claimant before the appeal hearing.

52. Mark Hilton said in the appeal hearing that the claimant had pushed his number through a tenant's door and exchanged texts with her making her feel uneasy, threatened and stalked. The claimant said he was not stalking her, he simply pushed his number through her door and she texted him asking who it was and they had a conversation, she made it clear she had a partner, he apologised and told her that he would leave her alone.

53. Bill Brown said that when the client says they no longer want someone on the contract, their hands are tied and they were not allowed to approach the resident at this stage so Your Housing did this and got a statement and forwarded it to the respondent with the request that the claimant be removed from the contract, so they suspended him pending investigation.

54. The claimant asked why H's statement was not brought up at the first meeting. Mark Hilton said it was because it had come to light that H wanted to change the statement as she had informed Michael that she did not wish for things to go this far and she did not want the claimant sacked and that her partner had made her go through with this so they had to go round and ask H to clarify her statement. Mark Hilton said that H said she did not wish to alter/retract her previous statement.

55. The claimant asked if they had asked the client if they had changed their mind. Mr Hilton said they had and the client did not want him on the contract. Mr Hilton said they were upholding the decision, as all the evidence was there and they would not be re-employing the claimant. The decision was made by Bill Brown and they were going to stick with that.

56. There was some discussion at the appeal hearing about the claimant smoking in the work's van, which was prohibited. However, the notes indicate that this matter was not relevant to the decision and Mark Hilton confirmed in evidence that he did not take into account the smoking in the van when deciding to confirm the claimant's dismissal.

57. On 30 August 2019, Mr Hilton wrote to the claimant to confirm the outcome of the appeal. He wrote:

“At the hearing despite the mitigating circumstances you put forward on your behalf you confirmed that fundamentally the allegations were substantively correct and you did post the note through the resident's door during your lunch break whilst wearing company uniform, ultimately resulting in a formal complaint being made by the resident directly to our customer. Also having

received a complaint from our client (Your Housing Group) your actions have resulted in a serious failure of trust and confidence and they have requested your removal from site. Clearly this has now led to a breakdown in trust and confidence between employee and employer.

“I am therefore writing to confirm the decision that you be dismissed and conclude that due to a breakdown in confidence we could not see a positive way forward.”

58. The letter was drafted by HR after Mark Hilton made his decision. Mark Hilton considered the letter accurately described why he made his decision.

59. The letter did not refer to any consideration of alternative employment.

60. Mark Hilton said in evidence that the claimant was dismissed because a client asked for him to be removed from site; the claimant had put a note through a tenant's door during his working hours (although when on a break) and making the tenant feel uncomfortable. He considered the offence too serious for a final warning. He said there were no other full time jobs elsewhere to which the claimant could be moved but this did not form any part of his decision to dismiss the claimant. He said he could not have moved the claimant elsewhere, knowing how he made H feel, with the claimant going into communal parts.

61. In neither the disciplinary or appeal hearings was the claimant's attention taken to any of the respondent's conduct rules. Bill Brown and Mark Hilton did not look at these rules when dealing with this matter and the tribunal was not shown any relevant rules of conduct.

62. Although H's statement of 30 July 2019 had asserted that Michael had knocked at the door of another tenant, asking that H provide a statement, no disciplinary action was taken against Michael. Mark Hilton said this was because no complaint had been made about Michael although he said the conduct was not acceptable.

63. I have read a joint statement made by Michael and Paul, work colleagues of the claimant. I can give this limited weight, since they were not present to have their evidence tested by cross examination. However, what is mentioned about H finding pots of slime for her children and thinking this weird, corroborates what was said by the claimant's trade union representative at the disciplinary hearing on 23 July 2019. I find, based on this part of the statement and what was said at the disciplinary hearing, that H initially thought that the claimant had left the slime for her children and this made her more uneasy than she would otherwise have been about the claimant leaving her his number. She then found out that a neighbour had left the slime. I find that Michael and Paul understood, from a conversation with H and her friend, that H did not want the claimant to lose his job and intended to contact Your Housing Group again about this.

64. The claimant notified ACAS under the early conciliation procedure on 20 September 2019 and the early conciliation certificate was issued on 3 October 2019. The claim was presented on 6 October 2019.

65. The claimant started work within 2 weeks of dismissal. He started his current job on 21 September 2019 but had worked before that. He is earning at least as much as with the respondent.

66. The claimant's gross and net weekly pay with the respondent was £307.88 per week (37.5 hours per week at £8.21 per hour). He had completed 7 years' continuous service when he was dismissed. He was aged 34 when dismissed.

67. The claimant made a claim for universal credit, before he got his new job, but was told he was not entitled to this.

### Submissions

68. Mr Thorpe, for the respondent, made oral submissions. The claimant chose not to make any submissions.

69. Mr Thorpe submitted that the respondent had followed a fair and proper process. He submitted that dismissal was an appropriate sanction, taking account of the seriousness of the misconduct. The claimant failed to show any remorse or recognise he had done anything wrong. There was a high possibility that he would do the same thing again if not dismissed.

