EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Martin**
Respondent:	**Jet Maintenance Limited**
Heard at:	**Remotely for London South Employment Tribunal**
On:	**22 March 2023**
Before:	**Employment Judge L Robertson**
Representation	
Claimant:	**in person**
Respondent:	**Mrs J Letts, Citation Limited**

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal succeeds.

2. The respondent is ordered to pay to the claimant £3,345.12 made up as follows:

   2.1. a basic award of £968.40; and

   2.2. a compensatory award (which includes an additional award for failure to provide written particulars) of £2,376.72.

REASONS

The Claimant's claim

1. By a claim form dated 26 June 2021, the claimant, Mr Martin, brought a claim for unfair dismissal, which is a claim for ordinary unfair dismissal under Part X of the Employment Rights Act 1996 ("the ERA").

The Hearing

2. The claimant represented himself at the hearing. The respondent was represented by Mrs Letts.

3. The respondent called two witnesses:

3.1. Wesley King, managing director of the respondent;

3.2. Keith Eddowes, engaged by the respondent as a consultant in the capacity of Head of Operations and Improvement at the time of the events the claim is about.

4. The claimant gave evidence on his own behalf.

5. I explained to the parties that I would only read documents to which I was referred in the statements or in evidence.

6. The parties had prepared an agreed bundle of documents consisting of 100 pages. During the hearing, the parties produced additional documents in the form of the minutes of the disciplinary hearing on 23 February 2021 between Stuart Farrar (HR Consultant, Citation HR) and the claimant, and emails between Mr Farrar and the claimant dated 25 and 26 February and 2 March 2021. The case was stood down to allow time to review those documents.

7. Based on our preliminary discussions at the start of the hearing, it was common ground that:

7.1. The claimant's employment by the respondent started on 19 March 2018;

7.2. The claimant had been summarily dismissed 'in the heat of the moment' by Duncan King (a director and co-owner of the business, and Wesley King's brother) on 25 January 2021; however, Wesley King had withdrawn the claimant's dismissal shortly afterwards and suspended him on full pay pending an investigation. The claimant had agreed to that course of action. As such, the claimant's employment continued after that date;

7.3. The claimant had ultimately been summarily dismissed by a letter dated 8 March 2021;

7.4. By the time of the claimant's dismissal, he had two complete years' continuous employment; and

7.5. The claimant had never been given a statement of particulars of his employment by the respondent.

8. In view of the events leading to the claimant's dismissal, the effective date of termination was to be determined by me but it was common ground between the parties that his employment terminated summarily on 8 March 2021.

9. The respondent relied on conduct or, in the alternative, some other substantial reason justifying dismissal as potentially fair reasons for dismissal. The claimant did not believe that either reason for dismissal was genuine. His position was that the dismissal was unfair because the decision to dismiss him had been taken "in a fit of rage" by Duncan King on 25 January 2021 and his subsequent dismissal in March 2021 was a foregone conclusion from that point.

10. The claimant had produced a schedule of loss in which he referred to a claim of wrongful dismissal in addition to his claim of unfair dismissal. I explained that this claim had not been brought in the ET1 and therefore was not currently

part of his claim. After discussion at the start of the final hearing, the claimant confirmed that he was only pursuing a claim of unfair dismissal.

11. I heard the issues of both liability and remedy. At the end of the one day hearing, there was insufficient time to hear the parties' submissions and for deliberations. It was agreed that the parties would send any written submissions they wished to make to the Tribunal and the other side by 23 March 2023 and judgment would be reserved.

Findings of Fact

12. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the representations made by or on behalf of the parties at the hearing and the relevant statutory and case law, I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

Findings relevant to fairness

13. The claimant's employment by the respondent began on 19 March 2018. He was employed as a drainage surveying manager.

14. The claimant had never been given a statement of particulars of his employment. There was no evidence before me which sought to explain this.

