Case Number: 2501168/2018

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr D Howard**

Respondent: **Waterside Dental Laboratory Ltd**

Heard at: **North Shields** **On:** **8 & 12 October 2018**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **Ms H Hogben of Counsel**
Respondent: **Mr M Winthrop, Solicitor**

RESERVED JUDGMENT

1 The judgment of the Employment Tribunal is that the claimant's claim for unfair dismissal is well-founded and the respondent is ordered to pay to the claimant the following:

Basic award		£3,300.75
Compensatory award		£15,958.41
a	Grand total	**£19,259.16**
b	Prescribed element	£ 6,604.22
c	Period of prescribed element from 20 February 2018 to 12 March 2018	
d	Excess of grand total over prescribed element	£12,654.94

REASONS

1 I heard witness evidence from the claimant and Paul Laidlaw, Director, and I was provided with a joint bundle of documents consisting of 81 pages.

2 The issues to be determined by the Employment Tribunal were as follows:

2.1 Was the reason for the dismissal the claimant's conduct?

2.2 Did the respondent genuinely believe the claimant to be guilty of gross misconduct?

2.3 Did the respondent have reasonable grounds upon which to sustain that belief?

2.4 At the stage at which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

2.5 Was dismissal within the range of reasonable responses open to a reasonable employer in those circumstances?

2.6 Was the dismissal procedurally unfair and, if so, had a proper procedure been followed by the respondent, what are the chances that the claimant would have been dismissed in any event?

2.7 Did the respondent unreasonably fail to follow the ACAS Code on disciplinary and grievance procedures and, if so, how much should any awards be adjusted by under section 207A of TULR(C)A?

2.8 Did the claimant contribute to his dismissal and, if so, how much should any compensation awarded be reduced by to reflect this?

The Facts

3 The claimant began his employment with the respondent on 6 October 2012 and was employed latterly as a Dental Laboratory Manager. The claimant was appointed to the Manager's role on 5 March 2015. The respondent company is a dental laboratory which makes dentures, crowns, bridges, gumshields and other dental products for NHS dentists and employs 22 employees.

4 It is common ground that the claimant signed a statement of particulars of employment when he began his employment as a Dental Technician and this can be seen at pages 1-11 of the Tribunal bundle. The claimant signed a second statement of particulars of employment when he was appointed as a Dental Laboratory Manager and this can be seen at pages 13-24 of the bundle. The claimant's evidence is that he was not provided with a copy of either of the statements of particulars at the time he signed them, although he read them prior to signing both statements. The claimant's evidence is that he only received copies of the signed statements in the course of preparations for this Tribunal hearing.

5 The claimant was expected to work from 7:30am to 5:30pm five days per week, Monday to Friday, however, it is common ground that the claimant would attend work regularly at around 5:30am each day and performed in the region of two hours of unpaid work for the respondent company each day. The respondent accepts that the claimant's work was to a very high standard and this was the reason why he was promoted in 2015 to the position of Dental Lab Manager.

6 It is common ground that the respondent does not have a staff handbook or any other documents in which policies and procedures relating to the claimant's employment can be found. The only reference to a disciplinary procedure is that written on page 18 of the Tribunal bundle, which is a small paragraph in the claimant's statement of particulars. This states "The company reserves the right to discipline or dismiss an employee with less than 12 months of continuous

service without following company procedures. The company reserves the right to dismiss an employee following any violent or aggressive conduct without following company procedures. The company reserves the right to dismiss an employee after receiving a verbal and written warning without notice." Mr Laidlaw accepted in cross-examination that the respondent company does not have a procedure in place which defines gross misconduct or sets out the procedure for investigating any complaints or issues relating to disciplinary matters. Mr Laidlaw's evidence is that it would be a matter of common sense for employees to understand what was required of them and the process that would be adopted by the company in response to any issues of disciplinary or grievance matters.

7 The respondent's evidence is that the claimant is the most aggressive person that Mr Laidlaw has met and at paragraph 9 of his witness statement he states that six employees have left his business because of the claimant's attitude. However, Mr Laidlaw accepted that Ms Bell had been offered more money to work elsewhere and Ms Hunter and Mr Jones both wanted to work part-time which he would not allow in his practice. I note that none of the six employees that Mr Laidlaw says left because of the claimant's attitude have attended this hearing to give any evidence.