### The Law

70. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

71. Section 98(4) provides that 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 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

72. In relation to a conduct dismissal, the Tribunal is guided by the authority of ***British Home Stores v Burchell*** [1979] IRLR 379. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the

other parts of the **Burchell** test: was this belief was based on reasonable grounds and formed after a reasonable investigation?

73. Section 122(2) Employment Rights Act 1996 provides: "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."

74. Section 123(6) Employment Rights Act 1996 provides: "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."

### Conclusions

75. I conclude that the respondent has shown a potentially fair reason for dismissal, being conduct. Although I accept the claimant has a genuine suspicion that the respondent used this incident as a convenient reason for dismissing him, being keen to get rid of him because he had transferred to the respondent on better terms than other employees, there is insufficient evidence to persuade me, on a balance of probabilities, that this is the case. The claimant had transferred to the employment of the respondent in 2018. He was not dismissed until July 2019. There is no dispute that the disciplinary proceedings leading to his dismissal were initiated because of a genuine complaint from a tenant of the respondent's client, Your Housing Group, following the claimant putting a note through the tenant's door, with his telephone number. I conclude that it was this conduct which was the reason or principal reason for the claimant's dismissal. There was no dispute that the claimant had done this, so Bill Brown and Mark Hilton both had a genuine belief that the claimant was guilty of this conduct.

76. I next consider whether the respondent acted reasonably or unreasonably in treating this conduct as sufficient reason for dismissal in all the circumstances. Considering the questions posed in the **Burchell** case of whether the belief in the claimant's guilt was based on reasonable grounds and formed after a reasonable investigation, I conclude that the respondent had reasonable grounds for concluding that the claimant had posted the note through H's door because the claimant admitted doing so. No further investigation was required to establish this fact. I will return to whether the penalty of dismissal was, however, reasonable in all the circumstances.

77. Before considering the reasonableness of the penalty, I consider the procedure followed. There are some aspects where the procedure fell short of good practice. The claimant was not given the notes taken by DB from a conversation with H until the disciplinary hearing itself, although Bill Brown had had the notes since 5 July. The claimant was not given the "statement" signed on 30 July 2019 until the appeal hearing. It would have been better practice, and more consistent with the ACAS Code of Practice on Discipline and Grievance, paragraph 9, to provide copies of these documents ahead of the relevant meetings, to allow the claimant and his representative reasonable time to consider them. However, given that the documents were not long and the claimant and his representative had some time to

consider these during the meetings, I would not have found that these departures from good practice were sufficient, by themselves, to take the procedure followed outside the band of a reasonable procedure and the dismissal unfair for this reason alone.

78. A more serious problem with the procedure followed is the involvement of Mark Hilton prior to the appeal stage. Although Mark Hilton may have been viewing himself as only giving advice to Bill Brown before the disciplinary hearing, the nature of that advice was such that Bill Brown understood he had to dismiss the claimant for posting the note through H's door, regardless of any explanation that might be provided or whether the claimant might be moved to another contract. The decision to dismiss was, therefore, effectively that of Mark Hilton, rather than Bill Brown. The appeal was then heard by Mark Hilton who was effectively reviewing his own decision. Whilst it is not impossible for the appeal manager to be the same as the dismissing manager and for the procedure to be fair in all the circumstances, this will not normally be the case where the organisation is of a size which would allow for different managers to deal with the dismissal and the appeal. Paragraph 27 of the ACAS Code, states that the appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case. It would have been possible for the appeal to have been dealt with in this case by a manager not previously involved in the case given the size of the respondent organisation. Mark Hilton could have refrained from advising Bill Brown, keeping himself independent for a possible appeal, if he was the manager best placed to deal with an appeal. Mark Hilton's level of involvement, with his advice to Bill Brown, which was, in effect, an instruction to dismiss, meant that he was not an impartial appeal manager. I consider that this takes the procedure followed outside the band of reasonable procedure and the dismissal is unfair for that reason.

