EMPLOYMENT TRIBUNALS

Claimant: **Mr Joseph Coldron**

Respondent: **Lionweld Kennedy Flooring Limited**

Heard at: **East London Hearing Centre**

On: **18, 19, 20 August and 3 September 2021**

Before: **Employment Judge Russell**

Representation:
For the Claimant: **In Person**
For the Respondent: **Ms M Stanley (Counsel)**

JUDGMENT

1. **The claim of unfair dismissal succeeds. The Claimant is entitled to a basic and compensatory award.**

2. **A fair procedure would have lasted four weeks and there is a 90% chance that the Claimant would have been fairly dismissed thereafter.**

3. **The Claimant contributed to his dismissal by reason of his foolish conduct. The basic and compensatory awards are each reduced by 75%.**

4. **The claim of breach of contract in respect of dismissal without notice fails.**

5. **Claim for unauthorised deduction from wages in respect of pay and/or holiday succeeds. The Respondent must pay the Claimant the sums of £1,967.20 for wages and £496.23 for holiday pay**.

6. **There shall be a 10% uplift by reason of the Respondent's unreasonable failure to comply with the ACAS Code.**

REASONS

1. By a claim form presented to the Employment Tribunal on 28 May 2019, the Claimant brought a complaint of unfair dismissal following his summary dismissal for gross misconduct. By a second claim form presented on 13 June 2019 the Claimant also brought claims for notice pay, wages and holiday pay. The Respondent resisted all claims. At the outset of this hearing, the Respondent conceded that the dismissal was unfair as it had failed to follow a fair procedure but maintained that it was not wrongful and that there should be no financial award.

2. The proceedings were briefly stayed due to concurrent proceedings in the High Court in relation to a breach of warranty given by the Claimant to the Respondent in an Asset Purchase Agreement. Judgment in default was entered in favour of the Respondent and has not been appealed. The stay on the Tribunal proceedings was then lifted and the case was listed for a final hearing.

3. I heard evidence from the Claimant on his own behalf and I heard evidence from Mr M Sayer on behalf of the Respondent. I was given an agreed bundle of documents and read those pages to which I was taken during the course of the evidence. I resolved only those disputes of evidence necessary to decide the issues in the case.

Findings of Fact

4. The Claimant commenced employment on 1 December 2016 with The Grating Company. At the time The Grating Company was owned by the Claimant's father. The Claimant's initial position was Senior Proposals Manager. A copy of his contract was not in the bundle. Over time, he worked up to the position of Sales Manager. I accept as reliable and plausible the Claimant's evidence that his father and Mr Wrigley ran the companies, albeit with the Claimant's help with sales.

5. The business was successful, reaching a turnover of £1.4million per annum, and came to the attention of the Respondent, a wholly owned subsidiary of Hill & Smith Holdings Plc, as a potential acquisition target. Negotiations were carried out by representatives of Hill & Smith and with the Claimant's father and Mr Wrigley as owners of The Grating Company Limited and Pro Composites Limited, a related company. Contemporaneous emails show that the Claimant was involved in the negotiations on behalf of The Grating Company to a limited extent prior to the APA being concluded. He provided a representative of Hill & Smith with access to The Grating Company's accounting software package (QuickBooks) and to their bookkeeper (Shmunky). I accept the Claimant's evidence as inherently plausible that his father worked on the accounts prior to acquisition but that he had asked Shmunky to get all of the financial records up to date during the negotiations.

6. On 27 April 2018, the parties entered into an Asset Purchase Agreement ("APA"), a copy of which was in the bundle, for an initial purchase price of £445,133.59. The sellers as defined in the APA are the two corporate entities (the Grating Company and Pro Composites Limited). The Claimant, a Mr Brotherton and Mr Wrigley are named as "key persons". Prior to being named a key person, the Claimant took independent legal advice.

7. Clause 5 of the agreement deals with debtors and creditors. Clause 5.2 provides that with effect from the completion date, all debtors would be payable to Hill & Smith as buyer. They would be responsible for collecting debts but the sellers were required to use all reasonable endeavours to assist in collection of the debts and to hold any payments received on trust for the buyer.

8. Clause 11 provides for a joint and several warranty by the selling companies and the named key persons in the terms set out in Schedule 3. One is an express warranty about debtors, particularly that: (i) the information about debtors provided in Schedule 13 is true, complete and accurate, (ii) no part of the debtors is overdue by more than 120 days, (iii) the debtors will be recoverable in full in the normal course of business and in any event not later than 120 days after completion, and (iv) that no part of the debt is subject to a right of counterclaim, set off, withholding or other deduction. Schedule 13 lists the debtors for each company separately. For The Grating Company, the list includes Cilantro Engineering, PDR Construction Limited, Hayden Mechanical Electrical Limited, J Reddington, Blue 3, Designer Group, SDC, Deck Joint Limited, MCS Build and various other companies R G Carter. The total value of the debtors for The Grating Company listed in the spreadsheet in Schedule 13 is approximately £450,000. The debtors listed for Pro Composites Limited are just under £97,000.

9. The APA also included a deferred payment mechanism. There was some dispute as to whether this was payable to the companies defined as sellers or to the individuals identified as key persons. For the purposes of this Judgment, I find that it does not matter which is correct. The Claimant clearly anticipated that he would ultimately benefit from the payment if made and acted accordingly. If the conditions for deferred payment were met, the Respondent would be liable for a significant payment whether paid to the key persons directly or to The Grating Company or Pro Composites Limited.

