EMPLOYMENT TRIBUNALS

Claimant: Mr L Clarke

Respondent: IP Jones Fencing Contractors Ltd

HELD AT: Manchester **ON:** 29 January 2018

BEFORE: Employment Judge Tom Ryan

Appearances:
Claimant: Mr M Firth (claimant's father-in-law)
Respondent: Mr C Taft, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The complaint in respect of a redundancy payment is dismissed upon withdrawal by the claimant.

2. The complaint of unfair dismissal is well-founded.

3. The respondent is ordered to pay compensation claimant for unfair dismissal in the sum of £1,384.24 calculated as set out in the reasons below.

4. The provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996 ("the Recoupment Regulations") do not apply to the award for unfair dismissal.

5. The complaint of breach of contract in respect of unpaid notice pay is not well-founded and is dismissed.

6. The tribunal does not have jurisdiction to consider the complaint in respect of unauthorised deductions from wages.

REASONS

1. By a claim presented to the Tribunal on 28 September 2017 the claimant made complaints of unfair dismissal, unpaid notice pay, unpaid holiday pay and unpaid wages. He also intimated a claim for a redundancy payment.

2. The respondent resisted the complaints and made an employer's claim in respect of the sum of £330.88 owed by the claimant. It was common ground that the claimant had acknowledged that debt and paid that sum to the respondent.

3. The respondent disputed that the claimant had been dismissed, asserting that the claimant had resigned from his employment and that the claimant brought his employment to an end during a period of notice which he had given to the respondent. In the alternative, it was submitted that if the claimant was dismissed it was for the potentially fair reason of conduct.

4. It was agreed at the outset of the hearing that the claimant was not redundant nor entitled to redundancy payment and that complaint was withdrawn.

5. The issues that I had to decide, in summary, were:

    5.1. whether the claimant's employment ended by reason of resignation or dismissal;

    5.2. if there was a dismissal what was the reason for it;

    5.3. whether the dismissal was fair or unfair;

    5.4. whether any remedy for unfair dismissal should be reduced because of the claimant's conduct and/or the application of the principle in **Polkey v. A E Dayton Services Ltd** [1987] IRLR 503 HL;

    5.5. what remedy should be ordered in respect of unfair dismissal;

    5.6. whether the respondent was in breach of contract in failing to pay the claimant in respect of his notice period;

    5.7. whether the tribunal had jurisdiction to determine the complaint in respect of holiday pay, either as a complaint of unauthorised deductions from wages or as a complaint of breach of the Working Time Regulations 1998, having regard to the relevant time limit for bringing such a complaint.

Relevant legal framework

6. For unfair dismissal the relevant statutory provision is s. 98 of the Employment Rights Act 1996. It is for the respondent to prove the reason or principal reason for the dismissal. If it is shown that it is a reason relating to conduct, the tribunal must be satisfied that the respondent had a genuine belief in the conduct alleged, that it had reasonable grounds for that belief, that it was formed after as much investigation into the circumstances as was reasonable and that the decision to

dismiss for that conduct was one which a reasonable employer could reasonably make. (See: **British Home Stores Ltd v Burchell** [1978] IRLR 379 EAT, **Iceland Frozen Foods v Jones** [1982] IRLR 439) The test for a fair investigation is also the "reasonable range" test. (See: **Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111 CA)

7. If it is found that the dismissal was unfair because of the respondent's procedural failings, any compensatory award may be reduced to reflect the chance that the claimant would have been dismissed fairly of a fair procedure had been followed. (See: Polkey v. A E Dayton Services Ltd [1987] IRLR 503 HL)

8. The compensatory award must be such amount as is just and equitable but may also be reduced because of conduct of the claimant, either conduct that contributed to the dismissal or other blameworthy conduct.

9. In respect of holiday pay, whether claimed as arrears of wages or under the Working Time Regulations 1998, a tribunal can only consider such a complaint if it finds that it has jurisdiction to do so. Such a complaint must be presented to the tribunal within the period of 3 months beginning with the date upon which wages were paid in arrears. If there was a series of deductions, which can extend back up to 2 years, the complaint must be presented within 3 months of the last in the series. The period of 3 months is construed as 3 calendar months less one day. The ACAS early conciliation period is to be taken into account in calculating whether the claim is in time. The relevant provision in that regard is section 207B of the Employment Rights Act 1996.

10. Complaints of breach of contract, where the breach is outstanding upon termination of employment may be brought in the tribunal. The legal position is governed by common law. An employee is entitled to be given reasonable notice by his employer. That cannot be less than the minimum period of notice provided by statute which, in summary, is one week's notice for each year of employment up to a maximum of 12 years. If there is a breach of that entitlement then the measure of damage is the pay that would otherwise have been earned in the employment. An employer is entitled to dismiss summarily, that is without notice, if the claimant is guilty of gross misconduct. That means conduct which is so serious in the context of the employment that the employer is entitled to bring the contract to an end forthwith.

Evidence

11. In deciding this case I heard evidence from the claimant. He called as witnesses Mr Adam Clarke and Mr Paul Richardson. On behalf of the respondent heard evidence from Mr Ian Jones the owner and managing director of the respondent and Mr Robert McKay the operations director.

