



EMPLOYMENT TRIBUNALS

Claimant: Mr D Kairys

Respondent: Benchmark Fabrications Ltd

HEARD AT: Cambridge Employment Tribunal

ON: 10th February 2020 and 5th March 2020

BEFORE: Employment Judge King

REPRESENTATION

For the Claimant: In person with his wife

For the Respondent: Ms Y Montaz (counsel)

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds. The Claimant contributed to his dismissal by 25%. Any compensatory award will be uplifted by 20% for failing to follow the ACAS COP1 and a 10% Polkey reduction on the award is just and equitable.
2. The claim for redundancy payment is not well founded and is dismissed.

REASONS

My reasons are as follows:

1. The claimant represented himself before the Tribunal with the assistance of his wife Mrs Virginija Kairene. The respondent was represented by Ms Montaz (Counsel). I heard evidence from the claimant, his wife and

another witness for the claimant Mr Kennedy Harper. I heard evidence from Mr Cole (Managing Director, who provided an overview), Ms Robson (appeal officer), Mr Kirby (involved in the investigation), Mr Copping (involved in the investigation and dismissing officer), Mr Zietek, with the assistance of an interpreter and Mr Burakowski with the assistance of an interpreter on behalf of the Respondent. The Claimant and Respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran from pages to 1 to 138.

2. At the outset it was clear that this was never going to be a one day case and the parties particularly the respondent as the represented party should have notified the Tribunal that the case was more suitable for 2-3 days. Instead an application to postpone was made that morning. Having discussed this with the parties and considering the overriding objective, the claimant wished to proceed and pressures on listing it was agreed that we would start and the hearing as predicted went part heard. Luckily, we were able to sit again on 5th March before the pandemic impacted the Tribunal service and on the second day an interpreter was arranged for the two respondent witnesses who required it but in order to conclude evidence and submissions we sat. This resulted in a reserved judgment in this case and delays in providing this judgment.
3. Two of the respondent's witnesses gave evidence via an interpreter. It became clear during the course of their evidence that their witness statements were not as they seemed. The witnesses said that these were produced at the respondent's site with their solicitor and inhouse accounting personnel acting as interpreter. Both contained the phrase "I was aware that the claimant was running and doing small bits for himself and selling them on his eBay account". The obvious inference from both statements was that the witnesses had seen the claimant act as alleged. Further, as these witnesses reported to the claimant, they said that they felt they could not say anything and they assumed he had permission. However, upon questioning it transpired that they had no such knowledge of relevance at the time and that they made these statements after dismissal having been told this by the Company. They had no such first hand experience of this. Given the misleading nature of these statements and the fact that they have been told what to say they must not be given much weight. Given the language difficulties I do not think it was the witnesses themselves who were being dishonest with the Tribunal and that the fault must lie with the respondent or those who were instructed in the case preparation rather than counsel representing at the hearing.
4. At the outset the claims were identified as unfair dismissal and a redundancy pay claim. The issues as to liability were identified at the outset of the hearing as follows.

The issues

Unfair Dismissal

5. The Claimant being an employee with requisite service to bring the claim, the claim being presented in time and dismissal not being in dispute, the issues for the Tribunal were as follows;
 - 5.1 What was the reason for dismissal?
 - 5.1.1 In this case the Respondent asserts that it was a reason related to conduct which is a potentially fair reason under s98(2) Employment Rights Act 1996. It must prove it had a genuine belief in the misconduct and that that was the reason for dismissal. The claimant asserts that he was dismissed for redundancy.
 - 5.2 Did the Respondent hold the belief in the claimant's misconduct on reasonable grounds (i.e. after carrying out a reasonable investigation)? The burden of proof is neutral here but it helps to know that the Claimant's challenges to the unfairness of the dismissal and these are:
 - 5.2.1 Failure to follow the ACAS COP1;
 - 5.2.2 Failure to carry out an investigation or hold an investigation meeting;
 - 5.2.3 Not being informed of the allegations in advance;
 - 5.2.4 Not being invited to a disciplinary hearing or given the right to be accompanied;
 - 5.2.5 Failure to provide notes of the meeting;
 - 5.2.6 Failure to follow their own disciplinary procedure;
 - 5.3 Was the decision to dismiss a fair sanction, that is was it within the range of reasonable responses of a reasonable employer?
 - 5.4 If dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probability that the claimant actually committed the misconduct alleged.
 - 5.5 If the dismissal was unfair does the respondent prove that if it had adopted a fair procedure the claimant would have been dismissed in any event?
 - 5.6 If so when, i.e. after what passage of time or what % chance.

- 5.7 Did the respondent or claimant fail to follow the ACAS COP1 so as to entitle the claimant to an uplift or a reduction in any compensation?
- 5.8 Any aggravating features of the breach of the claimant's rights so as to incur a penalty under s12A Employment Tribunals Act 1996?
- 5.9 What is it just and equitable to award the claimant? Is there an allegation of matters discovered post dismissal?

Redundancy payment

6. If the claimant was dismissed by reason of redundancy then what is the correct redundancy payment the claimant is entitled to?