10. Following the conclusion of the APA, the Claimant entered into a contract of employment directly with the Respondent. The APA recognised that the acquisition amounted to a TUPE transfer and the Respondent now concedes that the Claimant's employment transferred to it. The Claimant's job title was Risers & Civils Contract Manager and he was also required to undertake any other duties within his capabilities that the Respondent may reasonably request him to perform. His salary was £43,000 per annum. Clause 7 provided that:

> **The Company is hereby authorised by you to deduct from your salary (which includes for this purpose, salary, pay in lieu of notice and holiday pay) any debts owed by you to the Company.**

11. The holiday year ran from 1 January to 31 December and he had a basic annual entitlement of 25 days plus Bank Holidays. The Claimant was entitled to 4 weeks' notice of termination. Clause 9 provided that the Respondent could terminate employment summarily without notice or pay in lieu of notice for gross misconduct. The disciplinary procedure sets out a list of examples of behaviour falling within the definition of gross misconduct. These include serious negligence that could or does result in unacceptable loss, damage or injury as well as theft, fraud, accepting or offering a bribe, falsification of company records or any dishonesty involving the company, its employees, customers or authorised visitors or attempts to commit such offences.

12. It is evident that the acquisition did not prove as positive as either the Claimant or the Respondent had hoped. Very soon, differences began to appear with regard to the operation of the business, its profitability and in particular the outstanding list of debtors.

13. Following the conclusion of the APA, the Respondent tasked Ms Regan to collect the debtors listed in Schedule 13. On 30 May 2018, she emailed the Claimant, Mr Brotherton and Mr Wrigley as key persons and noted that the opening debtor information required in order to chase the debts was still outstanding. It is clear from the attached schedule that there was significantly more outstanding information required in respect of debtors of The Grating Company than Pro Composites even at that early stage.

14. On 8 June 2018 Ms Regan asked the Claimant to start urgently chasing outstanding customer information which had still not been provided. The Claimant replied to say that he was on it but the information was not provided by him until some time later. Contemporaneous emails show that there were significant queries raised by customers on a number of the outstanding invoices. In broad terms, these included queries as to whether or not variation orders had been raised to authorise additional works and whether the cost of those works were recoverable, whether or not quotes had been turned into invoices before work was undertaken, whether or not there were remedial works required affecting the sums of money that could be recovered and whether or not there were contra invoices to be set off against the apparent debt. Ms Regan and Ms Sally Stabler, an accountant employed by the Respondent, sent emails to clients to recover the debts on the list.

15. Although the APA envisaged that all debtors would be recovered by the end of August, or there about, it is clear from emails sent from September 2018 and onwards that this had not proved possible and that significant outstanding questions remained.

16. In an email sent on 17 August 2018, Mr Sayer was chasing the Claimant for action to recover the debt as information and paperwork was still outstanding in order to do so. It does not appear that the Claimant responded. Mr Brotherton was involved in chasing the Pro Composites debts and significant progress was made. From contemporaneous emails, such as the one sent on 30 August 2018 to which the Claimant was copied, Mr Brotherton was also trying to chase The Grating Company debts. By an email sent on 31 August 2018, the Respondent's General Manager made clear that upon his return from holiday, the Claimant should speak with Mr Brotherton to try and find appropriate paperwork to help chase the debts.

17. A meeting to discuss the debtors took place on 6 September 2018. Mr Sayer again chased the Claimant for an update on 19 September 2018 in anticipation of a report to be given to the group company at the end of the month. On 24 September 2018, the Claimant provided a breakdown list of the debtors and the current position. This was the first of many spreadsheets updated over time to reflect the ongoing debtor situation. The Claimant's first spreadsheets suggested that copy invoices were being sent, amounts were being chased and, in some cases, payment had been made.

18. By October 2018, the Respondent was becoming increasingly impatient at both the delay and what it perceived as a lack of action by the Claimant to chase down payment of the debtors.

19. The majority of the emails chasing payment came from either Ms Regan or Ms Stabler but they sought the Claimant's help in establishing the factual basis of the debts. For example, on 6 November 2018, Ms Regan asked the Claimant to substantiate the work done for a customer who was querying the debt. The Claimant did not respond. Whilst debt collection was not part of the Claimant's contracted duties, it was a reasonable request by the Respondent to ask him to assist with the collection of the debtors given his previous professional relationship with customers who were new to the Respondent. These were reasonable duties falling within the scope of the employment contract.

20. In early October 2018, one of the debtors on the APA list paid £6,219.97 directly to the Grating Company account. On 12 October 2018, Mr Davies asked Mr Wrigley, the Claimant and Mr Brotherton to confirm that the money had been transferred to Respondent pursuant to the APA. The email did not suggest that the money was being held by the Claimant his own account. The Claimant replied some days later to say that he had made a BACS payment on 13 October 2018, he did not state whether this was from his own account or The Grating Company account.

21. When nothing was received, the Claimant was asked to provide details but did not reply. On 22 October 2018, Ms Stabler asked the Claimant to confirm the account into which the BACS payment had been made. The Claimant did not reply. In evidence, the Claimant said that he had agreed to make the payment personally on behalf of Pro Composites as Mr Wrigley and Mr Brotherton did not have the money to pay it themselves. A subsequent disagreement with Mr Brotherton led him to change his mind and he cancelled the BACS payment. This explanation was not given to the Respondent at the time and, in any event, the money was owed to the Respondent under the APA and was not paid.

22. The Claimant denies that the £6,219.97 was transferred into his own account at any time. Mr Sayer relied on information from Mr Brotherton that the Claimant had transferred the money into his own account and the fact that the Claimant had said that he would pay it, not that it was not in his own account. The Claimant's bank statement does not show any transfer of £6,219.97 into his personal account nor a BACS payment on 13 October 2018. The Tribunal was not provided with copies of the relevant bank statements for The Grating Company or Pro Composites. On balance, the Tribunal finds that the Claimant did not transfer the money to his personal account even if he had initially agreed to repay it on behalf of Pro Composites to resolve the issue and comply with the APA. Nor, however, did he ensure that the money was paid from the seller company accounts.