12. I read the statements from all those witnesses. I also read the statement of Mr Stan Hart prepared on behalf of the claimant but he was not called to give oral evidence since his statement was not challenged by the respondent.

13. The parties had prepared a bundle of documents to which I refer by page number.

Findings of Fact

14. Before I begin to set out my findings of fact it is appropriate to record that the case largely turns upon the evidence given by the two principal witnesses in the case, the claimant and Mr Jones. The central issues in the case were in dispute. Although both relied upon some of the documentary evidence to support their contentions, those documents were not conclusive and could be interpreted as supporting the position of either witness. This is one of those rare cases where my conclusions are derived not only from an assessment of credibility based upon the inherent likelihood, or otherwise, of certain things having been said or done but also to some extent upon the demeanour of the witnesses before me.

15. I make the following findings of fact and identify the evidence on disputed facts.

16. The respondent is a supplier and installer of fencing and gate systems based in Leyland. Although Mr Jones started the business in 1988 as a sole trader, the respondent was incorporated in 2000. Mr Jones and his wife are directors. There are other directors and the company employs around 75 staff and engages about 20 self-employed contractors. A number of people who have been employed by the company over the years have become self-employed contractors and have then provided services to the company.

17. The claimant started his employment on 16 March 2006 as an apprentice installer.

18. In 2010 the claimant became the respondent's workshop manager. Regrettably he was sent to prison for a period of 3 months in early 2011. Mr Jones agreed to keep his job open for him and his employment was treated as continuous despite that break. It was common ground that Mr Jones and the claimant had a good relationship. That decision and the character reference Mr Jones wrote for the purposes of the probation services testified to that. Both men appear to accept that good relationship continued until the matters which brought the claimant's employment to an end.

19. In 2013 the claimant was issued with a statement of particulars of employment (30-38).

20. In 2015 the claimant asked if he could become a fencing installer or "fitter" because in that role he was paid piecework and could earn more money. Mr Jones accommodated the request and the claimant continued to work as a fitter until his employment came to an end

21. As a fitter the claimant had the use of a company van to transport tools and materials which he was permitted to take home at the end of each day.

22. The claimant was not issued with any statement of variation to his particulars of employment when he became a fitter. Any such statement would have referred to his job role, method and rate of payment and other such matters.

23. The statement of particulars of employment contained the following passage:

> "**OTHER EMPLOYMENT**:
>
> It is expected that you will devote your whole time and attention to this Company during your working time. Therefore, you must not take on other employment or work outside working hours without first asking the Manager and obtaining their written permission.
>
> Permission will not be unreasonably refused but if we are not happy about the other employment or business activity may ask you to choose between working for us or continuing with your other activities.
>
> Where permission would normally be refused are where the outside work damages or interferes with your own capacity, capability or credibility in doing your work for us or affects your performance of your duties or exposes you to a conflict of interest or where there could be damage to the Company's interests or reputation.
>
> You must not:
>
> - Set up in business (either alone or with others) which competes with any aspect of our business or
> - do any work of any nature in any capacity for any of our competitors."

24. The particulars of employment also provided for annual holidays in respect of a holiday year from 1 January to 31 December based upon a four-week paid holiday leave entitlement. It provided that holiday pay would be paid at the rate of £50 per day for any holiday day where the normal daily rate of pay was equal to or more than that sum.

25. The particulars provided for the employee to receive, "except for summary dismissal", notice of dismissal of one week for each year of employment up to a maximum of 12 weeks. For employees giving notice, it was stated that the employer "would expect wherever possible a reasonable amount of notice" and as an "absolute minimum" one month's notice for an employee who had completed over 6 months' service. The respondent reserved the right to pay in lieu of notice at its discretion.

26. The particulars referred at various points to the "Employees Handbook". That was said to be contractually binding in respect of "the restrictive covenant rules". However, I was not provided with the copy of the handbook and the respondent did not rely upon any such provision in this case.

27. The parties agreed that the complaint in respect of holiday pay was in respect of the periods of holiday for which the claimant had been paid at the rate of £50 per day rather than at a rate based upon his actual earnings. It was common ground that the respondent had changed the basis of payment for holiday pay at the end

of 2016. The claimant made no complaint that his holiday pay during 2017 was paid at less than the proper rate.

28. The respondent permitted staff to have reasonable use of the company's workshop and equipment to carry out work for themselves or for friends and family in addition to their contractual duties. Staff who did that were charged a nominal fee for using the workshop or a company van and were charged at cost price plus 10% for materials. This practice was known in the company as "Jobs for Grandma". Rules relating to this were published in a letter which dealt with a number of other instructions as well (77 – 80). Although the letter was undated the claimant did not suggest that he was unaware of the instructions. In summary, staff were told they could have a friends and family discount in respect of purchasing materials and hiring equipment and vehicles for up to 2 jobs per year. Such transactions had to be agreed in principle by the operations management team by completing a form and approved by a director.

29. In this regard, Mr Jones gave evidence that the claimant used this facility on a number of occasions to carry out work for family and friends. On one occasion the claimant and his cousin, Adam Clarke, who was also an employee of the respondent, asked if they could use the workshop to make some gym equipment. When they told Mr Jones that they were thinking of turning that into a business and selling such equipment privately, Mr Jones said that he would need to charge them a higher fee for using the workshop. They told him then that they would just be making equipment for themselves and use the workshop on that basis.