The Law

Unfair Dismissal

7. Dismissal under Section 95 of the Employment Rights Act 1996 not being in dispute, under Section 94 of the Employment Rights Act (ERA) 1996;

(1) An employee has the right not to be unfairly dismissed by his employer.

8. Section 98 of the ERA states that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

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

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

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

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

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

9. In conduct cases one must have a regard to the case of *British Home Stores Ltd -v- Burchell [1980] ICR 303 EAT* which sets out a three step test where the Respondent must hold a reasonable belief formed on reasonable grounds following a reasonable investigation. Regard must also be had to the ACAS Code of Practice on discipline and grievance (COP1). I have also had regard to *Software 2000 Ltd v Andrews [2007]* and *Polkey*.

10. Section 122(2) of the Employment Rights Act, dealing with contributory fault in respect of the basic award which 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."

11. Section 123(6) Employment Rights Act 1996 deals with contributory conduct in connection with the compensatory award and this 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."

12. Section 207A of the Trade Union and Labour Relations (Consolidation Act 1992 TULCRA) deals with the adjustment of awards for failure to comply with the ACAS Code as follows:

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

(6).....

Redundancy

13. Under right to a redundancy payment is set out in s135 Employment Rights Act 1996:

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

(2)

14. The circumstances in which a dismissal is said to be for reasons of redundancy are set out in s139 Employment Rights Act 1996 as follows:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

- (a) the fact that his employer has ceased or intends to cease—*
 - (i) to carry on the business for the purposes of which the employee was employed by him, or*
 - (ii) to carry on that business in the place where the employee was so employed, or*
 - (b) the fact that the requirements of that business— (i)*
 - for employees to carry out work of a particular kind, or*
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
- have ceased or diminished or are expected to cease or diminish.*
- (2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).*
 - (3)*
 - (4)*
 - (5)*
 - (6)*

15. **Finding of Fact**

15.1 The claimant was employed by the respondent from the 16th April 2007 until his summary dismissal on 4th March 2019 having almost 12 years of service. More latterly the claimant was a supervisor for Unit 7. The respondent's business was in the design and manufacturing solutions specialising in displays and fixtures for the retail and hospitality sectors. The respondent was a family run business with Mr Cole being the sole director as well as the Managing Director in title.

15.2 The respondent had a sister company which operated from the same building and is a printing business. The claimant did not work in this area of the business. The claimant's wife Virginija Kairiene also worked for the respondent for a short while between September 2017 and May 2018 before she left to work elsewhere. She knew Mr Kennedy Harper historically as they had worked together and she returned to the printing company later in 2018. She says that in February 2019 she started her own business GraphicArtz Limited of which the respondent was aware however the business was formed much earlier and there is a dispute about how much the respondent knew. This matters not for these proceedings.

15.3 It later transpired that at Companies House that Mr Kennedy Harper was a director appointed on 7th September 2018 before he resigned on 22nd October 2018 before being reappointed on 10th June 2019. Mr Harper was

a shareholder of 9 shares like the claimant's wife and a third (smaller) shareholder unconnected with these proceedings was also a director. The claimant's wife became a director in September 2018. The claimant was neither a director nor a shareholder of the business at any time according to his evidence and the records from Companies House.

15.4 The claimant's contract is a very basic contract and contains no restrictions on holding outside interests. There is reference in the handbook to not having other employment (which the claimant did not) and reference to not undertaking other duties during working hours. The company has an Internet and email policy which does not permit personal use of emails and the right to monitor usage of the same.

15.5 In 2011 there was an issue involving the claimant and his ebay account. The respondent investigated items they believed to have been taken from the premises (locks and screws) that were listed on there. The claimant told them that his account had been hacked and he had no involvement in this matter. Given he was being targeted by others at the time the respondent accepted his account and by letter dated 15th February 2011 the respondent confirmed that no disciplinary action was being taken against the claimant. The claimant was viewed by all the respondent's witnesses as an excellent worker.

15.6 Later in 2015/2016 there was a break-in and 51 TV's with a value of up to £2,000 were taken from an upstairs room. Mr Cole (Managing Director) felt that this was an inside job but no police action was taken against any individuals. Mr Cole suspected the claimant and in his mind "there remained a lingering doubt in his integrity". No disciplinary action was taken in this regard and the claimant was subsequently promoted to supervisor. In his evidence Mr Cole had confused the two incidents into one incident which the respondent later accepted were two incidents as the claimant advanced.

15.7 On 28th February 2019, Mr Cole (Managing Director) became aware of Mr Harper's role in the claimant's wife's business. He spoke to Mr Copping about this and Mr Chris Pack, Operations Director who was Mr Harper's line manager. All three of them held a meeting with Mr Harper. Mr Harper accepted that he was involved as he had been providing the claimant's wife with advice and that he had helped her in the words of his own witness statement "whilst at work using Benchmarks equipment". Mr Copping offered Mr Harper two alternatives after a discussion with the three managers, to resign and that would be an end to the matter or to hold a detailed investigation which might involve external third parties.