23. On 22 October 2018 the Claimant sent an email purporting to resign from his position, citing a lack of trust and criticising the Respondent for not making the business as successful as anticipated at the time of the APA. Part of the Claimant's complaint was that money was deducted from his wages but his expenses were not properly and fully reimbursed. Consistent with the Claimant's position later in January and February 2019, I find on balance that his outstanding sense of grievance about unpaid expenses was also part of the reason why the £6,219.97 was not transferred to the Respondent in October 2018; he regarded the sums as inter-linked and capable of set off in some way.

24. The Respondent did not accept the resignation and the Claimant remained employed.

25. Throughout October 2018, the Respondent continued to chase the APA debtors and, as time progressed, the spreadsheet was updated to show amounts paid, those due to be paid, those where agreement had been made for payment and those where no agreement had been made as yet.

26. A further debtors' meeting was held on 24 October 2018. The Claimant and Mr Wrigley were asked to deal with some of the outstanding debts with extreme urgency, including a Cilantro debt of £135,000 for variation work where there were no details and a Reddington debt of £42,000. Mr Brotherton was actively chasing debts for Pro Composites and updated the Respondent about the work being done by the Claimant to secure payment of £44,000 from Haydens. On 26 October 2018, Mr Brotherton was still waiting for the Claimant to bring in his computer to pursue further the Haydens debt. The contemporaneous emails are consistent with Mr Brotherton being more active than the Claimant or Mr Wrigley in chasing The Grating Company debtors.

27. Ms Regan requested a further update on debtors from the Claimant by email dated 6 November 2018 as significant information had not been provided. There was no response and she chased the Claimant for the outstanding information on 12 November 2018. On 14 November 2018, Ms Regan again emailed the Claimant saying that she could not act further on the debt without the required information from the Claimant. The Claimant replied that he would be staying late that night to work through the lists.

28. On 12 November 2018 Mr Brotherton, Mr Wrigley and the Claimant sent a joint email proposing a termination of the APA. The Respondent did not accept the proposal.

29. As time progressed, the debtors spreadsheet showed an increasing number of red, unrecoverable debts particularly following the debtors meeting on 19 November 2018.

30. The Claimant was absent from work due to ill health from 22 November 2018 to 16 December 2018. Debtors recovery essentially stalled in his absence. Upon his return, the Claimant sent an email giving an update of his actions to recover the debt from Cilantro and resolve disputes with others on the debtors list. He asked whether Reddington had paid or whether the whole debt was moving to non-recoverable.

31. The extent to which the relationship between the Claimant and the Respondent had deteriorated is clear from an email from Mr Robinson on 19 December 2018 seeking advice on whether the Claimant could be removed without fear of unfair dismissal.

32. On 8 January 2019, a manager at Hill & Smith Holdings provided Mr Sayers with a report summarising the acquisition and subsequent issues with debtor collection. I accept that this report was required because the Board of the parent company were concerned that the benefits of the acquisition had proven to be unrealised. At the date of the report there remained significant levels of uncollected debtors, despite the Respondent's instruction of solicitors to pursue apparently valid claims and work to resolve disputes. The report states:

> "**invoices were raised by [the Claimant] off the back of quotes or orders where the work had not been completed or in some instances started (244K). Whilst [the Claimant] has stated incompetence as the reason for the errors, the value and volume of these indicates that the erroneous invoices were at least in part a deliberate deception intended to result in financial gain for the sellers**".

33. The report also detailed concern about the monies received from debtors which had not been transferred to the Respondent (and may have been retained by the Claimant), debtors setting off sums for defects which could not be contested and a lack of paperwork to support debts for variation works. The report proposed that solicitors be engaged to establish whether there were grounds to terminate their employment and the earn out, as well as recovery action on the APA guarantees. The report recommended that no specific action should be taken against Mr Brotherton as he was junior, not involved in the erroneous invoicing, did not benefit financially from the APA, was performing well and the Respondent wished to retain him.

34. In anticipation of the anniversary of the APA agreement and the issue of whether the deferred payment should be made, emails were exchanged between the Claimant, Mr Brotherton and Mr McNally (Commercial Director for the Respondent). Mr McNally suggested that the debtors had been overstated in the APA. In a joint response on 22 January 2019, the Claimant, Mr Wrigley and Mr Brotherton stated that it had been confirmed in October that for various reasons The Grating Company debtors were incorrect and sought information as to the current position on outstanding debts. It stated:

> **"from what has been told to equal parties the TGC debtor balance was an error completed by their accountants, discussions between equal parties has raised an honest question that acquisition should not have been rushed and due diligence should have been completed by the purchaser and subsequently allowed to be completed by Pro Composites, before Directors names were put to the document, any error could have been spotted prior to acquisition signing and dealt with correctly allowing correct information to go into APA and for all equal parties to understand correctly what they were signing into, on more than one occasion a proposal has been offered for discussion moving forwards with our then GM Kevin Davies but no responses have been received to date".**

35. I accept on balance the Claimant's evidence that Shmunky did not simply provide The Grating Company with accounting software, as suggested by the Respondent. The Grating Company used QuickBooks, a commercially available software system, as seen from the invoices and records disclosed by the Claimant during the course of the hearing. Those invoices also show that Shmunky on occasions posted the initial invoice, amended lines of work and reconciled payments on the accounts. To raise an invoice, Shmunky would require a purchase order, an invoice and a delivery note. I accept the Claimant's evidence that these could be supplied by any employee at The Grating Company who dealt with orders.

36. A significant area of dispute between the parties was about debtors which the Respondent says were "fresh air invoices", in other words sums being claimed for work on the basis of a quote but where the work had not in fact been undertaken. As stated in the report to the Board, the Respondent believed that the Claimant had raised the fresh air invoices as part of a deliberate deception intended to result in financial gain for the sellers of the Grating Company and Pro Composites.