30. In early 2017 the claimant asked if he could use the workshop to make a mezzanine floor for a friend. Mr McKay and Mr Jones agreed that he could do so. He used the workshop on payment of a daily rate but was asked to get the work done quickly so as not to obstruct the respondent's business.

31. The claimant produced photographs of metal gates made in February 2015 and March 2015 and fencing work from February 2016 and metalwork produced in November 2016 together with photographs from April - June 2017, which I infer relates the mezzanine floor (87-93). Mr Jones accepted that the claimant had permission to do that private work using the respondent's facilities in the way described above. He explained that the claimant had said that those were jobs for family or friends or his personal use and Mr Jones permitted this because he trusted the claimant.

32. From about the end of 2016 Mr Jones began to receive information that the claimant was saying that he could make more money during the weekend than he could working for the respondent. Mr Jones dismissed this at the time. Later on, he overheard staff talking of their suspicions that the claimant was working for himself when he was off sick. Mr Jones again dismissed this as gossip and rumour.

33. On 27 April 2017 goods were delivered by a supplier, FH Brundle, to the respondent's premises. These goods had not been ordered by the respondent. Upon enquiry the respondent was informed that the claimant had placed the order but then cancelled it. As a result, the supplier was maintaining that the company was liable for a "restocking charge" of £66.88. As a fitter the claimant

had no longer got authority to place orders with suppliers nor was there any reason for him to place such an order in the course of his employment as a fitter.

34. On Mr Jones' instruction Mr McKay spoke to the claimant who denied having placed the order but said that he had simply asked for a quote. Mr McKay assumed that that was regarding the mezzanine floor that the claimant was working on. Mr McKay said that he would contact the supplier as it seemed unfair for a restocking charge to be levied if all that the claimant had done was ask for a quote. However, the claimant said that he would contact the supplier and sort it out and that if a restocking charge was due he would pay it personally. Mr Jones gave the claimant the benefit of the doubt and did not take the matter further at that time. For completeness I record that the sum of £66.88 was not paid by the claimant at the time since it formed part of the employer's claim referred to above.

35. On 30 May 2017 the claimant and his wife, Hannah, incorporated a company, LA Clarke Fencing Contractors Ltd.

36. On 7 June at 08.49 the claimant texted the respondent to say he was not well enough for work that day. Later he was telephoned to enquire whether he would be well enough to work on 8 June otherwise the respondent would need to collect the van and tools. The claimant said he was ill with a fever but would be back at work the following day. In the event he texted again on 8 June to say he was not well enough but would have to be in work the following day. However, he was absent again on 9 June. This caused further rumours, of which Mr Jones heard, that the claimant was not really unwell but was carrying out his own work.

37. On 9 June 2017 Adam Clarke said that he and the claimant were coming in on Saturday 10 June to finish off the mezzanine floor. Mr Jones considered this was odd given the claimant's reports about his health and he was further suspicious because of the reiterated rumours. He therefore asked the claimant to call him and, when he did, arranged for the claimant to meet him and Mr McKay the following day.

38. According to the claimant Mr Jones said in that phone call that he had heard the claimant was leaving and asked whether it was true. The claimant said that he replied "There is some truth in it Ian. It was a difficult decision and it's not 100%. I haven't made my mind up yet." According to the claimant, Mr Jones replied, "Right! Well I bloody want answers as I'm not having anyone make a fool of me! Not again!" However he then agreed to allow the claimant to continue to use the workshop the following day to make the mezzanine floor.

39. According to Mr Jones at the meeting on 10 June the claimant did not appear ill. When asked, the claimant said he was feeling better. Mr Jones asked him outright if he had been working for himself and the claimant denied it. Mr Jones considered the claimant appeared uncomfortable and he wondered whether the claimant was being honest. He repeated his question and again the claimant denied that he was working for himself. The claimant then said that he had in the past thought about setting up his own business but had not done so. He said to Mr Jones, "thinking about it is one thing, but doing it is another". Mr Jones said that if the claimant was giving him his word, then he would not take the matter

further. The claimant was permitted to use the workshop to finish of the mezzanine floor and Mr Jones asked the claimant to let him know within the next couple of days if he was "with us" or not.

40. Mr McKay's evidence confirmed Mr Jones' account. He explained that he understood why Mr Jones took the claimant's word and said that Mr Jones' approach was "always to see the best in people."

41. According to the claimant the meeting started with Mr Jones and Mr McKay asking him to update them on the private jobs that he had been doing. He said they wanted to know what his intentions were but he said that "at this time my intentions were completely unresolved and I didn't wish to commit myself one way or the other." He said Mr Jones asked whether his plans were to leave the respondent and set up by himself and he said it was something he was hoping to do in the future but he was "not ready to make such a big change just yet". He accepted that he prevaricated and made the statement quoted above about "thinking about it…".

42. The claimant accepted that he did not inform Mr Jones at this meeting that he had incorporated his own fencing contracting company about 10 days earlier.