8 Mr Laidlaw says that there was an incident between the claimant and Mr Ian Grant, alongside whom the claimant worked, in October 2016. The claimant admits that he had a disagreement with Mr Grant on 13 October 2016 and he says that Mr Grant had been aggressive towards him and pointed his finger in his face, at which point the claimant had pushed Mr Grant away from himself as a form of self-defence. The claimant accepts that he apologised to Mr Grant the following day and they both shook hands and continued working together. Mr Laidlaw relies on the documents at pages 25 and 26, which he says were notes written by his wife on the basis of information that he had given to her about the incident on 13 October 2016. I note that, although Mrs Laidlaw was present at the Tribunal hearing, she was not called as a witness to give any evidence about when the documents at pages 25 and 26 were created and the circumstances surrounding their creation. It is common ground that the claimant did not see the documents at pages 25 and 26 in October 2016, the evidence of the respondent being that Mr Laidlaw had offered to show the claimant the documents but that he had shrugged his shoulders and said, "Whatever". However, the claimant's evidence is that he was not told anything about the notes which had been made by the respondent, he was not offered the opportunity to see them and that he saw them for the first time in preparation for this hearing. Given that Mrs Laidlaw has not given any evidence to this Tribunal about how these documents were created by her and when they were created by her, I prefer the evidence of the claimant that he was unaware of these documents, particularly as both parties agreed that the claimant had not seen these documents prior to this hearing. The document at page 26 purports to relate to an event on 17 February 2017 where another argument ensued between the claimant and Mr Grant. The claimant says that Mr Grant was cherry-picking the work that he wished to do and that he had previously complained to Mr Laidlaw about Mr Grant's laziness and Mr Laidlaw accepted in cross examination that the claimant had made such a complaint. However, Mr Laidlaw's evidence is that Mr Grant was nearing retirement and could not be expected to change the way he worked and that the

claimant should just accept the situation. Mr Laidlaw says the claimant was issued with 2 verbal warnings by him relating to the incident s in October 2017 and February 2017. The claimant's evidence is that he was not given any warnings by Mr Laidlaw and that the documents on pages 25 and 26 of the bundle are wholly incorrect.

9 On 19 February 2018 the claimant was working in the wax room when he says he received some primary models and major models, but when he examined the quality of the work he found that it was entirely unsatisfactory and they would have to be rebased which would mean a further 20 minutes of work in order to bring them up to a standard which he could use. The claimant says he was surprised that the major model had been sent through to the wax room with such poor trimmings and so he decided to take the models back into the plaster room to show whoever had done the trimming that it had been done incorrectly. It is common ground that the claimant asked who had done the models and on finding that it was Mr Laidlaw's youngest son, Leon Laidlaw, the claimant had said something along the lines that he could not use the models because "they are shit". It is common ground that the claimant said these words in response to his colleague, Neil Wetherby, suggesting that the claimant use the first models instead and went on to suggest that the claimant could rebase the second models himself as he had been doing "nothing all morning". The claimant was clearly upset by this suggestion as he had been in work from approximately 5:00am and also because Mr Wetherby was supposed to be training Leon Laidlaw, who had only been there for three weeks.

10 It is common ground that both Mr Wetherby and the claimant left the plaster room at this point. The claimant's evidence is that Mr Wetherby left the room in order to go and smoke a cigarette and that he had left the room in order to return to his own working area and that he had not been following Mr Wetherby. However, it is common ground that whilst in the corridor Mr Wetherby shouted to the claimant, "I'm going to smash your face in" and this was followed by raised voices between Mr Wetherby and the claimant. Other members of staff were present at the time and it is evident that the claimant returned to his room and Mr Wetherby continued on his way to smoke his cigarette. However, there is a conflict in the evidence as to whether any member of staff had to intervene between the two men and the claimant's evidence is that there was a distance of at least 10 yards between them and there was no need for any member of staff to intervene.

11 It is common ground that Mr Laidlaw was not in the office at the time of the disagreement between the claimant and Mr Wetherby because he was absent on annual leave. Mr Laidlaw and his wife returned from holiday on the afternoon of 19 February 2018 and they were told by their daughter, Chloe, who also works at the respondent's business, about the incident between the claimant and Mr Wetherby and the fact that the claimant had "had a go" at Leon, her younger brother, about his work. Mr Laidlaw says that Chloe told him that the claimant and Mr Wetherby had an argument and that she had to get between the two of them in order to diffuse the situation. Mr Laidlaw says he told Chloe to write down what she had told him in the form of a statement and this can be seen at page 30 of the bundle. I note that the statement at page 30 does not make any reference to what the claimant said to Leon Laidlaw and it makes no reference to Mr Wetherby making any threats against the claimant in the corridor.

12 Mr Laidlaw says that later that day he interviewed Susan Athey, David Birchall, Kathleen Allen, Neil Wetherby, Leon Laidlaw and Ross Laidlaw. Their statements can be seen at pages 27, 28, 29, 31, 32 and 33, respectively. Mr Laidlaw says he asked his wife to make the notes which appear at pages 34 and 35 of the bundle which sets out his findings from his interviews with the members of staff. Mr Laidlaw says he planned to speak with the remaining employees on the morning of 20 February 2018.

13 On 20 February 2018 the claimant attended work early, as usual, and Mr Laidlaw, who had also gone into work at around 5:00am that morning, told the claimant to collect his things and leave the business immediately. It is common ground that the claimant was not invited to a disciplinary hearing and it is also common ground that Mr Laidlaw did not tell the claimant at the time of his dismissal on 20 February the reasons for his dismissal. Mr Laidlaw's evidence is that it would have been obvious to the claimant as to the reasons why he was being dismissed at that time.