37. In evidence the Claimant strongly denied that he was responsible for fresh air invoices; he had been the Sales Manager and was not responsible for invoicing, indeed he did not know how a quote could be converted to an invoice without paperwork to support the work done. The Claimant's evidence, consistent with the email above, was that there were errors by Shmunky which had been raised with the Respondent as early as October 2018 and which explained the discrepancies in the APA debtor list and the

sums recovered. He relied upon Cilantro invoice 11159 which showed a fluctuating balance and a number of payments, some entered and amended on the same day. The Claimant said that he could not answer further about fresh air invoices, for example Deck Joint, without knowing who had raised the invoice and why.

38. Mr Sayer found nothing unusual in the fluctuating balance on the Cilantro, he regarded it as normal practice for a bookkeeper to allocate payments to particular invoices and to amend entries already put through. Mr Sayer accepted that the Claimant had raised bookkeeper error as an explanation for issues on some of the invoices as early as October 2018 but that as there was no contract between Shmunky and the Respondent, these could not be investigated further by anyone other than the Claimant. Even if there were some errors by Shmunky, Mr Sayer did not find plausible the Claimant's explanations about the fresh air invoices given the period of time spent chasing the debts, the Claimant's changing explanations and the large sums of money involved in what was a very small company. Mr Sayer conceded in cross-examination that he did not know who had raised the fresh air invoices but relied upon the fact that the Claimant had warranted in the APA that they were real debts.

39. During his evidence on 19 August 2021 (day 2 of 3), the Claimant wanted to rely upon some of the QuickBooks records. Whilst the documents were late, they were clearly relevant to the issues of contributory fault and alleged repudiatory breach of contract said to entitle the Respondent to dismiss without notice. I adjourned the hearing until the following day to allow the Respondent time to consider the documents and give instructions to Ms Stanley. In fact, Mr Sayer was unavailable and Ms Stanley maintained that she had not had sufficient time properly to consider the 110 pages which were only in fact disclosed to her at about 5pm on 19 August 2021. In the interests of justice, I agreed to postpone until 3 September 2021 and Mr Sayer could be recalled if needed.

40. The QuickBooks records do not show clearly the value or nature of each item of work or where there were variations. One of the fresh air invoices relied upon by the Respondent was for £44,215.20 said to be owed by PDR Construction Limited but which in fact was entirely for work ordered but not undertaken. The QuickBooks records show this sum as invoiced on 31 January 2018 but not the name of the person who raised the invoice. The description of the work is simply given as "JLR wash bay". The invoice was added onto QuickBooks on 14 February 20018 by Shmunky virtual assistant, a further Shmunky edit on 8 May 2018 and, the same day, the Claimant deleted a blank line on the invoice. Another fresh air invoice was for £28,281.78 for Designer Group, raised on 26 April 2018 by Shmunky for "services" at the Westfield shopping centre but without further detail. A further fresh air invoice for £6,859.15 was raised by Shmunky on 5 October 2017 for unspecified services. There were other edits by Shmunky and the Claimant's only edit was on 8 May 2018 apparently to include the description of the services as "25mm GRP Grating".

41. On balance, there was insufficient evidence for me to find that the Claimant had raised or caused to be raised any of these fresh air invoices, far less that he did so knowing that it was for work which had not been done. Of the 17 invoices disclosed, the Claimant made entries on 9 of them. I find it significant that the Claimant's entries on the QuickBooks records for six of the nine entries were each on 8 May 2018, after the APA had been concluded, the other three entries were minor amendments over the period of a year. I find that the invoices do not show that the Claimant had in-depth involvement with the bookkeeping process as Ms Stanley submits, quite the contrary, his involvement was

limited and largely after the APA consistent with the Claimant seeking to assist in the recovery of the debtors and not in any wrongdoing on his part.

42. As well as the fresh air invoices, the Respondent relied upon the amount of debt which had to be written off due to a lack of paperwork in support of variations. Mr Sayer's evidence was that the lack of paperwork was not the fault of Shmunky, who simply dealt with what they were given, but of the Claimant. In his evidence, the Claimant did not accept that without a variation order the debt would never be recoverable and that variation work would be undertaken on a verbal instruction by the site manager. On the Cilantro debt, he maintained that the problem of recoverability only arose when the Respondent demanded variation orders and essentially that the debt had been written off too easily by the Respondent when it was still recoverable. On balance, I accept the Respondent's case that the ability to recover debts for variation work was significantly undermined by a lack of adequate paperwork and that this was not a bookkeeper error. However, I also accept that debts would not need to be written off simply because of a lack of paperwork and that the Claimant (as Sales Manager at The Grating Company) was not solely responsible for ensuring that the correct paperwork was generated. The lack of paperwork did mean that the Claimant's active involvement in providing information was even more important.

43. On 5 February 2019, an email was sent to Mr McNally and Mr Sayers in connection with the legal advice obtained which suggested that the Respondent's current strategy could result in ongoing liability for suspension on full pay plus a risk of a constructive dismissal and/or breach of contract claim from the Claimant and Mr Wrigley. The proposed strategy is not set out in the email but it is clear that, at that stage, it was not to dismiss the Claimant summarily.

44. Emails were exchanged between January and 8 February 2019 between Mr McNally and the Claimant. Mr McNally sought payment of the money incorrectly paid to The Grating Company account which should have been transferred to the Respondent. The Claimant sought payment of outstanding expenses in order to be able to transfer the money due to the Respondent. Mr McNally regarded these as separate issues and the Claimant's final position was that he would deduct his outstanding expenses from the money owed to the Respondent. The Claimant did not make payment of even this reduced amount.