43. The claimant's evidence was that he and his wife talked it over that weekend and decided that since most of their families owned businesses or self-employed "we should give it a go as well".

44. Mr Jones followed this up with a text message (101) on the morning of 12 June: "Pls let me know your plans" to which the claimant replied saying that he would call the respondent later.

45. Mr McKay spoke to Mr Jones shortly after that and explained that that morning one of the respondent's contractors had told him that the claimant had set up his own business and bought his own van.

46. Since he and Mr McKay were busy Mr Jones asked his wife and fellow director, Kelsay, to carry out some investigations. She conducted an Internet search which revealed that the claimant was a director of the company that he had incorporated and that its registered office was the claimant's own address. Mr Jones was shocked and doubted whether the claimant had been telling him the truth. It occurred to him that the claimant had acted in breach of contract and it brought back into focus in his mind the earlier rumours and the issue about the order to FH Brundle in April.

47. On that day the claimant was working on a site in Blackburn. His evidence was that he telephoned Mr Jones that morning. Initially Mr Jones said there had been no phone call but accepted in evidence that he was mistaken and that the claimant's witness statement had reminded him that there was a phone call between them.

48. The claimant said that he told Mr Jones on the telephone that he had "decided to go for it and move on with my own business". He said that after a pause Mr Jones quietly said okay, and asked when the claimant was leaving but "was very

quiet and seemed rather disappointed." According to the claimant, he asked if one months' notice would be sufficient and Mr Jones agreed and that he said that he would come in later that day to give Mr Jones his written notice.

49. Mr Jones' account of the call was of the claimant said he thought he was going to give it a go on his own but there was no mention of notice at that time.

50. The claimant went back into the respondent's yard at about 4 p.m.

51. Mr Jones spoke to the claimant. It was agreed there was nobody else present. Mr Jones said that he told the claimant he had found out about his limited company. He put to the claimant that he had not been truthful and the claimant accepted this. Mr Jones maintained that the claimant admitted he had used some of the respondent's digging gear for his own work. Mr Jones said he was very disappointed and that he thought the claimant had gone about things entirely the wrong way and that he should have been up front with them. According to Mr Jones the claimant said that that was what his wife had said to him. Mr Jones said that he thought the conduct was very serious and he should be dismissing the claimant but that he took his reference to "going on his own" as his resignation. The claimant confirmed that he wished to leave the company.

52. The claimant's case was that he handed his written notice (42) to Mr Jones at the meeting. It is a letter dated 11 June 2017 which the claimant said that he had prepared over the weekend. Mr Jones maintained that he did not receive a copy of that until disclosure in these proceedings.

53. Mr Jones' case was that at the meeting the claimant asked him if Mr Jones wanted him to work one month's notice but although there was a lot of work on he told the claimant he was only required to work one week. The claimant said that was ok and they shook hands.

54. In cross-examination Mr Jones said that the claimant had told him that his brother-in-law had lent him a van and it was then that he asked him about incorporating the company and the claimant said, "Ah, yes." Mr Jones said that at this point the claimant admitted using the respondent's van and tools for his own work. He was becoming angry at that point because he considered that the claimant had lied to him very severely on the previous Saturday. He said that he told the claimant this was terrible gross misconduct and he could not believe he had acted in that way. He said the claimant replied, "Yes, I know. That's what Hannah said." Mr Jones said he asked why the claimant had not told him and the claimant repeated, "Yes, that's what Hannah said."

55. According to Mr Jones that was when they stood up. This was the point at which notice was discussed. They went out into the corridor. After greeting another member of staff Mr Jones said that he could not believe the claimant had gone about it in the way he did. He told the claimant that he could have done some "subbying" work, i.e. sub-contracting after he left employment. The claimant said, "I know, I've been stupid." Mr Jones said that he would see what Mr McKay and his wife thought about it and he then said, "We will carry on for this week. We may be able to offer you some subbying work in the future."

56. The 2 men had a further conversation on 13 June 2017. According the claimant it occurred when he went to the yard in the morning. He said that Mr Jones apologised for being so angry and said that he understood the way the claimant had done things. The claimant's case was that Mr Jones also said that if the claimant needed longer than one month's notice "that he would let me stay" and also told him that if "things didn't go well" he would consider having him as a subcontractor.

57. Mr Jones accepted there was a further conversation. He was not precise as to when the conversation occurred. He said that he had reflected on how much work the company had on and decided that because of the amount of work it could be difficult to replace the claimant at short notice. He said that he had told the claimant that he could finish the work that had been allocated to him provided he gave his total commitment to completing that work and doing full continuous days on site. He said that the claimant agreed. Mr Jones stated in evidence that he did not know how long that work would take to complete but that it might be finished by around the last week of June.

58. The claimant continued working at the Blackburn site.

59. On the morning of the Friday of that week, 16 June, the claimant sent Mr Jones a text message asking if he could come to work at lunchtime because he wished to attend his son's school sports day in the morning. Mr Jones did not see the text message until after work that day but then replied saying it was alright for him to have taken the morning off. However, on the following Monday, he discovered that the claimant had not been in work at all that day. The claimant's account was that he had not been able to go to work in the afternoon because the tyre on his van that needed replacing and he had done that with the approval of another manager.