15.8 Mr Harper resigned immediately the same day. Given his involvement with the claimant's wife, the respondent decided to investigate whether the claimant was involved. Mr Copping informed Ms Robson about what had

happened and she said she would ask the IT Manager Mr Fox whether there had been any suspicious emails between the claimant and Mr Harper. Mr Fox told Mrs Robson that his wife Mrs Fox (who left the business on 14th February 2019) had mentioned to him that she had seen a USB stick pass from the Claimant to Mr Harper which was unusual. It was however not unusual enough to have been raised by either at the relevant time. Ms Robson passed this information onto Mr Copping. She later also became involved in the investigation as Mr Fox gave her the emails he had collated and as she felt they were relevant evidence she handed these to Mr Copping between the first and second investigation meeting. Ms Robson would later become the appeal officer also.

15.9 Mr Copping held the first investigation meeting with the claimant and Mr Kirby (Production Director). The claimant did not appreciate at the time that any of the meetings were investigation meetings as he thought they were production discussions. This is certainly the case for the first meeting. The claimant was asked about the memory stick and whether he had ever passed any documents or information which he denied. He was asked about his wife's business and confirmed that he was not involved in any way. He confirmed that Mr Harper was a friend of his wife but he was unable to confirm Mr Harper's involvement in this business.

15.10 Notes were made of the investigation meeting but they were never shown to the claimant. According to those notes this meeting was short and only about 10 minutes long. A second meeting was held that same afternoon again about 10 minutes long according to the notes. This picked up on where they had left that morning. By this time, Ms Robson had provided emails to Mr Copping. The emails found following a search of the IT system were between 14th June 2018 and 6th August 2018 and were small in number.

15.11 In the second investigation meeting again with Mr Copping and Mr Kirby the claimant was shown the emails and asked why he had not mentioned them in the earlier meeting in connection with the questioning about Mr Harper. The claimant confirmed he had forgotten about them (they were 9 months old). The respondent's IT search at Ms Robson's request had not revealed any more recent evidence. The claimant is noted as having said that he was involved in getting samples for his wife's business. Of the handful of emails one related to the samples and another accepted later by the claimant to be unrelated to his employment and others were accepted by the respondent to be work related. The claimant was told to consider his position overnight and the matter would be discussed in the morning.

15.12 On 1st March 2019 the claimant attended a third investigation meeting. This time this was with Mr Kirby but also Mr Pack. Mr Copping was not present on this occasion. The claimant accepted that Mr Harper had handed him a sample book. He was not sure where the sample book had come from.

The claimant told the respondent that his wife was selling items on his ebay account. The claimant gave the respondent his ebay account address. He was told to bring the samples book with him on Monday morning by Mr Kirby as reflected in his notes of the meeting which is not accurately reflected in his witness statement. There are conflicting notes and witness statements about this meeting. Mr Kirby's witness statement better reflects Mr Pack's notes not his own. The claimant was told that they would not take action at that time and it would be followed up by Mr Pack meeting Mr Copping on Monday. At no point was the claimant suspended.

15.13 On Monday morning (4th March 2019) the claimant attended another meeting this time with Mr Copping, Mr Kirby and Mr Pack. This time there was a note taker present. This was said to be a disciplinary hearing. Notes were not given to the claimant from the investigation meeting, no invite was sent to the claimant for the meeting. There was no indication to the claimant before the meeting that this was a disciplinary meeting. He was not given the right to be accompanied. At the outset of the meeting nothing was said to distinguish between this meeting and the earlier meeting and aside from a note taker, the same personnel were involved so the claimant had no clue that this was a more formal and serious meeting. He had no idea his employment could be terminated at this meeting.

15.14 The respondent accepts that the claimant had no invite to this meeting but Mr Copping said that he felt time was of the essence and that they were so concerned by what they were uncovering they decided that the hearing should be held immediately and with verbal notice. In actual fact the claimant was never told verbally or otherwise that this was a disciplinary hearing. No such urgency existed and the claimant could have been suspended at any time to give the respondent more time to look into the matter.

15.15 In this meeting, the claimant was given two options that he be suspended and external people are brought in to carry out an investigation that is likely to spread outside the respondent or the claimant could resign there and then. The claimant wanted an investigation. The tone of the meeting is accusatory and not neutral. Mr Copping led the questions and had also been the investigating officer. He raised evidence of a similar issue on his file (this being a reference to the matter which did not proceed to disciplinary 8 years earlier). In the meeting the claimant was shown the eBay account and asked about items on it and whether they had been made with material from the respondent. Again, the claimant was presented with the two choices of investigation or resignation. He was asked whether it was a coincidence that this was happening again with his eBay account. He explained it was being used by his wife. He was asked for a third time whether he wanted to resign. The meeting lasted 20 minutes and he was told to come back in 20 minutes.

15.16 The meeting reconvened after the break and the claimant was asked further questions and the claimant said he was sorry he did not think about it which was a reference to the sample book. Again, the claimant was pressurised to resign, by being told about his reference would be clear if he resigned and being asked again if he wanted to resign. The claimant maintained that he wanted the investigation. No further break was taken and the respondent concluded the meeting stating as follows:

“You cannot give us a good reason as to why you have done it again, having had some previous history of a similar situation with Ebay.