45. On 18 February 2019, Mr McNally attended the Respondent's premises in Colchester. The Claimant thought that the purpose of the meeting was to discuss the anniversary of the APA. Instead, Mr McNally informed him that his employment was being terminated with immediate effect, without any disciplinary process as he had under two years' service and that he should resolve any disagreement through solicitors. A letter confirming termination without notice or payment in lieu of notice was sent the same day.

46. The Claimant's final payslip showed gross basic salary for the month of £1,967.20 and accrued holiday of £496.23. The Respondent did not make any payment, relying on clause 7 of the contract to recover part of the money not paid by the Claimant in October 2018.

47. Mr Wrigley and Mr Brotherton were also dismissed by Mr McNally on 18 February 2019. Mr Brotherton was subsequently re-instated. I accept as truthful and plausible Mr Sayer's evidence that this was because Mr Brotherton had previously been employed by

Pro Composites which had lower debtors, had worked hard to collect the debtor sums and had considerable success in doing so.

48. By letter dated 18 February 2019 to The Grating Company and Pro Composites Limited, the Respondent required payment of the unrecovered debts in the sum of £493,741.61. The attached schedule suggests that by that date only £18,840.66 had been recovered from the total on The Grating Company debtors list (less than 5% of the total). By comparison, £35,602.11 of the Pro Composite debt had been recovered (about 37%). Judgment in default for £443,654.22 plus interest and costs was entered in the High Court on 9 December 2019.

49. The Claimant wrote to the Respondent on 18 February 2019 challenging the decision to terminate his employment summarily and without any proper process. He asked for a written explanation for the reason for dismissal to be provided and for confirmation that all outstanding expenses, including holiday, would be paid to him.

50. On 20 February 2019, the Respondent replied asserting that the reason for termination was conduct, specifically:

> "**your conduct both before and since our acquisition of the business in relation to the raising of false accounts/billing for work that had not been done; failure to resolve unpaid debts and collect on the book debts; your failure to pay over to the company money due to it which was paid into your account by a customer and the disruptive impact your behaviour within the business has had.**
>
> **…**
>
> **For the avoidance of doubt, I want to make it clear that we believe that we have good grounds to terminate your employment without notice on the basis that your conduct, in terms of both of your false accounting and misrepresentation of the true position of the business, amounts to a repudiatory breach of your contact of employment. The true extent of that breach has only recently become apparent as monies due in relation to book debts are now quite clearly irrecoverable. Your conduct prior to the sale can be relied upon to the same extent that your conduct after the sale – and our decision is based in part on the fact that he misrepresented the financial position to us as well as failing to pursue and recover monies due. Further, you have retained monies paid by a customer which you accept are due to the company. In addition, your behaviour in and around the business has had a negative impact on those working with you**".

51. The Respondent became aware in or around April 2019 that the Claimant had commenced new employment with Deck Safe Solutions Limited. It sent a letter before action to both the Claimant and Deck Safe Solutions Limited requiring the employment to be terminated as it was in breach of the restrictive covenants in the Claimant's former contract of employment with the Respondent. As a result, Deck Safe dismissed the Claimant.

Law

Unfair Dismissal

52. In addition to a basic award calculated according to length of service, age and a weeks' pay (subject to the statutory cap), section 123 ERA provides that the compensatory award shall be such amount as the Tribunal considers just and equitable in

all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The award should compensate the employee for loss and is not intended to penalise the employer.

53. In deciding what is just and equitable in all the circumstances, the Tribunal may reduce compensation if satisfied that the employee could have been fairly dismissed by reason of pre-termination conduct which came to light after his dismissal, **W Devis & Sons Ltd v Atkins** [1977] ICR 662, HL. It is not, however, just and equitable to take into account conduct known to the employer at the time of the dismissal but which it chose not to rely upon, **Devonshire v Trico-Folberth Ltd** [1989] ICR 747, CA. When considering any reduction, the Tribunal must not lose sight of the overall question of fairness and a proper consideration of what would have happened applying the **Burchell** test, **Panama v London Borough of Hackney** [2003] IRLR 278, CA.

54. Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

55. The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is culpable or blameworthy. It may also include conduct which is perverse or foolish, bloody-minded or unreasonable in all the circumstances. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award.

56. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

57. Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be

made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence that employment might have terminated sooner, is so scant that it can effectively be ignored.

58. The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on disciplinary and grievance procedures).

59. The appropriate order for deductions is as follows:-

(i) Calculate the total loss suffered;
(ii) Deduct amounts received in mitigation and payments made by the formal employer other than excess redundancy payments;
(iii) Make any **Polkey** deductions;
(iv) Make any adjustment for failure to follow statutory procedures;
(v) Make any deduction for contributory fault;
(vi) Apply the statutory maximum.

Breach of Contract – notice pay

60. The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismiss without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

Unauthorised Deduction from Wages

61. The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

62. A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA.

63. The Tribunal must first consider what amount was due to the claimant under the terms of his contract and, if a lesser sum was paid, go on to consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

Holiday Pay

64. An employee's entitlement to paid annual leave is set out in regulations 13, 13A, 14 and 16 of the Working Time Regulations 1998. In particular, regulation 14 provides that where the employment is terminated during the course of a leave year, the Tribunal must determine the amount of any payment in lieu of accrued but untaken holiday by multiplying the statutory entitlement by the proportion of the leave year expired and then deducting the actual amount of leave taken.

Conclusions

Unfair Dismissal

65. The Respondent relies in submissions on conduct both before and after the APA as the reason for the Claimant's dismissal. In summary: before the APA, the Claimant either knew or ought to have known that the debtors were not recoverable and/or gave a warranty that he was not in a position to give; after the APA, he did not do enough to collect the debts, did not admit that the debts were not recoverable and retained £6,219.97 belonging to the Respondent.