60. There was no dispute that the claimant worked on 19 and 20 June, the Monday and Tuesday of the following week.

61. At 14.24 on 21 June 2017 the claimant sent a text message to the respondent's operations administrator, Jeanette. It read: "Hello. I'm on a mini break hol this Friday till Monday. It's for my birthday from the missus. Thought I'd text you before I forget. I'll tell Dennis too." Apparently Dennis was the manager of the site at Blackburn where the claimant had been working.

62. This was shown to Mr Jones. He considered it unprofessional and discourteous that it had not been mentioned to him given the current discussion about completing work and working full days. It caused him to doubt the claimant's motives and commitment. He told the administrator to reply requesting that the claimant return the van to the company yard that evening. The claimant did not do so. He replied at 18.03 that evening to say that his phone battery had died and he had only just seen the text and that he would be in in the morning.

63. Mr Jones telephoned the claimant who did not answer and so he went to the claimant's home that evening to collect the respondent's van. The claimant was not present. The claimant's evidence was that he had been at his wife's parents home having supper and that he had begun to charge his phone when he got

there which was why he had not seen the text message from Mr Jones before. He said he did not respond because they were having a meal.

64. When Mr Jones arrived at the claimant's home he sent a further text message saying that he has come to collect his van and tools and asking when the claimant would be back. The claimant telephoned him and asked him what he wanted. Mr Jones said that he had come to take the van back to the yard and that he thought the claimant was taking advantage.

65. According to the claimant when Mr Jones telephoned him that evening he asked why Mr Jones was taking the van I Mr Jones said that he could not take any more of it, that the claimant was "taking the piss" and everybody was laughing at him (that is to say at Mr Jones). According to the claimant, he said that he did not understand at which Mr Jones said, "I've had enough! You're sacked!"

66. The claimant said that when he asked why, Mr Jones said because he had asked for the Friday and Monday off. The claimant explained that he had only asked for the Friday off and that his wife had booked a surprise weekend of which he had previously been unaware. He offered to get his wife to cancel the holiday but Mr Jones said, "It's too bloody late, Luke. I'm taking the van." That was the last conversation the men had.

67. Because the claimant was not at home Mr Jones sent for the spare keys to the van to be brought by a member of staff. While he was waiting he went to see Adam Clarke who lived nearby. Mr Adam Clarke accepted that Mr Jones did not tell him that he had sacked the claimant. He described Mr Jones as coming across as very upset and having had enough of the claimant. He said that he had a sense that the claimant had been sacked but he did not want to get involved.

68. The following morning there was an exchange of text messages. At 06.41 Mr Jones wrote:

> "Morning Luke message on the last straw. People have been telling me that you have been and will be doing us over for two years now. Rob & I have told them that was rubbish!! Yet we had a deal that you finished Blackburn on the basis of 5 days a week. They are all laughing at me now having told me that you wouldn't do it!!!! You've made me look a fool for the last time. Please bring everything that belongs to IPJ fencing. From the welding mask down to a pencil. Give Dal your paperwork so he can check it out (no over booking) I cannot put into words how I feel. Ian"

69. The claimant replied:

> "There is only one victim in all this Ian and that's me!! The way I've been treated since I told you my plans is absolutely shocking! I've given you 12 years of loyal work and this is how you repay me! I feel sick that you've acted this way."

70. Mr Jones:

> "Best 2 for both of us to say no more let the dust settle then catch up, when all the chatter has finished."

71. The claimant:

> "No it's not on Ian!! I feel you have a vendetta against me! I'll be in this morning to collect my things"

72. Mr Jones concluded the exchange:

> "Yes collect your things and sort out paperwork. I meant talking about what has gone on. I can tell you I have no vendetta! I just feel that what other people have told me appears to have some substance when I have dismissed it in the past."

73. The claimant did go into the office on 22 June and completed paperwork so his final pay could be processed.

74. On 26 June 2017 the claimant emailed Mr Jones requesting that he reconsider his decision to dismiss him and to re-employ him until the end of the notice period (46).

75. Mrs Jones replied on 27 June (47-48). Mr Jones had approved the answer. In the letter, but in layman's terms, the respondent disputed that the claimant had been dismissed. It rehearsed the history of early June and the discovery of the incorporation of the claimant's company. As to the meeting on 12 June it was stated that Mr Jones and the claimant had come to a "gentlemen's agreement". The email continued, "during our conversation, I acknowledge that it must have been a hard decision you to make to go it alone and that I would not stand in your way. We would send you off with good wishes for the future. You requested that you would like a further 1 month's work, but I felt that given the circumstances, this was inappropriate. We agreed that you would be able to finish the work that had been scheduled to you and that this should be concluded by the end of the week, dated 16th June." The email made it clear that Mr Jones was describing the agreement to give full commitment and working full days as the gentleman's agreement. The email continued to rehearse the events of the period of 16 to 22 June 2017.

76. The respondent attached to its email a report obtained from the internet indicating the setting up of the claimant's company. It also contained 4 reviews obtained from Yell.com all dated between 15 and 20 June 2017 commending work recently done by the claimant apparently for customers. It also contained images of the company's Facebook page, the invoices from FH Brundle and delivery notes dated 28 April and 2 May 2017 from another supplier, Kloeckner Metals, made out to the company care of the claimant at his home address and an undated packing list addressed to the claimant from another supplier, Forest Metal Components.