We gave you the opportunity to resign which basically you are refusing.

We have to make a decision. That decision, unfortunately and it hurts me to say it, we are terminating your contract of employment with Benchmark effective today through Gross Misconduct.”

15.17 By letter dated 5th March 2019 the claimant was informed that the meeting the day before was a disciplinary hearing. This letter came from the note taker who was HR Manager and not from Mr Copping. This letter set out in writing for the first time the matters of concern. This concerned allegations of *“a track record on his file of you taking things, underhand through the back door, from Benchmark and subsequently being sold on your ebay account.*” The letter confirmed that the standard disciplinary procedure was referred to when making this decision and stated that this does not permit recourse to a lesser sanction.

15.18 The respondent had not been clear as to the rationale for dismissal in its letter but Mr Copping gave evidence around this matter. His evidence was that the claimant was summarily dismissed for not being open and honest with his line manager and Director, not wanting to speak to them and asking their permission to conduct his other business and checking if there was any conflict. He confirmed that the decision was based on his concerns of the severity of what they had uncovered and the risk to the Company. The decision was his but that he had agreed this with the others and that it was a unanimous decision.

15.19 The standard disciplinary procedure is set out in the Company handbook. As the allegations were not set out to the claimant in advance of the said disciplinary hearing they were not specified as being misconduct or gross misconduct so that he could understand the seriousness of the allegations. The allegations are not clear but the handbook lists *“failure to devote the whole of your time, attention and abilities to our business and its affairs during your normal working hours” “unauthorised use of email and internet”* and *“failure to carry out all reasonable instructions or follow our rules and procedure”* are all listed as misconduct and not gross misconduct. Gross misconduct is said to be *“any behaviour or negligence resulting in a*

fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct". The procedure makes a distinction between different forms of conduct which is not usual as unsatisfactory conduct, misconduct, serious conduct and gross misconduct. This provides that the only outcome for gross misconduct is dismissal but for serious misconduct it is a final written warning. The policy was not followed in terms of procedure. The allegations are not set out and specified as misconduct or gross misconduct.

15.20 There were print outs of the claimant's eBay account in the bundle but these were not great copies. The respondent accepted that some of the materials the claimant used to sell the products were the same wood they used such as oak but it accepted other items were not related to it. The items on the eBay account were not items the respondent manufactured or made which were then on the account. This was different to 2011 when the claimant was accused of selling locks on his eBay account that had been taken from the respondent but for which no further action was taken as it was accepted his account had been hacked. The respondent appeared to move on from this as it subsequently promoted the claimant.

15.21 Mr Cole gave evidence about the incident with Mr Harper but his witness evidence was not impressive in many regards. His evidence conflated what was later accepted to be two separate incidents of the locks (2011) and another incident of TV's. It contained supposition and irrelevant matters about the claimant's choice of holiday location, a visit to the claimant's wife's business site and levels of profit post dismissal and incorrect statements such as that the claimant was a shareholder in the business when he was not. As the managing director he was clearly involved in the disciplinary decisions and other witnesses confirm the decision taken to dismiss were taken unanimously. Given Mr Cole's comments that the 2011 incident left him with "lingering doubts about the claimant's honesty" which again is part of the dismissal case it is clear that he was also involved in the decision.

15.22 The claimant was given the right of appeal to Ms Robson. The claimant duly appealed with a three page letter of appeal (undated) setting out all his grounds for appeal. There were numerous grounds.

15.23 By letter dated 13th March 2019 this was acknowledged and the claimant was invited to an appeal hearing on 15th March 2019 setting out five grounds of appeal. This time the claimant was given the right to be accompanied. The claimant replied and confirmed he was unable to attend at such short notice as he wanted to take legal advice. He submitted a further document expanding on his grounds of appeal.

15.24 A rearranged appeal meeting took place with Ms Robson and the claimant on 19th March 2019. The claimant accepted that two of the emails in

August 2018 were not work related. He was questioned about the memory stick. The respondent did not alter the initial grounds of appeal. The respondent dismissed the appeal by letter setting out more of an explanation for the decision taken. The appeal was not a re-hearing and focused on limited points of appeal. It did not comment on or review the clear procedural failures already made. The claimant was not replaced following his dismissal.

15.25 The Claimant having complied with the ACAS Early Conciliation between 13th May 2019 and 14th May 2019 presented his claim for unfair dismissal and a redundancy payment on the 22nd May 2019.

Conclusions

16. Turning to the claim for unfair dismissal first; at the outset, I remind myself it is not for the Tribunal to substitute its view for that of the Respondent, it must merely be satisfied that dismissal fell within the range of reasonable responses. Guilt or innocence is not my role. I have to consider not my views on the matter but what a reasonable employer would do in those circumstances such as those.

17. Turning to the list of issues identified at the outset;

Has the Respondent shown the reason for dismissal?