15. In early January 2021, the claimant took a period of annual leave. He was then required to undergo a period of COVID-19 isolation. During his absence, he had given his computer password to one of his colleagues, Ben Buttrick, Drainage Manager, so that he could put an up-to-date 'out of office' message on the claimant's email account and postpone or attend the claimant's client commitments during his period of absence.

16. During the claimant's absence, Mr Buttrick and Paul Cornford, Engineer, had logged onto the claimant's computer to forward some of his draft reports to their own email accounts and then complete those reports for submission to the respondent's client. This was done at the request of Duncan King. There was a dispute about whether they had sent any emails externally from the claimant's email account, and the respondent's investigation reported that only internal emails had been sent. I prefer Mr Eddowes' persuasive evidence that only internal emails had been sent, and to individuals who (because it was a small office) would know that the claimant was absent and was not sending the emails himself.

17. There was evidence that, as soon as the claimant "got wind" that they were doing this, they stopped. It is unclear to me why this was felt to be necessary – this was something they had been asked to do by one of the respondent's directors, and the respondent considered it was entitled to make that request because the computer systems belonged to the respondent and it needed to continue its business – but there was insufficient persuasive evidence to find that the respondent's explanation was not correct.

18. On 25 January 2021, the claimant returned to work. The claimant had become aware that emails had been sent from his email account. He went to look for Duncan King to discuss this with him. It took a couple of attempts to find him,

and the claimant found Duncan King smoking outside the front door of the respondent's premises.

19. There was a verbal altercation between the claimant and Duncan King during which, the parties accept, the claimant and Duncan King swore at each other. There was, however, a dispute about who swore first, whether the claimant behaved aggressively towards Duncan King (and vice versa) and whether the claimant refused to leave the respondent's premises after being dismissed (as to which, see the next paragraph).

20. It was common ground that, during this discussion, Duncan King summarily dismissed the claimant 'in the heat of the moment'. It was also common ground that Wesley King had withdrawn the claimant's dismissal shortly afterwards and suspended him on full pay pending an investigation. The claimant had agreed to that course of action. As such, the claimant's employment continued after that date.

21. Wesley King carried out an investigation into the incident. On 25 January 2021, he carried out investigation meetings with the claimant, Duncan King, Emily King (Duncan King's wife), Laura Klitynska, Paul Cornford and Phil Hodges. Notes of these interviews appear at pages 36-41 and 46 of the bundle.

22. On 29 January 2021, Wesley King invited the claimant to a disciplinary hearing to take place on 3 February 2021 (page 47-48 of the bundle). In that letter, the claimant was advised that the purpose of the hearing was to "consider and discuss disciplinary allegations of gross misconduct, namely that of the allegations of gross insubordination and threatening behaviour." The allegations related to "the altercation between [the claimant] and Duncan (Director/owner) where the suggestion is, you used inappropriate and aggressive language."

23. The claimant was informed by that letter that, if he were found guilty of the allegation, a disciplinary sanction up to and including dismissal may be imposed. He was given the right to be accompanied by a work colleague or trade union representative. The interview notes from Wesley King's interviews on 25 January 2021 were enclosed.

24. The hearing was re-scheduled and took place on 5 February 2021. The claimant appears to have been accompanied to that meeting by Mr Hodges, a work colleague. At the start of the hearing, the claimant confirmed that he understood the reason for the hearing and that it was due to inappropriate language and raised voices. This did not in fact reflect the allegations set out in the letter.

25. Before any discussion about the disciplinary allegations took place, however, the claimant submitted a grievance which, in summary, described the altercation between the claimant and Duncan King by way of explanation and mitigation. The grievance also raised concerns about the claimant's email account being accessed and used in his absence, including his view that he had been impersonated and that it amounted to breaches of the GDPR. The grievance also raised concerns that, despite Wesley King's acknowledgement that he was happy with the claimant's performance, Duncan King had victimised the claimant and undermined the claimant's authority by calling his

productivity into question in front of colleagues prior to the incident on 25 January 2021.