77. In an email dated 7 July 2017 (69-70) the claimant responded asserting that he had never used the respondent's van or tools for any work done or charged under the name of his company. He maintained that he did not lie about his

intentions in the meeting of 10 June. He asserted that he had given one month's notice in writing which he maintained was appropriate because it took him up to his holiday in France on 15 July. He continued to maintain that he had asked for a day's leave of absence for the holiday over the weekend. He responded to say he was willing to attend the meeting suggested by the respondent in the previous email.

78. In further emails the respondent declined to hold a meeting. The subject matter of what was to become the employer's claim was raised in those emails.

79. During cross-examination, the claimant confirmed that he had created the Facebook page for his company on 20 June 2017 and a website for the company on 7 July 2017.

80. In the hearing the respondent produced a series of photographs (145-147) which it asserted it had obtained from the claimant's company's website showing wooden fencing and metal railings. Each of the photographs contains the name of the claimant's company, the company logo and date. The dates on each page are respectively May 2017, May 2017 and February 2017. Although there did not seem to be a dispute that these photographs were displayed on the website the claimant did not accept that the company name, logo, and dates were on his website and suggested that the images had been doctored. No evidence was provided to demonstrate independently that they had been doctored. I expressed the view that it was probably disproportionate to adjourn the proceedings and for the parties to undertake the cost of obtaining evidence as to that allegation.

81. The claimant was asked about each image during cross-examination. As to the image at page 145 he said it was work he had done in July 2017. If that were right the date of May 2017 on the photograph would be wrong. As to page 146 he said that it was work he had done in May 2017, so the date was correct, but it was work done for a friend of a friend and that the steel had been purchased through the respondent. His explanation for that was therefore that it was a private job that the respondent had approved. As to page 147 the claimant said that it was work done in February 2017. Although he had done the work it was done for a former employee of the respondent whose job it was Mr Richardson. Mr Richardson's evidence confirmed that.

82. The claimant was also asked about the reviews on the yell.com website. He said that these were spoof reviews by friends and family created in order to improve the image of his new business.

83. During cross-examination the claimant was also asked about the complaint for holiday pay. He accepted, frankly and to his credit, that he had raised the issue of holiday pay not being paid at the correct rate in 2016 and before that. He accepted that he was aware at that time that he could have raised a claim to the tribunal about that. He accepted that there was nothing that would have prevented him from doing so.

84. Although it is not uncommon for a tribunal to be invited to take into account the demeanour of the witnesses, it is only rarely that I have considered I needed to do so.

85. The claimant's evidence was given in an apparently credible way. Generally, he appeared cool and dispassionate. However, there were occasions when I had to remind him of the need to answer the question. I do not say that I considered him to be deliberately evasive but there were one or two points where I considered that might be a potential conclusion.

86. Mr Jones appeared no less credible. He demonstrated some slight signs of distress when describing the meeting with the claimant on 12 June 2017. I did not have any concern that this was not genuine. I suspect that he may be of a more emotional temperament. It was when he was describing in his own words the conversation with the claimant and the claimant's acknowledgement to him that his wife had advised him to act differently that this was apparent.

87. It is common ground that the relationship between the men and their families had been good over many years and, as I understand it, Mrs Clarke taught piano to Mr Jones' child or children.

Submissions on the issue of credibility

88. Mr Taft on behalf of the respondent submitted that there was powerful evidence that the claimant had been working on his own account as it were, behind Mr Jones' back, while still employed by the respondent. He referred to the photographs with the disputed company name and logos and pointed out that 2 of the 3 dates on the photographs were correct. He pointed out that the claimant accepted that he had purchased a works plan in March 2017 albeit when questioned about it the claimant had maintained it had been purchased to transport his dogs rather than carry out his own work. He submitted that the claimant's behaviour in refusing Mr McKay's offer to sort out the restocking charge to FH Brundle in April 2017 was curious if the all the claimant had done was ask for a quotation rather than place an order. Mr Taft relied upon the incorporation of the claimant's company on 30 May 2017 and the fact that Mr Jones gave evidence that he was being told over a considerable period that the claimant was "working on the side". He submitted that there was no specific point which proved that the claimant was definitively working but that the threads of these points when taken together was powerful evidence to that effect.

89. Mr Taft next relied upon the claimant's denial of working on his own account in the meeting of 10 June 2017.

90. By contrast Mr Taft submitted the claimant was not a reliable witness. In cross-examination the claimant had repeatedly asserted that the van bought of his brother or brother-in-law in March 2017 was not for work. Mr Taft submitted that this was unlikely and that the claimant's insistence upon it was incredible. As to the text message by which the claimant said he was taking off the Friday and Monday over the weekend because of his wife's present of a holiday for his birthday Mr Taft drew attention to the claimant's insistence even in evidence that the text message was only notifying the respondent that he was going to take one day off.