17.1 In this case the Respondent relies on misconduct (gross misconduct). I accept that this was the reason for the dismissal and not a redundancy as the claimant alleges. Whilst the claimant was not replaced following his dismissal, the reason the investigation commenced was because of Mr Harper and his resignation. I do not accept that had the claimant not been dismissed at that time he would have instead been made redundant. I do not think that the definition of s139 of the Employment Rights Act 1996 is met. I am satisfied that the respondent has shown that it had grounds to carry out an investigation into the issues of conduct that came to light. Conduct is a potentially fair reason for dismissal under s98 Employment Rights Act 1996.

Did the Respondent hold the belief in the claimant's misconduct on reasonable grounds (i.e. after carrying out a reasonable investigation)? The burden of proof is neutral here but it helps to know that the Claimant's challenges to the unfairness of the dismissal and these are:

Failure to follow the ACAS COP1;

**Failure to carry out an investigation or hold an investigation meeting;
Not being informed of the allegations in advance;
Not being invited to a disciplinary hearing and given the right to be accompanied;
Failure to provide notes of the meeting;
Failure to follow their own disciplinary procedure;**

17.2 Here the respondent held three short investigation meetings and carried out a search of its IT systems. The claimant was given the ultimatum of resign or face an investigation. He wanted the latter but instead the respondent pushed ahead with dismissal. The fact that the respondent had offered the claimant an option of an external investigation is recognition that the matter had not been fully investigated. The respondent has acted contrary to fairness in a number of ways in its process in this matter. Taking first the claimant's points of challenge to the dismissal in turn.

Failure to follow the ACAS COP1;

17.3 The ACAS Code of Practice COP1 applies to misconduct cases. In this case it is apparent from the facts of this case when reading the Code that there a number of breaches have taken place.

17.4 Contrary to paragraph 6 of the Code, in this case the investigation was led by Mr Copping who then conducted what is said to have been the disciplinary hearing. Three managers were involved in these initial stages Mr Kirby, Mr Copping and Mr Pack. They carried out the investigation meetings, made the decision to hold the disciplinary meeting and whilst Mr Copping put his name to the decision they have confirmed that it was unanimous decision following a discussion. I have also concluded that Mr Cole was also involved in that decision to dismiss from the evidence I heard.

17.5 Contrary to paragraph 9 of the Code, in this case the claimant was not notified in writing that there was a disciplinary case to answer. I do not accept that he was verbally told this was a disciplinary meeting and given the personnel involved this meeting looked like a continuation of the investigation meetings. As such since there was no written notification, it follows that the claimant was not given sufficient information about the alleged misconduct and its possible consequences to enable him to prepare for the disciplinary meeting. No written evidence was provide to him in advance. Contrary to paragraph 10 of the Code he was not given the right to be accompanied to the meeting or told the time and venue.

17.6 Whilst the claimant knew what was being investigated at no time until the dismissal letter (and even then, it is not well particularised) did he know what the actual allegations against him were. He was not told whether this was misconduct, serious misconduct or gross misconduct since the respondent's own policy draws this distinction. He was not provided with

a copy of the company's disciplinary policy. He was not given copies of the evidence against him. The only statements obtained post dated the appeal and as I have set out above witness statements obtained from those that reported to him were misleading to the tribunal.

17.7 Contrary to paragraph 12 of the Code, the hearing that the respondent relies on as a disciplinary hearing was not conducted in a fair way. As I have set out above, the notes of the meeting reflect the accusatory way the claimant was interrogated during that meeting and pressured to resign on three occasions or have an investigation. There were three managers present plus HR as a note taker. The fact that an investigation was offered to the claimant supports the conclusion that the hearing was not in actual fact a true disciplinary hearing since if the investigation was concluded it would not have been offered again. The meeting was labelled as a disciplinary hearing after the event. The claimant was not given the reasonable opportunity to state his case, ask questions or call witnesses. The way this meeting was conducted was contrary to all these principles in the ACAS Code of Practice and general principles of fairness.

17.8 As the claimant was never properly invited to attend the disciplinary hearing he was not given the right to be accompanied contrary to paragraphs 13-17 of the Code.

17.9 Contrary to paragraph 18 of the Code, in this case the decision was not taken after the meeting. The decision had been taken in the second half of the meeting without an adjournment following the additional matters put to the claimant. The reality is though that the decision was pre-determined. When the claimant refused to relent to the pressure to resign he was dismissed.

17.10 Contrary to paragraph 27 of the Code, in this case the appeal was not dealt with impartially and by a manager who has not previously been involved in the case. Ms Robson asked the IT Manager to carry out an investigation, passed on the evidence to Mr Copping, provided additional evidence to Mr Copping about a memory stick which she raised again in the appeal and therefore cannot be said to have been impartial and not previously involved.

Failure to carry out an investigation or hold an investigation meeting;

17.11 I do not accept the claimant's point that no investigation meeting took place. Whilst they may have been brief and the claimant was not told that they were investigation meetings they did in fact take place.