66. In principle, I accept that conduct prior to employment can be relevant conduct which can fairly be relied upon when deciding to dismiss an employee. In this case, the Claimant effectively obtained his employment with the Respondent as part of the overall APA negotiations and agreement. Any dishonesty in connection with the APA would be akin to dishonesty on a CV or job application which, when discovered, may lead to a fair dismissal. In other words, there was a clear connection between the conduct in relation to the APA and the subsequent employment relationship and the nature of the work undertaken by the Claimant for the Respondent.

67. The reason for dismissal as given to the Claimant at the time, by the letter dated 20 February 2019, was raising false accounts, billing for work not done, failure to collect debts, failure to pay over customer money due to the Respondent and disruptive conduct. This is consistent with the 8 January 2019 internal report recommending legal advice on termination of the Claimant's contract which rejected the Claimant's explanation that incompetence was the reason for errors and made clear that the Respondent believed that there had been, at least partially, a deliberate deception to achieve financial gain. The Respondent did not then, as it does now, seek to argue in the alternative that the Claimant *ought* to have known that the warranties were inaccurate or that (even without actual or constructive knowledge) had given a warranty which was not reliable and which he was not in a position to give.

68. However, in deciding whether or not the Claimant would have been fairly dismissed had a fair procedure been followed and/or whether the Claimant's conduct contributed to his dismissal, I conclude that I must consider the actual conduct for which the Claimant was dismissed and what the likely outcome would have been following a proper disciplinary process (as well as any further adjustment for misconduct found after the event).

69. Dealing first with dishonesty and false accounting, I have found on balance that there is insufficient evidence that the Claimant raised the fresh air invoices or was responsible for any false accounting. Indeed, Mr Sayer effectively conceded as much in evidence

saying that it was enough that the Claimant had warranted that they were genuine. I have found that the Claimant involvement in the bookkeeping process was largely after the APA as part of his efforts to assist in the recovery of the debtors and is not indicative of any dishonesty or false accounting on his part. The Claimant was undoubtedly in breach of the APA warranties which imposed strict liability but I do not conclude that the evidence has shown that he actually knew that the warranties were not accurate when he gave them. Although a key person, the Claimant was not responsible for finance and invoices at The Grating Company or Pro Composites. His financial involvement was limited: he provided the Respondent's parent company with access to QuickBooks and Shmunky and asked the bookkeeper to get all of the financial records up to date. Other than that, his father worked on the accounts prior to acquisition.

70. On balance, I conclude that if there had been a fair investigation with the QuickBooks entries properly analysed, the Respondent could not fairly have dismissed for raising false accounts or billing for work not done. Nor, for the same reasons on the evidence provided to me and which would have been obtained during a fair investigation and disciplinary process, do I conclude that the Respondent could fairly have concluded that the Claimant ought to have known that the warranties were inaccurate.

71. Nor do I accept Ms Stanley's submission that it does not matter whether the Claimant knew, or ought to have known, that the debts as warranted were recoverable. The APA imposed strict liability upon the sellers and key persons in respect of the warranties and breach of warranty was a matter dealt with by way of separate proceedings in the High Court. The fact that an employee has given a warranty in a commercial agreement in good faith and without negligence and that it subsequently proves to be incorrect is not, I conclude, of itself sufficient to amount to conduct which could reasonably lead to a fair dismissal.

72. The other three reasons given at the time were failure to resolve and collect debts, failure to transfer the £6,219.67 to the Respondent's account and disruptive conduct.

73. The Claimant's job was not debt collection and, even on its own case, the Respondent was not requiring the Claimant to undertake all of the debt collection work. Instead, the Respondent required the Claimant to support Ms Regan and Ms Stabler by providing the necessary information and customer contact required to maximise the chances of debt recovery. Such duties were reasonably allocated and were within his capabilities.

74. There was a 120-day deadline within the APA for collection of the debts, in broad terms by around the end of August 2018. As set out in my findings of fact, even from the early days of the employment relationship the Claimant was being chased to provide outstanding customer information and failing to respond in a timely manner. The first spreadsheet analysing the debtors and giving detailed information on problems with collection was not produced by the Claimant until 24 September 2018 and only after Mr Sayer became involved in chasing him. On balance, I conclude that if there had been a fair investigation and the exchanges of emails considered properly by the Respondent, there is a very high chance that the Respondent could and would have fairly concluded that the Claimant had failed to act with appropriate diligence and despatch to support the debt collection but that it could not have fairly concluded that it was an act of misconduct for the Claimant to have failed to actually collect the debts as this was the job of Ms Regan and Ms Stabler.

75. As for the retained money, I have found on balance that the £6,219.97 was not transferred into the Claimant's own account. It was retained in one of the seller accounts although it should have been paid to the Respondent under the APA. The Respondent relied on an assertion from Mr Brotherton and did not carry out any investigation or give the Claimant an opportunity to respond further to the allegation prior to dismissal. Had it done so, it is likely that the Claimant would have given the explanation which he has done during this hearing, namely that he was going to pay on behalf of Mr Brotherton/Pro Composites but changed his mind following a disagreement between them. This was not a compelling explanation, but it was genuine albeit not complete. As I have found, the Claimant's sense of grievance about his outstanding expense claims and a sense of "set-off" was also part of the reason why he did not transfer the money in October 2018. For this reason, I do not accept Ms Stanley's submission that the Claimant's offer to resign on 22 October 2018 is consistent with knowledge that the debts were not recoverable. It is instead consistent with the Claimant's unhappiness that he was being required to pay money to the Respondent when he believed them to owe him money (as well as unhappiness with how the business was being developed).