14 Mr Laidlaw says he then spoke to the remaining members of staff and obtained witness statements from them and these can be seen at pages 36, 37, 38, 39 and page 40 of the Tribunal bundle.

15 The respondent's evidence is that on 20 February 2018 Mr Wetherby was issued with a written warning and a copy of this can be seen at page 41 of the bundle. The warning records that it related to an altercation between the claimant and Mr Wetherby, that this was Mr Wetherby's first warning and that he was told that his behaviour was unacceptable and was not to be repeated.

16 The claimant's evidence is that he was told by Mr Laidlaw on 20 February to "pack his things" and to leave the premises straightaway, which he took to mean that he had been sacked. He claims that he was not surprised by the actions of Mr Laidlaw because he had been receiving silent treatment from almost everybody at the respondent's place of work for the preceding three weeks and he believed that Mr Laidlaw had used the incident the previous day as a way to remove him from the business.

17 The claimant sent an e-mail to Mr Laidlaw the week after he had been dismissed, a copy of which can be seen at pages 42-43 of the bundle, asking for the reasons for his dismissal, a copy of his contract of employment, evidence from the investigation and payment for his notice period and holidays which had been accrued. The claimant asked for the respondent to reply within 7 days. The respondent replied to the claimant on 26 February 2018, a copy of which can be seen at page 44 of the bundle, enclosing the claimant's P45 and payment of his accrued and outstanding holiday entitlement. The letter states, "As you are aware the reason for your dismissal is because of your conduct on 19 February 2018 which was both hostile, intimidating and inappropriate. As explained your conduct amounts to gross misconduct which warranted summary dismissal." Mr Laidlaw accepted in cross-examination that he had not made the claimant aware of the reasons for his dismissal previously and he had not explained to the claimant that his conduct amounted to gross misconduct and therefore this letter was, at best, misleading and inaccurate. The respondent did not provide the claimant with a copy of his contract of employment, as requested, at this point.

18 The claimant wrote to the respondent on 5 March 2018, as set out at page 45 of the bundle. The claimant informed the respondent that he was appealing against

his dismissal and he wished to raise a grievance. The claimant makes it clear in this letter that he was unaware of the reason for his dismissal because the reasons had not been provided to him on 20 February 2018. The claimant also sets out in this letter that the respondent had failed to follow the correct procedure with regards to the dismissal and he asked the respondent to provide the specifics of the allegations and the findings of any investigation undertaken. The claimant made a further request for a copy of his contract of employment and he requested a hearing to be arranged.

19 The respondent wrote to the claimant on 13 March 2018, as can be seen at page 46 of the bundle, enclosing a copy of the claimant's contract of employment. The respondent provided the claimant with copies of the statements it had gathered as part of its investigation and this was done under cover of a letter dated 21 March 2018, as set out at page 47 of the bundle. The claimant was requested to attend an appeal hearing on 5 April 2018 and he was asked to provide any further evidence he would like the respondent to consider at least three working days prior to the date of the appeal hearing. The claimant say he did not personally read the statements produced by the respondent, but his wife read them out to him and he was aware of their contents.

20 The claimant attended the appeal hearing on 5 April 2018 and a copy of the notes the claimant took with him, by way of an aide memoire, can be seen at pages 48A to 48E of the bundle. These are notes which the claimant prepared, with the assistance of a commercial solicitor, prior to the appeal hearing. A copy of the respondent's notes from the appeal hearing can be seen at pages 49-50 of the bundle. It is common ground that the appeal hearing lasted a maximum of five minutes.

21 The claimant's evidence is that there was no real opportunity for him to put forward his side of events at the appeal hearing and that he felt the appeal was a complete waste of his time. Mr Laidlaw's evidence is that he was hearing the appeal jointly with his wife and the claimant's view is that Mr Laidlaw's wife would support any decision taken by Mr Laidlaw. The respondent wrote to the claimant on 18 April 2018 with the outcome of the appeal and this can be seen at page 51 of the bundle. The letter states that the decision to dismiss was being upheld because of the claimant's hostile and aggressive behaviour which amounts to gross misconduct and that the claimant's grievance was not upheld because the claimant was aware of the incident and he had previously been warned for his hostile and aggressive behaviour towards other employees. The claimant's evidence is that the appeal was a complete sham.

22 The claimant obtained alternative employment at Mango Dental Technologies, which he started on 12 March 2018, but this was at a significantly lower salary than he had been receiving at the respondent company. Copies of the claimant's payslips from his new employment can be seen at pages 51A and 51B of the Tribunal bundle. The claimant says that his commute to his new employment is longer and he is travelling an extra 25 miles from home each day. The claimant says that the way he has been treated by the respondent has had a very negative effect on him. He had not been looking for a job as a manager because he feels that he has gained some security in his current role. The claimant relies on the schedule of loss which can be seen at pages 80-81 of the Tribunal bundle and asks, in addition to the basic award and loss of earnings, for an uplift of 25%

to be applied because of the respondent's unreasonable failure to follow the ACAS Code. The claimant has not produced any evidence about his pension loss but says he was part of an auto-enrolment scheme with the respondent, as he also is with his current employer. The parties therefore agree that there is no ongoing pension loss.