- 17.12 I do however accept that the respondent failed to carry out as much of an investigation as was reasonable on their own case. They offered this option to the claimant so by admission accepted that there was still an investigation to take place. They had some emails and an acceptance by the claimant that he had passed on a sample book and sent two emails to Mr Harper but there is no evidence to support some of the other conclusions that were drawn such as suppliers being used to get preferential rates, respondents items being sold on eBay or that this was 2011 repeating itself.
- 17.13 The respondent did not conduct a search of Companies House to see the level of the claimant's involvement only doing so in 2020 for these proceedings. It did not take a statement from Mrs Fox about the memory stick until after the appeal or statements from those that worked with the claimant or Mr Harper to what had been allegedly seen. An employer does not need to take all steps to investigate just to carry out a reasonable investigation.
- 17.14 Here given it gave the claimant a choice of this investigation but then withdrew it, it accepts that the matter had not been reasonably investigated when the decision to dismiss was taken. It is not necessary for me to determine what the respondent could have done by way of an investigation but merely whether the respondent acted within the range of reasonable responses when it comes to the investigation.
- 17.15 A reasonable employer would have investigated the matter particularly given the length of service of the claimant rather than making assumptions. The respondent may have held the belief that the Claimant was guilty of misconduct but did not hold that on reasonable grounds. The disciplining officer was also the investigating officer and had clearly predetermined the claimant's guilt early on. The tone of the meetings was accusatory and when the claimant did not relent to pressure to resign because he wanted an investigation to take place he was dismissed.
- 17.16 I am particularly concerned about the use of historic events for which the respondent held no reasonable belief in the claimant's guilt since it took no action at that time have then be raised years later. This was not a case where the claimant had previously been given a final written warning, years earlier. No disciplinary action was taken yet this is referred to as a track record and the managing director confirms that he viewed the claimant with lingering doubts as to his integrity. No reasonable employer would take no action and then use such matters in a future disciplinary matter. This view tainted the investigation and the disciplinary process from the start.
- 17.17 The respondent clearly had evidence that the claimant had sent a couple of emails months earlier in connection with his wife's business and taking a sample book from Mr Harper home. The claimant accepted that this was

his only involvement. The dismissal letter is the only place that sets out allegations against the claimant. The first was that he had not been open and honest with his line manager to get permission to run the other business or if there was a conflict. This was not the claimant's business and as such this is not applicable. No reasonable employer would have said that this was an honesty or conflict issue as alternative conclusions were available to it on the facts as to use of the internet/email during work time.

17.18 The claimant was also told in the outcome letter that he had lied when he said he had no involvement in the company but two hours later was shown the emails. As set out in the findings of fact there were historic emails and very limited emails. The claimant explained that he had not recalled the emails from 8 months earlier. The claimant did accept that he sent those emails during company time. A reasonable employer would have relied on the fact the emails were sent. A new allegation of using favourable rates offered by the respondent's suppliers to finance the products sold on eBay was also alleged but there was no evidence to support this conclusion. No statements, invoices etc. This would have no doubt formed part of the promised investigation if the respondent had gone down this route. No reasonable employer would have drawn this conclusion without any evidence. None of these matters were set out to the claimant as allegations before the disciplinary hearing allowing him to deal with them in the meeting.

17.19 I am mindful that I must not substitute my view for the respondent and the respondent should be judged in the eyes of the reasonable employer and carry out as much of an investigation as is reasonable. Here the investigation carried out was not complete as the respondent offered the claimant this as an option "to be investigated or resign now" conclusions were drawn based on assumptions and views of the claimant's integrity from matters years before.

17.20 A reasonable employer would not use the historic matters and would not have had an investigating and disciplining officer who had formed a view initially and was the same person. A reasonable employer would not pressure the claimant to resign or be investigated and then when they opt for the investigation, not carry this out but dismiss instead.

Not being informed of the allegations in advance;

17.21 As set out above, the respondent failed to inform the claimant of the allegations in advance and even in the dismissal letter this is muddled. This is a requirement of the code of practice and a fair dismissal and as I have set out did not happen.

Not being invited to a disciplinary hearing or given the right to be accompanied;

17.22 As set out above, the respondent failed to invite the claimant to a disciplinary hearing and give him the right to be accompanied. This is a requirement of the code of practice and a fair dismissal and as I have set out did not happen.

Failure to provide notes of the meeting;

17.23 The respondent did fail to provide the claimant with notes of the investigation meetings before the disciplinary. It is not clear at what point these typed notes were made as there were two conflicting copies produced by the respondent of the last investigation meeting. Mr Kirby's statement does not follow his own notes of that meeting but instead follows Mr Pack's notes which is unusual but since these are more favourable to the respondent have been selected to be referred to in the statement yet both are in evidence in the bundle.

17.24 When relying on something the claimant is said to have said at the investigation meeting it is of course wise and best practice to share those with the claimant and preferably as agreed notes. However, if this had occurred on its own it would not make the dismissal unfair. However, here this did not happen in addition to the claimant not knowing that he was formally being investigated or called to a disciplinary hearing or what the allegations were precisely and that these were misconduct/gross misconduct. It simply adds to the unfairness of this dismissal.

Failure to follow their own disciplinary procedure;

17.25 Whilst the respondent's disciplinary procedure does not follow the ACAS COP1 as it is lacking in much detail and does not take into account the guidance of the Code, there is very little procedure that is set down. Much of the procedure is about labels for the misconduct, serious misconduct and gross misconduct. It does however state that you will only be disciplined after careful consideration of the facts which did not happen in this case as set out above.