91. Mr Taft submitted that by contrast Mr Jones made appropriate concessions.

92. On behalf of the claimant Mr Firth disputed Mr Taft's analysis of the demeanour of the claimant. He submitted that the claimant was a "cool customer". He did not allege that Mr Jones was a liar described him as quite emotional, a person who boils up and did not like being laughed at.

Conclusion on credibility

93. Overall my conclusion is that, where the evidence of the claimant and the evidence of Mr Jones is in conflict, the evidence of Mr Jones is to be preferred. I should add that I am satisfied that I do not consider that either witness was seeking deliberately to present a false picture. I am satisfied that these unhappy events have led to a position where both consider that their version of the facts is correct. Whoever is right or wrong their positions have become entrenched

94. This dispute arose in the context of a long and good relationship in which the claimant had been a good employee and Mr Jones had supported him, not least by keeping his job open when as a younger man he had been sent to prison. The ending of that relationship was to an extent an emotional event for both men. The evidence which is not in dispute demonstrates that Mr Jones was not averse to his employees branching out to set up their own businesses. Mr Richardson and others had done so. Had the claimant gone about things differently I suspect that this outcome could have been achieved amicably. In the event Mr Jones was understandably upset by the claimant's lack of candour. It is likely that Mr Clarke was upset when his activities in at least starting to set up a business were raised with him only 2 days after he had told his employer that he was not doing that at that time.

95. However, that conclusion does not of itself justify a finding that the claimant was in fact operating a business on his own account whilst remaining employed by the respondent.

96. In my judgment the matters relied upon by Mr Taft point to a conclusion, albeit only on the balance of probabilities, that the claimant had in fact commenced working on his own account prior to the termination of his contract of employment. In this regard I consider the following factors support this conclusion:

    96.1. the order to FH Brundle and the claimant's response to Mr McKay in respect of that;

    96.2. the order to Kloeckner Metals;

    96.3. the claimant's purchase of a van in March 2017 which I do not accept was acquired for the predominant purpose of transporting the family dogs;

    96.4. the claimant's apparent sickness on 7 to 9 June 2017 with his ability to attend to his own work on the following day;

    96.5. the incorporation of the company; and

96.6. the claimant dissembling to his employer and long-time supporter Mr Jones on 10 and 12 June 2017 when first asked about the company;

96.7. the claimant's admissions about working which I accept were made to Mr Jones on 12 June 2017.

97. In reaching this conclusion, I do not place weight on the disputed internet documents. For completeness I record that I do not accept that the yell.com reviews were entirely false or spoof as the claimant would have it. In addition, it seems to me unlikely that the respondent would have doctored the photographs downloaded from the claimant's website and yet by chance have managed to get the dates of 2 of the images correct.

Specific findings in respect of unfair dismissal and breach of contract

98. I make the following specific findings on disputed issues in so far as they are necessary to give a conclusion to the legal issues in the case.

99. It is not in dispute that the claimant tendered a month's notice on 12 June 2017. On the balance of probabilities, I find the respondent did not accept this. The contract provided for a minimum of a month's notice to be given by the employee. The claimant was required to give that period of notice and entitled to do so. Insofar as Mr Jones purported to set a shorter period that was a decision by the employer to bring the contract to an end when that shorter period of notice expired.

100. However, there was clearly some agreement that the employment would continue beyond that period of one week. In my judgment, whatever the merits or consequences of the decision, given that the claimant and the respondent were expecting him to work at least on 22 June 201, the decision to require him to surrender the van and the respondent's tools, which would inevitably have frustrated any work being done for the respondent by the claimant, brought the contract to an end at that point.

101. Thus, whilst I accept that the claimant had given notice, before that notice period expired the respondent brought the contract to an end. At that point the claimant was dismissed.

102. The reason for the dismissal was a reason that related to the claimant's conduct. I am satisfied that the respondent had a genuine belief that the claimant was guilty of misconduct in setting up a business as evidenced by the matters recited above.

103. The respondent had reasonable grounds for that belief.

104. In acting as he did, understandably but precipitately, Mr Jones did not begin to carry out a fair procedure before reaching the decision to terminate the contract and dismiss the claimant.

105. I do not accept the respondent's argument, forcefully advanced by Mr Taft as it was, that even in these unusual circumstances the respondent can excuse the

failure to carry out a fair procedure. Mr Taft acknowledged there was no authority that supported the submission that he made which was that despite the authorities section 98 (4) could be construed so as to resolve the employer from having to carry out an investigation in the circumstances which would include a disciplinary hearing.

106. In my judgment the inherent weakness of the argument is demonstrated by the facts that the claimant asked Mr Jones to reconsider the decision to dismiss him. That request gave rise to the opportunity for the respondent to hold a meeting. Such a meeting could well have operated to serve for an appeal even if the parties had not used that language. It was the respondent's decision eventually that there should be no such meeting. Although the language of section 98(4) is apparently wide, I am required to have regard to the ACAS Code of Practice. Although I was not address specifically upon that, it serves as a benchmark to point up the inherent fallacy in Mr Taft's argument on the fairness or otherwise of the lack of a procedure.

107. In the circumstances I find that the claimant was unfairly dismissed because of the respondent's procedural failings.