26. The minutes of the disciplinary hearing (page 49 of the bundle) record that Wesley King reassured the claimant that there was no issue with the claimant's "workmanship." The hearing was adjourned to enable Wesley King to investigate the claimant's grievance. Wesley King informed the claimant that the disciplinary hearing was to do with the claimant's actions on the day and he would be invited to another disciplinary hearing once the investigation had been completed. The claimant's grievance letter (pages 50-52 of the bundle) were sent to the respondent following the adjournment of the hearing.

27. Mr Farrar, HR Consultant of Citation HR, was then tasked with investigating the disciplinary allegations against the claimant and holding a disciplinary hearing with him.

28. Wesley King sent a letter to the claimant dated 18 February 2021 (pages 54-55 of the bundle). Referring to the claimant's grievance, the letter said that, "those matters are now being dealt with," and instructed the claimant to attend a reconvened disciplinary hearing with Mr Farrar on 23 February 2021. The letter explained to the claimant that the respondent wanted to ensure that the matter was dealt with as objectively as possible. It explained that Mr Farrar would hold the hearing, review the evidence and provide Wesley King with a report containing recommendations, including as to potential sanctions. Following receipt of that report, Wesley King would then make a decision.

29. In that letter, the disciplinary allegations were described differently from Wesley King's earlier letter. In large part, the allegations were more specific but the allegation of gross insubordination was removed. The allegations were that, on 25 January 2021, the claimant acted in an offensive, aggressive, and threatening manner in the workplace. The letter went on to describe the specific allegations as follows:

    29.1. [the claimant] had an unprofessional, loud and aggressive tone raising issues about alleged misuse of [his] computer station during a period of [his] absence from work;

    29.2. [the claimant] then entered into an altercation with Duncan King in which [he was] shouting, swearing with a threatening and aggressive manner; and

    29.3. On being asked to leave Duncan's office, [the claimant was] alleged to have made comments to the effect of "make me" and "go on then hit me."

30. The letter described the allegations as potential gross misconduct, and informed the claimant that a possible outcome of the hearing was his summary dismissal. However, the letter went on to inform the claimant that, if the grievance needed to be concluded first (that is, before the outcome of the disciplinary hearing), decisions would be made in that order.

31. The claimant attended that hearing. The hearing took place by video. He was not accompanied, but had been informed of his right to be.

32. At that hearing, the claimant informed Mr Farrar that he had first become aware that someone had been using his email account when he spoke to a colleague during his COVID-19 isolation. He went on to say that, on his return, Mark Waters, the respondent's surveying engineer, had given the claimant the "heads-up" that Mr Cornford had been bragging about doing 40 reports in two days. The claimant saw emails in his sent items which he had not sent. He was also told by Mr Buttrick that, in summary, he had been instructed to complete the claimant's work in his absence by Duncan King. The claimant informed Mr Farrar that this led him to seek out Duncan King to ask if he knew what had happened.

33. The claimant described the incident on 25 January 2021 as starting out with the claimant asking Duncan King if Mr Cornford had been using his computer in a "matter of fact" way, to which Duncan King replied, "yes he has." The claimant said he had told Duncan King that he could not do that. In response, the claimant said that Duncan King walked slowly over to the claimant and leered over him, saying, "I am…boss and I can do what I like." The claimant referred to GDPR.

34. The claimant described Duncan King's demeanour as becoming more aggressive, raising his tone of voice saying, "40 f*cking emails in two days," and then said to the claimant, "you are a lazy c*nt." The claimant said that he moved back towards the door and responded, "No you are a lazy c*nt."