17.26 The handbook has no set procedure such as holding a disciplinary hearing with the right to be accompanied. The respondent did have an internal HR Manager who was present at the meeting that was said to be the disciplinary hearing so the organisation should have received some guidance internally and had external advisors as to what procedure to follow. Having the procedure documented in the disciplinary procedure may have prevented the mistakes being made in this case but given there is an internal HR Manager and the fact that the procedure did not follow the ACAS Code is of bigger significance. As most disciplinary procedures

would mirror the ACAS Code, it follows that to fail to follow the Code leads to a failure to follow their internal procedure or vice versa. Failure to follow a procedure that differs from the code does not of itself make the dismissal unfair.

- 17.27 Taking into account all of the above matters I do not find that the respondent held the belief in the claimant's misconduct on reasonable grounds. Further, the process was so inherently unfair for the numerous breaches of the ACAS COP1 and the way the matter was conducted that the respondent could not hold any such belief on reasonable grounds.
- 17.28 A reasonable employer would have made findings on what actually happened and if it was unable to do so it should have conducted further investigations just like it offered to enable it to determine what happened on the balance of probabilities. This was not done as conclusions had been drawn from the outset.
- 17.29 For all these reasons, the investigation fell out the range of reasonable responses that a reasonable employer might have adopted.

Was the decision to dismiss a fair sanction, that is was it within the range of reasonable responses of a reasonable employer?

- 17.30 I have found that the respondent did not hold a reasonable belief in the claimant's misconduct on reasonable grounds but for completeness have gone on to consider whether dismissal was within the range of responses for a reasonable employer.
- 17.31 This is more difficult to access because of the general unfairness found. The respondent did have the claimant's acceptance that he sent a couple of emails and passed on a sample book during work time. I can see that as Mr Harper was involved in the company as director and shareholder that the respondent would have had a reasonable belief in Mr Harper's misconduct. On the evidence the respondent had, dismissal was not within the range of reasonable responses of a reasonable employer for the claimant's case. The claimant had long service and a clean record contrary to the respondent's attempts to rely on matters for which the claimant had not actually been disciplined. However, if the offered investigation had taken place this may have led to more evidence and a proper process followed that was fair such as a proper disciplinary hearing with agreed minutes then it may have been possible that dismissal was within the range as the respondent may have been able to establish that belief. There was no reason to rush it through like they did.
- 17.32 On the case as established against the claimant without bringing in the historic matters and assumptions of misconduct from historic matters I do not think that dismissal was within the range. Dismissal in the

circumstances of this case was outside the range of reasonable responses by a reasonable employer in the same scenario as the respondent.

17.33 Given my conclusions above I do not conclude that the respondent acted as a reasonable employer in treating the reason to dismiss as a sufficient reason. It acted with haste having prejudged the claimant. It took the view that history was repeating itself despite history having established no misconduct on the claimant's part years earlier.

17.34 For all these reasons and those set out above, I do not find that the Respondent acted reasonably in treating the reason as a sufficient reason to dismiss the Claimant at that time on the evidence it had.

Did the Claimant contribute to the dismissal by culpable conduct?

17.35 This will need to be considered in respect of both the basic and the compensatory award, since the tests are different. Turning first to the compensatory award, this involves a number of considerations.

17.36 Firstly, in order to reduce the compensatory award, the claimant's conduct must have been culpable or blameworthy, it must have caused or contributed to the dismissal and the reduction must be just and equitable. In respect of these conclusions the conduct of the respondent is not relevant and I must only consider the conduct of the claimant.

17.37 The claimant was dismissed following his actions in sending emails about his wife's business to another employee during work time and in passing a sample book from Mr Harper to his wife. It was not established that the sample book was the respondent's and the evidence was that it was not. Nevertheless, the claimant accepted he should not have sent the handful of emails during work time. The contributory conduct is the sending of the two emails and the passing on of the sample book.

17.38 Taking the factors into consideration, I cannot find that the Claimant was blameless. The claimant's conduct was culpable and blameworthy. The conduct in question was not the sole cause of his dismissal but it contributed to it for the purposes of s123(6) Employment Rights Act 1996.

If so, by what percentage?

17.39 Under Section 123(6) of the Employment Rights Act 1996;

"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".

17.40 In this case I find that the employee is slightly to blame as he did engage in said conduct. This was limited to a couple of emails and he was not a director or shareholder in the other business but by virtue of his relationship with his wife stood to benefit. No other conduct was actually established.

17.41 I have a wide discretion in such matters and taking into account the above, I consider a 25% reduction would be just and equitable in this case. Had the respondent been able to establish other conduct by conducting a proper investigation then this may have increased the higher contribution for culpable conduct. As such, I consider it just and equitable to reduce the claimant's compensatory award by 25% for his contribution.

17.42 The test for the basic award is different. I have to consider whether the claimant's conduct before the dismissal makes it just and equitable to reduce the basic award. I can also take into account matters after dismissal. If the two witnesses for the respondent had been correct that they knew the claimant was selling the respondent's property on eBay that would justify such a reduction. Here however, these statements were produced that mislead the Tribunal and this was not the true position. They had no such knowledge and their evidence was unreliable. There was no evidence post dismissal (the managing directors supposition is not enough) to increase the reduction percentage.