108. In respect of the respondent's argument that the claimant would have been dismissed fairly in any event, I conclude as follows. If the claimant's employment had not been brought to an end on 21 June 2017 in my judgment it is almost inevitable that he would and could have been brought in for a disciplinary hearing by Mr Jones well before the expiry of the notice period. He could have been summoned to a meeting at which his dismissal for gross misconduct could have been considered as early as 12 June 2017. Had that occurred, I am satisfied that the claimant could have fairly been dismissed for misconduct.

109. On the balance probabilities it is likely that the respondent would have discovered the further facts pointing to the claimant working privately by the time of a disciplinary hearing. The evidence of how Mr Jones responded to the claimant's attitude by 21 June 2017 is, in my judgment, powerful evidence that the claimant would have been fairly dismissed at the conclusion of a disciplinary hearing if one had been properly convened.

110. On the evidence at that point a legitimate finding that the claimant was carrying out his own business behind his employer's back, given the terms of the contract and the obligation implicit in the fundamental implied term of trust and confidence, would be bound to follow. On the application of the **Polkey** principle I consider the period of the claimant's loss of earnings consequent upon the dismissal should be for a period of no more than 1 week from 21 June 2017.

111. In respect of contributory conduct Mr Taft submitted that there should be a 75% reduction in any basic award or compensatory award to reflect the claimant's conduct. In my judgment that was a fair and reasonable submission and it is one to which I accede. I note in doing so that I might have been persuaded that there should have been an even greater reduction. However, I also consider it would not be just for me to make a greater reduction bearing in mind that the claimant was not legally represented and this argument was not addressed by Mr Firth.

112. So, in considering the amount of any basic award to the claimant I reduce that by 75% to reflect the claimant's conduct. Any compensatory award for loss of earnings should be limited to the period of 1 week after 21 June 2017 and that sum should be reduced by 75% for contributory conduct as well.

113. Although the point was not raised before me, I considered whether to make an award for loss of statutory employment rights which is typically awarded to reflect the fact that a person who is employed will need to work for a further 2 years for a new employer before acquiring the right to redundancy payment or the right not to be unfairly dismissed. However, since the claimant had set up in business on his own account I considered that it was not appropriate to make such an award in this case.

114. I therefore award compensation to the claimant in respect of unfair dismissal.

115. It was first necessary for me to establish the claimant's gross and net weekly pay. In order that I could do so the parties identified for me the information shown by the payslips for the claimant's last 13 complete weeks of employment. The relevant figures are shown in the table below. One week was excluded by agreement as being wholly unrepresentative of the claimant's earnings.

Week	Gross pay	Income tax	NI	Net Pay
23/3/17	691.93	96.20	64.43	
30/3/17	545.91	67.00	46.91	
5/4/17	468.18	51.40	37.58	
13/4/17	598.82	53.02	11.34	
20/4/17	493.22	54.40	40.35	
27/4/17	429.56	41.80	32.71	
11/5/17	265.44	13.01	6.34	
18/5/17	568.74	69.60	49.41	
25/5/17	530.38	62.00	44.80	
1/6/17	507.20	78.80	54.89	
8/6/17	206.25	2.80	5.91	
15/6/17	397.32	55.20	40.84	
22/6/17	390.61	34.00	28.03	
Totals	6093.56	679.23	463.54	
Average	£468.74	52.25	35.66	£380.83

116. The claimant's continuous period of service was 11 years. He was born on 24 June 1985 and was 32 years old at the date of dismissal.

117. The basic award is calculated as follows:

11 weeks' pay at 468.74 = 5156.14
Reduced by 75% by reason of the claimant's conduct = £1,289.03

118. The compensatory award is calculating as follows:

1 week's pay from 21 June 2017 = 380.83		
Reduced by 75% by reason of the claimant's conduct	=	£95.21
The total award for unfair dismissal is therefore		£1,384.24

Breach of contract

119. I make no separate award for breach of contract that is in respect of the notice period. He is not entitled to pay in lieu of notice where he is guilty of gross misconduct. Since I have determined that he was in fact guilty of such misconduct that the employer would have been entitled to dismiss him summarily his entitlement to compensation for that period is properly reflected in the award for unfair dismissal.

Holiday pay

120. As I explained during the hearing, the question of whether holiday pay can be awarded to the claimant in respect of those periods of holiday in 2016 in respect of which he was underpaid, depends upon whether I find that the tribunal has jurisdiction. The complaint was presented on 28 September 2017. The ACAS conciliation period was from 10 to 31 August 2017, a period of 20 days. By my calculation the last date in respect of which the claimant could allege failure to pay holiday pay properly was 9 June 2017. Therefore, a complaint alleging arrears of wages which only occurred in 2016 was out of time by at least 6 months. I can only begin to consider extending time if I am first satisfied that it was not reasonably practicable for the claimant bring the complaint within the period of 3 months from the date of the last deduction. Based on the claimant's answers in cross examination as recorded above I cannot make that finding. For that reason, the tribunal has no jurisdiction to determine that complaint.

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Employment Judge Tom Ryan 2 February 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 February 2018

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FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2420571/2017

Name of case(s):	Mr L Clarke	v	I P Jones Fencing Contractors 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: 12 February 2018

"the calculation day" is: **13 February 2018**

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office