Submissions

23 The claimant submits that the purported reason for his dismissal was conduct, however the claimant was subjected to silent treatment in the run up to his dismissal which suggests that he may have been dismissed for some other reason. The claimant submits that the respondent did not have a genuine belief in the claimant's misconduct because there was clear evidence before Mr Laidlaw in the statements that he had obtained that the protagonist on 19 February 2018 who was threatening physical violence was in fact Neil Wetherby and not the claimant and this can clearly be seen in several statements where it states that Mr Wetherby had threatened to "smash in" the claimant's face. In light of this, the claimant submits that it is difficult to understand how the respondent founded a genuine belief as there are no reasonable grounds to form such a belief.

24 The claimant submits that there was no procedures or parameters set for an investigation and that there is no written disciplinary or grievance procedure in place for employees to understand what their rights are and how to challenge them. In the absence of such a procedure Mr Laidlaw does not appear to address his mind to the ACAS Code. The claimant submits that the reason for the investigation appears to be prompted by the complaint made by Mr Laidlaw's daughter. However, her written evidence is unreliable as she omits in her statement the fact that the claimant was the victim and that Mr Wetherby was threatening violence against him. In all the circumstances, the claimant submits that the respondent failed to carry out a reasonable investigation. The claimant submits that the respondent's position was that Mr Laidlaw was reacting to a complaint made by his daughter that his youngest son had been bullied in the workplace and that he failed to consider recusing himself due to a conflict of interests. The claimant submits that the respondent accepted in cross-examination that he did not consider accessing independent human resources advice or assistance and that he took the decision on the evening of 19 February to dismiss the claimant before giving the claimant any opportunity to comment on the allegations against him or to give his version of events.

25 The claimant submits that the alleged incident with the claimant and Mr Grant should be approached with caution because the claimant did not know that he had even been given a warning at that time. The claimant submits that he was given responsibility as a manager but he was not provided with any training on how to ensure the high quality of the work or how to deal with incidents like Mr Grant putting his finger in the claimant's face and being lazy in the workplace. Indeed, the respondent's evidence was that he provided no assistance to his manager and he was happy to gloss over the laziness of Mr Grant and took no action when the claimant complained about it. Further, the lack of disciplinary procedure means that we do not know the date by which any warnings would have lapsed and it appears that the respondent does not know such a date either.

26 The claimant submits that there was a heated exchange between the claimant and Mr Wetherby on 19 February 2018 where Mr Wetherby issued threats against the claimant which resulted in Mr Wetherby being issued with a written warning and the claimant being summarily dismissed. There was no consideration given at all by the respondent to action short of dismissal and therefore, the claimant submits that the dismissal was not within the band or range of reasonable responses. The claimant submits that there is inconsistency of treatment by the respondent in respect of the claimant and Mr Wetherby and the heated exchange between them, where the claimant stated, "they are shit" when referring to the quality of the work produced cannot fairly give rise to summary dismissal, especially where two people are involved in the altercation and one is not dismissed.

27 The claimant submits that there is a clear breach of the ACAS Code on Disciplinary and Grievance Procedures as the claimant was not given an opportunity to comment on the dismissal at all. However, even after the dismissal, the appeal was heard by the original decision maker and therefore it cannot be a fair approach to the procedure.

28 The claimant submits that Mr Laidlaw's evidence should be approached with caution because his evidence has been misleading, particularly in the letter at page 44 of the bundle in which Mr Laidlaw says, "As you are aware" and "As explained", both of which he accepted in cross-examination were incorrect and misleading. Further, if the claimant had indeed been the most aggressive person the respondent had met then there would be far more evidence of matters on the claimant's disciplinary record than a verbal warning of which he was unaware.

29 The claimant submits that if a fair procedure had been applied by the respondent then the claimant would not have been dismissed because he is a hard worker and there are many positive features about his employment, such as undertaking two hours of unpaid work per day.

30 The claimant submits that he concedes he did say that the work was "shit" and he did approach Mr Wetherby and spoke to him about the quality of the work, however with regard to contributory fault, the claimant submits that any contribution would be minimal, if at all, particularly as the claimant was the one that was threatened by Mr Wetherby.

31 The claimant submits that the figures in the schedule of loss are, by large, agreed with the respondent. In particular, the basic award and the claimant's losses to 12 March are agreed, as is the difference in the claimant's salary as set out at page 81 of the bundle. With regard to mitigation, the claimant submits that he has been dismissed for gross misconduct and he has gone out of his way to find a job very promptly, within four weeks of his dismissal, however the reality of finding another job at the same level as the one he had with the respondent when he is approaching 60 years old needs to be taken into account and he submits that he cannot be criticised for not finding alternative employment as a manager.