79. I also consider that the dismissal is unfair because the penalty of dismissal is outside the band of reasonable responses. What the claimant did was unwise and the claimant himself admitted in evidence, that, with hindsight, he should not have done it. However, the respondent categorised it as gross misconduct, warranting dismissal. The claimant's evidence in the disciplinary and appeal hearings, which was not disputed by the respondent, was that he did not know that H was a tenant of the client. H lived on a house on an estate, some of the houses in which were rented from the client and some of which were privately owned. The claimant did not work at H's property; he cleaned the communal areas of a nearby block of flats owned by the client. The claimant said during the hearings that he did not know that giving someone his number was a sackable offence. I have seen no conduct rules from the respondent which would have alerted the claimant to this being gross misconduct or, indeed, any form of misconduct. Neither Bill Brown nor Mark Hilton looked at any conduct rules when deciding whether to dismiss and could not point to any previous instructions or training that would have alerted the claimant that what he did was misconduct. It was also not disputed that he delivered the note during his lunch break. Although the word "stalking" was used at times, the claimant's alleged conduct, taking it at its highest, from the statement attributed to H, dated 30 July 2019, but about the production of which the respondent gave no evidence and which was written in the third person, would not fall reasonably within such a description. This is not to condone the claimant's behaviour, which could reasonably cause some recipients concern, but such serious terms as stalking should not be applied where not justified. I do not consider the conduct to which the claimant admitted was of

such a serious nature in all the circumstances as to merit dismissal for a first offence. A lesser penalty, of a warning, might have been appropriate, but I conclude that dismissal was outside the band of reasonable responses.

80. The respondent put its case squarely on the basis that the conduct was gross misconduct and warranted dismissal. An alternative possibility might have been for the respondent to argue that the dismissal was for “some other substantial reason”, being that the client instructed them, as it was entitled to do, that the claimant was not to work on its contract. Consideration of whether dismissal was fair in all the circumstances would then have to include looking at whether the claimant could have been redeployed onto other work, not being on a contract for that client. It is clear from the dismissal and appeal outcome letters and notes of the meetings that consideration was not given to redeployment. Bill Brown said he was aware from knowledge of his own contracts that there were no full time vacancies on these but he made no enquiries about vacancies on contracts that others managed in the region. In any event, his evidence was that he would have dismissed, whether or not there were any vacancies. Even if the respondent had put its case in this way, therefore, I would have concluded that dismissal was outside the band of reasonable responses and the dismissal was unfair.

81. I conclude that the complaint of unfair dismissal is well founded.

82. The respondent did not make any submissions that, if I found the dismissal to be unfair, compensation should be reduced because of the chance the claimant would have been fairly dismissed, had a fair procedure been followed. However, I identified this as a possible issue at the outset of the hearing so will consider it.

83. Given the client’s instruction that the claimant was not to work on its contract in future, I conclude there was a chance that the claimant would have been fairly dismissed, had there been no alternative work for the claimant. The respondent has not persuaded me that no alternative work could have been found. If there was no existing full time vacancy (and the respondent did not make enquiries at the time which would have persuaded me this was the case), the respondent could have explored the possibility of a swap with another employee or making an offer of part time work to the claimant. The claimant seeks compensation only for two weeks without work. The respondent has not persuaded me that there is a quantifiable chance that he would have been fairly dismissed within that period. If he was not dismissed for gross misconduct, he would have been entitled to a period of notice which would have exceeded these two weeks. I conclude, therefore, that the claimant is entitled to compensation for loss of earnings for the two weeks as sought, subject to any possible deduction for contributory conduct.

84. I also identified at the start of the hearing that I would consider whether the basic award and/or compensatory award should be reduced because of the claimant’s conduct. I consider that the claimant’s conduct in posting the note through H’s door was such that it would be just and equitable to reduce the basic award by a small proportion, being a 10 % reduction. I do not consider it just and equitable to reduce the compensatory award by any amount. The claimant has sought compensation for less than the period of notice to which he would have been entitled, since he was able to obtain other employment after two weeks. In these circumstances, I do not

consider it would be just and equitable to reduce the compensation sought for financial loss and loss of statutory rights.

85. The basic award, prior to this reduction, would be calculated as follows: 7 (completed years of service) x £307.88 (weekly pay) = £2155.16. Applying the 10% reduction, the basic award payable is £1939.64.

86. The compensatory award is the two weeks' loss of earnings – 2 x £307.88 = £615.76 plus an amount for loss of statutory rights. Given the claimant's level of earnings, I consider £308, a week's pay, to be an appropriate level for compensation for loss of statutory rights. The total compensatory award is, therefore, £923.76.

87. The claimant made an application for universal credit so, although he did not receive any benefits, I am required to apply the Recoupment Regulations to the part of the compensatory award which represents loss of earnings.

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Employment Judge Slater

Date: 6 April 2020

RESERVED JUDGMENT & REASONS  
SENT TO THE PARTIES ON  
7 April 2020

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



**NOTICE****THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990**

Tribunal case number: **2413733/2019**

Name of case: **Mr J Thorpe** v **Hi-Spec Facilities Services Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 7 April 2020

"the calculation day" is: 8 April 2020

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL  
For the Employment Tribunal Office

## INTEREST ON TRIBUNAL AWARDS

### **GUIDANCE NOTE**

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at [www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426](http://www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426)

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

**Claimant**                **Mr J Thorpe**

**Respondent**            **Hi-Spec Facilities Services Ltd**

**ANNEX TO THE JUDGMENT  
(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

**The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.**

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.