17.43 I have considered whether the two percentage reductions should differ for the basic award and the compensatory award. A reduction in the compensatory award does not necessarily mean that there should also be a reduction in the basic award but this would be exceptional. I therefore apply both percentage reductions to the claimant's basic and compensatory awards when the amount is to be determined. I consider this reduction to be just and equitable.

If the dismissal was unfair does the respondent prove that if it had adopted a fair procedure the claimant would have been dismissed in any event.? If so after what passage of time or what % chance?

17.44 Here there were numerous issues with the fairness of the dismissal and the procedure. There was more than the failure to provide a written invitation to the disciplinary meeting which may have not changed the outcome in any event given the other matters I have concluded.

17.45 However, the investigating officer was also the dismissal officer, the investigation was incomplete and the appeal officer not unconnected. The appeal did not correct earlier procedural issues and did not even consider or review the same. On balance, I conclude that the evidence was too unreliable to enable me to reach with any confidence the view that the dismissal would, on the balance of probabilities, have occurred in any event had all of this not happened within a certain period of time. I have found the dismissal to be both substantively and procedurally fair. I find

that given the sheer number of errors in the procedure it is not possible to say that if the claimant would have been dismissed within a period of time.

- 17.46 It is difficult to see what the promised investigation could have uncovered in terms of additional evidence. It is difficult to assess whether a fair appeal could have overturned the decision or corrected those points as the respondent approached this with the history as a fact that the claimant's integrity was in doubt. In accordance with *Software 2000 Ltd v Andrews* [2007] I should however consider whether I should have regard to any material and reliable evidence which might assist me in fixing just compensation, even if there are limits to the extent to which I can confidently predict what might have been as there is always going to be a degree of uncertainty.
- 17.47 Here the claimant accepted that he had sent two emails during work time connected with his wife's business and passed on the sample book. There must therefore be a % chance that given these admissions that the respondent would have dismissed in any event as a percentage chance had the process been conducted fairly. There was no evidence adduced that save for that conduct which led to the investigation the claimant would have been dismissed at any point. There was no redundancy position, he was considered to be a good worker with the respondent so there were no performance issues. There is therefore a small percentage chance that the claimant's employment would have ended at some point given he accepted that he had sent the emails and passed on the book. This does however have to be a slim % chance given that all the witness evidence was that the claimant was a good worker.
- 17.48 I have considered whether this is a case where the evidence the respondent seeks to rely on is so unreliable that I may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. However, the claimant has made some admissions.
- 17.49 I consider that of all the possible outcomes that there must be a slim % chance that the claimant's employment would have ended in any event based on the evidence. I consider on balance it is appropriate for me to reduce the award of the claimant by a small percentage chance that even if there was a different appeal officer and a different investigator, he was written to for the meeting and an investigation was conducted properly as offered that given his admissions and a fair process following a fair investigation dismissal could have possibly occurred. This % chance is lower than 50% and is a small chance. I had considered the position that this was a case where no Polkey reduction at all was possible. However, on balance I consider a 10% chance of dismissal to be likely and thus this is the appropriate reduction in this case.

Is an uplift for failure to follow the ACAS Code of Practice COP1 appropriate?

17.50 Given my conclusions that there were multiple breaches of the ACAS COP1 the claimant is entitled to an uplift in any compensatory award accordingly if that failure is unreasonable. As set out above the failures of the respondent were unreasonable.

17.51 Such an uplift should be between 10-25 % in accordance with s207A of TULCRA. I have considered that the claimant is a relatively small employer. However, they had both the retained services of an HR organisation and their own internal HR personnel. There were multiple failures and some significant ones such as failing to carry out a reasonable investigation, using the same investigating officer and disciplinary officer and an appeal officer who was previously involved in the investigation. There were simply no excuses for such blatant failings particularly in an organisation which clearly had the management structure yet felt the need for two-three managers to be present at the investigation meetings. They should have allowed one person to undertake each role. The failures of not inviting the claimant to the disciplinary hearing in writing, providing evidence to the claimant in advance and setting out the allegations against him and giving him the right to be accompanied were also unreasonable for the reasons set out above.

17.52 Had the employer not been a small employer the number of failures in this case would justify the maximum uplift of 25% but it is a balancing exercise of different factors. Given the administrative resources of the respondent and balancing its size I consider that an uplift of 20% would be appropriate in this case.

Any aggravating features of the breach of the claimant's rights so as to incur a penalty under s12A Employment Tribunals Act 1996?

What is it just and equitable to award the claimant? Is there an allegation of matters discovered post dismissal?

17.53 I leave these issues to be determined at the remedy hearing which is listed if the parties cannot resolve the matter given my findings above. However, there has been no evidence that there are any matters discovered post dismissal that if they were known pre-dismissal would have changed matters.

24 August 2020

Employment Judge King,

JUDGMENT SENT TO THE PARTIES ON
27th August 2020

Case Number: 3315921/2019

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FOR THE SECRETARY TO THE TRIBUNALS