32 The respondent submits that the losses claimed by the claimant after 12 March 2018 do not flow from the dismissal because the claimant has said that he is happy in his current job and he has chosen not to seek the managerial role.

33 The respondent submits that there was an incident with Mr Grant in 2016, but the matter was not taken any further because Mr Grant did not want to pursue it at that stage. The respondent accepts that the warning was not labelled as a written warning, but submits that it was legitimate to consider it in light of the February incident which precipitated Mr Grant leaving the business.

34 The respondent submits that the difference in the accounts given by the respondent's employees during the investigation can be put down to memory. However, there was sufficient evidence in front of the respondent to form a view that the claimant was guilty of gross misconduct.

35 When reviewing the actions of the respondent, the respondent submits it is not enough to say that the dismissal on 20 February was unfair due to a lack of process, but the Tribunal has to look at the whole process and include the appeal hearing of 5 April which did give the claimant an opportunity to state his case. The respondent submits that the claimant chose to ignore the statements taken by the respondent, but he had an opportunity to challenge them and failed to do so.

36 With regard to the argument of inconsistent treatment, the respondent submits that the claimant had "form" for this sort of behaviour and therefore this was sufficient to tip the balance in differential treatment and in itself is not a reason for finding the dismissal was unfair.

37 The respondent relies on the case of **Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374** and submits that where previous warnings have been given in good faith it was open to the respondent to take them into account even if they are spent warnings, especially where the claimant has not challenged the warning.

38 With regard to the process, the respondent submits that the deficiencies with the dismissal procedure can be cured on appeal.

39 The respondent relies on the case of **Nelson v BBC** and reminds the Employment Tribunal that, in order to make a finding of contributory fault, there has to be something culpable, which there was in this case, and it was unacceptable. The matter of the behaviour does not have to amount to a breach of contract in itself or lead to a dismissal in order for it to be taken into account. However, here it was the claimant's conduct itself that led to his dismissal and therefore he is the maker of his own misfortune and the respondent submits that contributory conduct should be assessed at 100%.

40 With regard to the failure to follow the ACAS Code on Disciplinary and Grievance Procedures, the respondent submits that the uplift that should be applied in this case is 10%, at most, because there was an appeal and the claimant failed to engage properly with that appeal and the respondent submits that this only applies to the compensatory award, not the basic award.

The law

41 The starting point with any unfair dismissal claim is section 98 of the Employment Rights Act 1996 and in particular subparagraph (4) which states:

98 General

(4) 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.

42 I refer myself to the leading case of **British Home Stores Limited v Burchell [1980] ICR 303** in which the Employment Appeal Tribunal set out the test to be applied in dismissal cases. The questions to be asked by the Employment Tribunal are as follows:

(1) Did the respondent genuinely believe the claimant to be guilty of gross misconduct?

(2) Did the respondent have reasonable grounds upon which to sustain that belief?

(3) At the stage at which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

Provided the employer has a reasonable belief that the employee was guilty of gross misconduct, it is generally irrelevant that the employee did not consider the behaviour to be inappropriate.

43 I refer myself to the case of **J Sainsbury Plc v Hitt [2003] ICR 111** in which the Court of Appeal observed that the need to apply the objective standards of the reasonable employer applies as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss.

44 I refer myself to the case of **Taylor v OCS Group Limited (2006) ICR 1602** in which the Court of Appeal held that defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal.

Conclusions

45 Applying the law to the facts I find that the respondent has shown that the reason for the claimant's dismissal related to conduct and the claimant has failed to provide any evidence to this Tribunal that there was an alternative reason for his dismissal or any evidence relating to the alleged silent treatment that he says he was subjected to prior to the dismissal. There clearly was an incident between the claimant and Mr Weatherby in the work place on 19 February 2018 and this was relied upon by the respondent to dismiss the claimant.

46 I shall deal with issues numbers 2.2, 2.3 and 2.4 altogether because they are inter-related and arise out of the guidance given in **British Home Stores Limited v Burchell**. The respondent's genuine belief and the reasonable grounds upon which to sustain that believe all stem from the nature and quality of the investigation carried out by the respondent. Therefore, I shall deal with the respondent's investigation before addressing the other matters. In this particular

case, applying the guidance in **J Sainsbury Plc v Hitt**, I find that the respondent had not carried out as much investigation into the matter as was reasonable in the circumstances. In particular, Mr Laidlaw's evidence was that he made the decision to dismiss the claimant on the evening of 20 February 2018, at which point he had spoken to six employees in addition to his daughter. He obtained five additional statements from employees the following day, after the claimant's dismissal, which did not form part of the initial investigation. Further, the respondent did not ask the claimant to provide his version of events and the claimant's views were not considered at all as part of the respondent's investigation. I find that that Mr Laidlaw was emotionally involved with the investigation and its outcome as the complaint was made by his daughter, who lives with him, it related to his youngest son and other family members were also involved with the incident. Mr Laidlaw accepted in cross examination that he gave no thought whatsoever to recusing himself and approaching a third party to carry out an independent investigation into the allegations and his evidence was that he made his decision upon his knowledge of the claimant as being "the most aggressive person I have met" and on the basis of the two alleged incidents between the claimant and Mr Grant in October 2016 and February 2017. Mr Laidlaw accepted in cross examination that his daughter's statement at page 30 of the bundle completely omits the comments made by Mr Weatherby to the claimant on 19 February 2018 and only presents evidence which showed the claimant in a bad light. The statement from Mr Weatherby at page 31 of the bundle, clearly states that he did threaten the claimant and that Mr Laidlaw's daughter was present at the time, however, Mr Laidlaw does not appear to have addressed his mind at all to the inconsistencies in the statements. Mr Laidlaw accepts that Mr Weatherby is close family friend, which I find may have influenced his view of the investigation.