76. The money rightly belonged to the Respondent. Even if not in the Claimant's personal account, he had control of the account from which the sum could and should be transferred. He was required to pay the money in both October 2018 and January/February 2019 but refused to do so. Even if not warned that his employment may be at risk because of the failure, it must have been evident that claiming to have made a BACS payment which was then cancelled, failing to reply to Ms Stabler and ultimately withholding money due to the Respondent could and would be seen as misconduct.

77. No particular disruptive conduct has been relied upon by the Respondent in these proceedings beyond the matters set out above (including the alleged lack of candour about the warranted book debts, the lack of diligence chasing the debts and failure to pay over the sums due).

78. If a fair procedure had been followed, I conclude that it is almost inevitable that the Claimant would have been dismissed for conduct relating to recovery of the debt and withholding £6,219.97. I accept the Respondent's case, based on Mr Sayer's evidence, that conduct was the genuine reason for dismissal and it was not to avoid the deferred consideration in the APA. I further conclude that dismissal would have been within the range of reasonable responses as the sums of money involved were significant. I take into account that it would have taken some time to reach that decision, say four weeks in order properly to investigate, meet with the Claimant at a disciplinary hearing and reach a decision.

79. As for the likely outcome of that process, Mr Brotherton was able to avoid dismissal even though he was a named key person within the APA, had not paid over the debt of £6,219.97 and was in breach of the APA warranty as only about a third of the Pro-Composite debt had been recovered. In the circumstances, there was some chance that following a fair procedure the Claimant may also have retained his employment (or at least rendered dismissal outside the range of reasonable responses). A key difference between the Claimant and Mr Brotherton, however, was that the latter was perceived as diligent and active in supporting the Respondent's attempts to recover the Pro Composite debts. This distinction is a reasonable one to draw based upon the contemporaneous emails. The outstanding amount of the Pro Composite debt as referred to in the High

Court letter before action was materially smaller than for The Grating Company (£61,034.40 compared to £432,707.31) and a greater proportion had been successfully recovered. Finally, Mr Brotherton had not told the Respondent that he had in fact transferred the £6,219.97 by BACS only then for the payment to fail to materialise.

80. Overall, therefore, I conclude that following a fair four-week procedure, there is only a 10% chance that the Claimant would not have been fairly dismissed.

81. Turning to contributory fault, I reminded myself that for s.123(6) the conduct must be culpable or blameworthy and have contributed to the decision to dismiss. The Respondent relies upon the same conduct as set out above. The mere breach of the warranty was not relied upon by the Respondent at the time of dismissal. Instead, the conduct which caused or contributed to the decision to dismiss is raising false accounts, billing for work not done, failure to collect debts, failure to pay over customer money due to the Respondent and disruptive conduct. As above, no particular disruptive conduct is relied upon beyond the matters set out above.

82. Unlike for a **Polkey** reduction, the Tribunal must find as a fact what, if any, conduct of the Claimant was foolish or blameworthy. For the same reasons, however, I again conclude that there is no evidence of to persuade me on balance that the Claimant raised false accounts or billed for work not done. Nor for the same reasons on the evidence provided to me, do I conclude that the Claimant was culpable or blameworthy when he gave the warranty. The Claimant had asked the bookkeeper to check that the records were up to date and made the financial records and the bookkeeper available to the Respondent. The Claimant was not responsible for finance and invoices at The Grating Company or Pro Composites and had limited input onto the QuickBooks system prior to the APA. He relied upon his father and the bookkeeper. The fact that an employee has given a warranty in a commercial agreement in good faith and without negligence and that it subsequently proves to be incorrect is not, I conclude, of itself sufficient to amount to conduct which could properly be described as culpable or blameworthy (even if the warranties eventually proved to be unsound).

83. However, the Claimant's conduct after the APA was foolish and blameworthy insofar as he showed a lack of diligence and proactive engagement with the Respondent to recover the debt. The value of the debt was a material and important inducement to the Respondent to enter into the APA at all, as can be inferred from the correlation between the purchase price (£445,133.59) and the debtors listed in Schedule 13 (£450,000 and £97,000 approximately). Time was of the essence in terms of collection due to the 120-day deadline and the warranties. Yet, the Claimant delayed in providing the outstanding customer information as early as May 2018, despite being chased by Ms Regan. Even by the end of August 2018, he had not provided required information and paperwork and delayed in responding to Mr Sayer in August 2018 despite the impending September deadline for collection of the debts. Mr Brotherton, by contrast, was providing the information and making progress on the Pro Composite debt.

84. This was particularly foolish conduct by the Claimant because, on his own case, the lack of variation paperwork did not necessarily mean that invoices should be written off as there may be evidence of an oral instruction to undertake the work. The lack of paperwork meant that it was even more important that the Claimant, with his knowledge of the work and customers, should cooperate actively with the Respondent to provide the information about what work had been done, who had authorised it and the value agreed. The longer

the delay in such information being provided by the Claimant, the less likely it was that such undocumented work could satisfactorily be established and the debt enforced. There was no good reason for the Claimant's dilatory response which gave the impression of a lack of co-operation and contributed to the belief that he had been dishonest in relation to the debt. This was culpable and blameworthy and contributed significantly to the decision to dismiss.

85. Furthermore, the Claimant was foolish in failing to transfer the £6,219.97 owed to the Respondent from the Grating Company and/or Pro-Composites accounts and in providing misleading information, suggesting that he had made a BACS payment which he had not and then failing to reply to Ms Stabler's request for confirmation. The Claimant's explanation that he was going to pay on behalf of Mr Brotherton/Pro Composites but changed his mind following a disagreement between them and his decision to withhold the money because he believed that he was owed expenses were not compelling and do not justify his conduct. As stated above, the money rightly belonged to the Respondent and the Claimant could, and should, have arranged payment. His failure to do so was culpable conduct which contributed significantly to the decision to dismiss.