47 In the circumstances, I find that the investigation carried out by Mr Laidlaw on 19 February 2018 fell short of a reasonable investigation in those circumstances as Mr Laidlaw appears to only have been interested in gathering information upon which he could base a decision to dismiss the claimant without hearing from the claimant himself. When looking at the statements obtained by Mr Laidlaw in the round, it appears that Mr Laidlaw was building a case against the claimant in order to dismiss him, without taking into account Mr Weatherby's culpability or the surrounding circumstances.

48 In light of the fact that the respondent carried out an inadequate investigation into the allegations against the claimant on 19 February 2018, I find that the respondent did not have reasonable grounds upon which to sustain a belief that the claimant was in fact guilty of gross misconduct. Whilst there was an argument between the claimant and Mr Weatherby on 19 February 2018, it is clear from the statements, and in particular Mr Weatherby's own statement, that he threatened the claimant with physical violence. It is also clear that the claimant was upset about the quality of the work which had been done by Leon Laidlaw and that he did tell the workers in the wax room that the models which had been made were "shit", however it is unclear whether such industrial language was commonly in use in this particular workplace or not as neither party has presented evidence on this specific point. In any event, as the respondent has no disciplinary procedure in which the definition of gross misconduct might be found, I find that, at its

highest, the conduct of the claimant in talking to his colleagues in such a manner could be classified as misconduct, but not gross misconduct.

49 I am not satisfied that, on the balance of probabilities, the claimant was given a formal warning by the respondent on 13 October 2016 or the 17 February 2017, as alleged. In particular, I am satisfied that the claimant had never seen the documents at pages 25 and 26 of the bundle relating to these purported warnings prior to the disclosure of documents for this hearing. The respondent does not have a procedure for giving warnings to employees and it was evident from Mr Laidlaw's evidence that the claimant has never been shown these documents. In any event, it is entirely unreasonable for warning to remain live on a worker's record indefinitely and there is no indication on either of these documents that the purported warnings would expire on a given date. I am mindful of the claimant's assertion that the documents at pages 25 and 26 have been created after the event in order to justify his summary dismissal and, given that Mrs Laidlaw could have given evidence to this Tribunal about the origin and creation of these documents but chose not to do so without giving any good reason for this failure, lead me to conclude that the contents of these documents must be treated with caution. Taking into account the guidance given in the case of **Davies v Sandwell Metropolitan Borough Council**, as referred to by the respondent, I cannot find that the claimant was issued with warnings in the past by the respondent or that such warnings were given in good faith. Therefore, I find that it was unreasonable for the respondent to take these matters into account at the time of making a decision about the incident of 19 February 2018.

50 I find that dismissal was not within the range of reasonable responses open to a reasonable employer in these circumstances because the statements gathered by Mr Laidlaw in his internal investigation show that Mr Weatherby was equally, if not more, to blame than the claimant for the altercation which took place on 19 February. However, the respondent has failed to show a genuine or good reason for the inconsistency of treatment in respect of Mr Weatherby and the claimant, particularly given that there was no evidence that that the claimant had ever received a warning from the respondent in the past or that such a warning was still live on his record. However, even discounting the position of the purported warnings, the evidence gathered by Mr Laidlaw shows that Mr Weatherby had threatened physical violence against the claimant whereas the claimant had not physically threatened anyone. As the respondent has no written procedure dealing with disciplinary matters and has provided no definition for what matters might constitute gross misconduct, I find that dismissal was not within the range of reasonable responses open to reasonable employers in these circumstances.

51 The respondent's own evidence is that the company does not have a disciplinary, grievance or appeal procedure, despite the requirement that such procedure should be set out in the statement and terms of conditions of employment or be referable to in a separate document, such as a handbook or in policies and procedures which might be available on an intranet. It is common ground that Mr Laidlaw did not inform the claimant about the nature of the complaints made against him or provide him with an opportunity to respond to the such complaints before making a decision about the termination of his employment and, therefore, I have no hesitation in finding that the respondent did not apply and follow a fair procedure in respect of the claimant's dismissal. I have considered Mr Winthrop's submission that the procedure should be looked at as a whole, in accordance with

the guidance given in the case of **Taylor v OCS Group Limited**, and therefore the question arises as to whether the imperfections with the dismissal procedure can be remedied on appeal. In this particular case, the appeal hearing was conducted by Mr Laidlaw and his wife, Mr Laidlaw being the original dismissing officer, and the hearing itself only lasting five minutes. I find that the claimant had not been in a position to challenge the reason for his dismissal at the time that he was dismissed on 20 February and that this failing rendered his dismissal unfair. Whilst the claimant may not have read the witness statements produced by the respondent himself, his evidence was that his wife read the statements to him and therefore he was aware of their contents. Therefore, I find that the claimant did engage with the appeal procedure, however the notes from the appeal hearing at pages 49 and 50 and the outcome letter at page 51 of the bundle demonstrates that the respondent did not address its mind to whether the claimant had sufficient grounds to challenge the respondent's reasons for dismissal. I find that this is not a case where there were some imperfections with the dismissal procedure which could be cured on appeal, but, rather this is a case where there was no dismissal procedure at all and the claimant was prevented from challenging the respondent's reasons for dismissal which rendered the dismissal unfair and was incapable of being remedied on an appeal by the holding of a five minute hearing which did not address the claimant's concerns. Therefore, I find that the claimant's dismissal was procedurally and substantially unfair.

52 Mr Laidlaw accepted in evidence that he would have handled the dismissal differently, knowing what he does now about the process and procedure involved, however, his evidence was that this would not change the outcome because he believes the claimant to be guilty of aggressive conduct. Looking at all the circumstances of the case in the round, I find that, even if a fair procedure had been adopted and applied by the respondent, this particular respondent would still have dismissed the claimant. However, I believe the correct question to ask is whether a reasonable employer would have dismissed in those circumstances and I find that, as the claimant was at the highest guilty of misconduct, rather than gross misconduct, a reasonable employer would have had imposed a sanction short of dismissal and therefore the claimant would not have been dismissed even if a fair procedure had been adopted and applied. The adoption of a fair procedure would have highlighted the inconsistency of treatment between the claimant and Mr Weatherby and, in those circumstances, the claimant would not have been dismissed. In the circumstances, I find that the principals as set out in the case of **Polkey v AE Dayton Services Limited** do not apply in this case as there is no chance that the claimant would have been dismissed if a fair procedure had been followed.

53 I find, from the evidence presented by the respondent, that the respondent did not address its mind to adopting and applying a fair disciplinary procedure or the ACAS Code of Practice on Disciplinary and Grievance Procedures. The respondent made no effort to attempt to put into place the provisions of the ACAS Code prior to dismissing the claimant in that the claimant was not provided with details of the complaints made against him or given an opportunity to challenge that evidence and present his own version of events. Although the respondent did hold an appeal hearing, the hearing itself only lasted five minutes and the decision was made, in part, by the dismissing officer and therefore did not meet the requirements of the ACAS Code sufficiently. In all the circumstances, I find that

the respondent's failure to follow the ACAS Code was an unreasonable failure and, in particular, there is no evidence that the respondent made any efforts to find out about the Code at all. Apply the provisions of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 I find that, as the respondent made a complete failure to apply the ACAS Code and that, as this failure was unreasonable, it is just and equitable to increase the compensatory award by 20%.

54 With regard to the question of whether there was any culpable or blameworthy conduct on the part of the claimant which could be categorised as contributory conduct under Section 123 (6) of the Employment Rights Act 1996, I find that the respondent has failed to adduce any evidence from the people involved in the incident on 19 February 2018, other than the statements gathered by the respondent for the purposes of dismissing the claimant. However, I note that none of the individuals who provided witness statements to the respondents has attended this Tribunal to give any evidence about the incident itself. The only person I have heard from is the claimant himself who concedes that he did tell his fellow workers that the work which had been done on 19 February 2018 was "shit" and that he had a heated exchange, with raised voices, with Mr Weatherby in the corridor at the respondent's place of work. In order to make a finding of contributory conduct, I note that it is insufficient to base this finding on the respondent's reasonable belief and what is required is a finding by this Tribunal in respect of what actually happened on 19 February. As the only direct evidence I have is that of the claimant, I find that the claimant did have a heated exchange with Mr Weatherby and he did state that the work was "shit". In the circumstances, I find that the claimants conduct was culpable or blameworthy, applying the guidance as set out in the Court of Appeal decision in **Nelson v BBC (No.2) 1980 ICR 110** as it can be categorised as unreasonable conduct on the part of the claimant. I note that the uncontested evidence of the claimant at paragraph 17 of his witness statement is that "this is no difference to the everyday language used at the lab" and it has not been suggested by the respondent that at any stage during these proceedings that foul language is not tolerated at the respondents work place. In the circumstances, although it was unreasonable for the claimant as a manager to get into such a heated discussion with members of the workforce and such conduct would, therefore, be unreasonable in all the circumstances, I find that it would just and equitable to reduce the claimant's compensatory award under Section 123 (6) of the Employment Rights Act 1996 by 10% and the basic award by 10% pursuant to section 122(2) of the Employment rights Act 1996 on a just and equitable basis on the grounds of the claimant's conduct prior to the dismissal.