86. Mr Brotherton was also a key person in the APA, the Pro Composites debt had not been collected in full and he did not arrange payment of the £6,219.97 to the Respondent, yet he was not dismissed. This was because the Respondent believed that he had pursued the debt diligently and did not consider him to have acted dishonestly. As a result, it is evident that the blameworthy conduct of the Claimant was the major cause of his dismissal.

87. Overall, I conclude that the Claimant's foolish conduct was not the sole cause but did contribute to his dismissal to a very significant extent such that it is just and equitable to reduce the compensatory award by 75%. The same reduction will apply to both the basic and compensatory awards as there is no good reason to do otherwise.

Breach of Contract

88. The Respondent relies upon the same conduct as above as amounting to gross misconduct entitling it to dismiss summarily. In essence, that the Claimant knew the warranties to be incorrect or ought to have known the same, took insufficient action to recover the debts, did not admit that the debts were not recoverable and retained money owed to the Respondent.

89. For reasons set out above, I have not found that the Claimant behaved dishonestly. Nor would the failure actively to recover the debts of itself amount to gross misconduct. However, the context in which the Claimant came to be employed by the Respondent means that there was a clear connection between the conduct in relation to the APA and the subsequent employment relationship and the nature of the work undertaken by the Claimant for the Respondent, in particular the collection of debtors and the payment of monies due under the APA to the Respondent.

90. Taking into account the nature of the Respondent and Claimant's employment relationship in the context of the APA, I conclude on balance that the combined effect of the Claimant's inaction in the face of a significant proportion of disputed debtors, providing misleading information about transfer of and then withholding the £6,219.67 without reasonable and proper cause despite repeated requests for payment was conduct which

caused the Respondent to doubt his honesty. In other words, it was conduct which was likely to (and did) seriously damage the relationship of trust and confidence between the Claimant and Respondent.

91. Insofar as it could be suggested that the Respondent's failure to accept the Claimant's resignation in October 2018 was a waiver of any breach, there were further subsequent breaches by the Claimant as the debtor recovery work continued and in his refusals in January and February 2019 to arrange payment of the £6,219.97 due to the Respondent by relying on a "set off" argument arising from his work-related expense claims.

92. By 18 February 2019, trust and confidence were so inherently undermined that the Respondent could no longer be required to retain the Claimant and was entitled to dismiss summarily by reason of his fundamental breach of contract.

Annual Leave and Unauthorised Deductions

93. The Claimant's final payslip showed gross basic salary for the month of £1,967.20 and accrued holiday of £496.23. The Respondent did not make any payment, relying on clause 7 of the contract to recover part of the £6,219.97 withheld from it by the Claimant.

94. Clause 7 authorised the deduction from salary of any debts owed by the Claimant to the Respondent, it is not limited to debts which arise from the employment itself but it does require the Claimant to owe the money to the Respondent as a debt. Clause 5 of the APA requires the sellers to hold any payments received on trust for the buyer and to account to the Respondent on a weekly basis for the same. The Claimant is not defined as a seller in the APA. I have found that the sum of £6,219.97 was paid into the Grating Company account and, on balance, that it was not transferred into the Claimant's personal account.

95. The Claimant's legal liability under the APA in relation to debtors arises from his warranties in clause 11 and Schedule 3. The warranties do not make the Claimant personally liable for the payment of sums paid by debtors into the sellers' accounts. The Respondent did not rely upon any sums owed by the Claimant for breach of warranty, purely on the £6,219.97.

96. In the circumstances, I conclude that the sum of £6,219.97 was not owed personally by the Claimant to the Respondent and, as a result, the latter was not authorised by clause 7 of the contract of employment to make the deductions. The Claimant is entitled to payment of £1,967.20 wages and £496.23 holiday pay.

Unreasonable failure to comply with the ACAS Code

97. The Respondent is not a small employer and has access to specialist employment law advice and support from its parent company, as can be seen from Mr Robinson's email on 19 December 2018 and the internal Hill & Smith report in January 2019. It could reasonably have been expected to follow a proper disciplinary process, including investigation, disciplinary hearing and right of appeal. It failed to undertake any disciplinary process at all and dismissed the Claimant on 18 February 2019 without any prior warning to him that it was even contemplating such action.

98. The reason why it failed to do so was a genuine but erroneous belief that the Claimant did not have two years' continuous employment and therefore would not be able to bring an unfair dismissal claim. The failure to comply with the ACAS Code of Practice was deliberate but was not due to a flagrant disregard of its requirements. It was, however, unreasonable as with its resources and access to legal advice it should have realised that the APA was expressly stated to amount to a TUPE transfer, the Claimant was employed by the Grating Company immediately before that transfer and by the Respondent immediately afterwards and, as now conceded, was also TUPE transferred with the benefit of his previous period of service. In all of the circumstances, I conclude that the appropriate uplift is 10%.

99. The safeguard of a fair disciplinary process is a fundamental requirement of employment law and a fair dismissal, even where the employee has committed an act of gross misconduct. The Claimant's conduct was not such that it would not be just for there to be an ACAS uplift in the circumstances of this case.

Remedy

100. This Judgment deals with liability only. It is hoped that with these reasons and the precise reductions for **Polkey** and contributory fault that the parties will be able to agree the appropriate remedy figure without the need for a further hearing. They should notify the Tribunal within 28 days of this Judgment being sent as to whether a hearing is to be listed and any proposed case management orders required.

101. Finally, I apologise to the parties for the lengthy delay in promulgating this Judgment. It was dictated shortly after the conclusion of the hearing but has taken this long to finalise due to a mixture of pressure on judicial resources, absence and other professional obligations. I regret if the delay has caused any undue stress or anxiety.

Employment Judge Russell
17 February 2022