55 I find that the claimants claim for unfair dismissal is well founded and the respondent is ordered to pay to the claimant a basic award which has been agreed by the parties in the sum of £3,667.50, less a 10% reduction due to the claimant's conduct prior to the dismissal, pursuant to section 122(2) ERA 1996.

56 The parties have agreed that the claimant incurred a net loss of earning from the date of dismissal to the date he began his new employment, 12 March 2018, (four weeks at £536.28) in the sum of £2,145.12. The parties also agree that the claimant incurred a partial loss of earnings from 12 March 2018 to the date of this hearing, a period of 13 weeks in the sum of £3,969.90, however, I am mindful of the respondent's submission that the claimants loss ceased on 12 March 2018 on

the basis that he did not look for a managerial post because he was happy with his current job, although it is at a reduced rate of pay and it is not at management level. As the respondent has failed to adduce any evidence at all of any alternative jobs the claimant could have applied for after the 12 March 2018 to the date of this hearing, and taking into account the claimant's evidence that he would rather have had the security of his current job than the uncertainty of trying to find a managerial position given the circumstances surrounding the reasons for his dismissal, I find that the respondent has failed to prove that the claimant has failed to mitigate his losses and, therefore, I award the claimant his partial loss of earnings from 12 March 2018 to the date of this hearing in the sum of £3, 969.90.

57 The claimant has claimed a future loss of earnings for a period of 22 weeks in the sum of £2,911.26 and this figure has been agreed by the respondent. Bearing in mind my findings regarding the respondent's failure to prove that the claimant had failed to mitigate his losses and my findings on the claimant's reasons for currently working in a lesser role, I award the claimant 22 weeks of loss of earnings in the sum of £2,911.26 on the basis that the claimant should be able to find a position equivalent to the that he held at the respondent company within the next 22 weeks.

58 With regard to the claimant's claim for additional expenses which he has occurred due to the extra distance that he has to travel in order to attend his current place of employment, I note that expenses can be awarded under Section 123 (2) (a) of the Employment Rights Act 1996 as it states that assessment of an employee's loss shall be taken to include any expenses reasonably incurred by the complainant in consequence of the dismissal. Mr Winthrop has tried to argue that these expenses should be confined to those incurred in looking for new employment, however I note that he does not cite any case law for that proposition and I note that Tribunals have readily awarded removal expenses, school fees, business set up costs and legal costs in cases where the Tribunal has found that those expenses have reasonably been incurred in consequence of a dismissal. In this case, I find that the reason why the claimant has had to travel an additional 50 miles per day, five days a week, is because he had to accept employment at a place of work which is further away from his home as a direct result of his dismissal by the respondent. Therefore, I award the claimant his travel expenses for a period of 48 weeks at the rate of £112.50 per week, as set out in the schedule of loss, in the sum of £5,400.00 in accordance with Section 123 (2) (a) ERA 1996.

59 The parties agree that the claimant is entitled to the sum of £350.00 in respect of the loss of his statutory rights.

60 The total amount of compensation payable by the respondent to the claimant is as follows:

Basic Award	£3,667.50
Less conduct before dismissal under Section 122 (2) and (3) 10% reduction	£366.75
Total Basic Award	£3,300.75

Compensatory Award

Loss of earnings from date of dismissal to 12 March 2018	£2,145.12
Loss of earnings to date of hearing	£3,969.90
Subtotal =	£6,115.02
Increase under Section 124 (A) ERA of 20%	£1,223.00
Subtotal =	£7,338.02
Less contributory fault 10% reduction Section 123 (6)	£ 733.80
Total prescribed element	£6,604.22
Future loss of earnings 22 weeks	£2,911.28
Expenses 48 x £112.50	£5,400.00
Loss of statutory rights	£350.00
Subtotal =	£8,661.28
Increase under Section 124A ERA of 20%	£1,732.26
Subtotal =	£10,393.54
Less Contributory fault 10% reduction Section 123 (6)	£1,039.35
Subtotal =	£9,354.19
Total compensatory award	£15,958.41
Total award =	**£19,259.16**

(a) Grand total £19,259.16

(b) Prescribed element £6,604.22

(c) Period of prescribed element from 20 February 2018 to 12 March 2018

(d) Excess of grand total over prescribed element £12,654.94

Regulation 4 (2) of the Employment Protection (Recoupment of Job Seekers Allowance and Support) Regulations 1996 apply.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1 November 2018

JUDGMENT SENT TO THE PARTIES ON

1 November 2018

AND ENTERED IN THE REGISTER

Miss K Featherstone

FOR THE TRIBUNAL

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2501168/2018**

Name of case(s):	**Mr D Howard**	v	**Waterside Dental Laboratory**

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: **1 November 2018**

"the calculation day" is: **2 November 2018**

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

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

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

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

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

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

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

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