35. The claimant also informed Mr Farrar that, as he and Duncan King were face to face, Duncan King asked the claimant, "do you want me to hit you?" The claimant said that he responded, "go ahead." The claimant denied saying, "make me go on hit me." The claimant described then being "fired" by Duncan King and being told to, "get out." The claimant said that he had walked back into the building and up the stairs and admitted he had said, "you can't make me." He informed that Duncan King said, "f*ck it I can throw you out myself."

36. The claimant admitted to swearing, using a raised voice and offensive language. There had been no discussion up to that point which would indicate that the claimant had accepted that he had engaged in aggressive behaviour (as opposed to verbal aggression) toward Duncan King. Mr Farrar then said, "you admit to unprofessional loud and aggressive conduct in workplace but it is solely as a result of loud unprofessional conduct towards you," to which the claimant replied, "yes." In relation to the second allegation, the claimant made clear that he accepted that he had sworn once but only in response to Duncan King's comments and behaviour. The claimant said that only Mr Hodges could have heard everything that was said.

37. In his oral evidence, the claimant was clear that he had only admitted to swearing at Duncan King in response to Duncan King swearing at him, and he had not admitted to sustained swearing, aggressive or threatening behaviour. I prefer the claimant's evidence as to his admissions based on a review of the minutes, taking into account my findings above.

38. The claimant referred to his unblemished record, said that Duncan King swore regularly and he had emails which showed Duncan King being aggressive in the past. He also referred to the mitigation contained within his grievance. The claimant indicated that he thought that there was an agenda to silence him because of the issues he raised about use of his computer and for Mr Buttrick

to replace the claimant. At this point, the claimant indicated that the relationship was salvageable in his view. The claimant informed Mr Farrar that he tended to work with Wesley King rather than Duncan King.

39. The claimant agreed to the contents of the minutes.

40. Mr Farrar then carried out further interviews with Duncan King, Mr Cornford and Mr Hodges. He was also sent a floor plan by the claimant.

41. During his interview, Duncan King gave a different version of events to Mr Farrar. He admitted to having wanted to, "punch [the claimant's] lights out," and also commented, "I am not going to sit back and let someone talk to me like a piece of shit while we pay their wages." Mr Farrar asked (page 65 of the bundle) whether trust and confidence were gone and could not be salvaged and Duncan King replied, "No." Duncan King made further remarks which might have indicated that he thought the relationship had broken down (including that he wanted the claimant to leave and that he no longer wanted to employ him) but clarification was not sought. Duncan King also explained to Mr Farrar that he and the claimant did not really work closely together.

42. Mr Farrar then produced a report (pages 56-60 of the bundle). In that report, Mr Farrar stated that the claimant and Duncan King accepted that swear words were exchanged and the conversation was generally loud and animated, but there was a dispute as to who was the originator of the conduct complained of. It notes that Duncan King's position was that the claimant had squared up to him. Mr Farrar sets out that his interviews with other colleagues were such that there was one witness who recalled that the claimant swore first, and one witness who recalled the opposite. He did not grapple with the evidence given in the earlier interviews. He was unable to conclude which version of events he preferred.

43. Mr Farrar reports that the claimant admitted to all three elements of the allegation and that he should receive a sanction. Mr Farrar observes that whilst a certain degree of industrial language was accepted within the workplace, directly swearing at someone was not acceptable. He opined that, ordinarily, he would expect both employees involved to face disciplinary action but this situation was different in that it involved an owner of the business. Although Mr Farrar had not been appointed to deal with the claimant's grievance, he investigated the claimant's concerns as well as the points he made during the disciplinary hearing itself. Mr Farrar concluded that there was no evidence of a conspiracy against the claimant, that it was not for the claimant to determine who used his computer, and the evidence was that Duncan King had been direct but not abusive in the past.

44. As such, Mr Farrar recommended that all three elements of the allegation were upheld. He concluded that the way that the claimant approached the matter was the root cause of the issue. He accepted that there was clear mitigation because of the way Duncan King conducted himself but that did not excuse the claimant's conduct. Mr Farrar recommended a final written warning. However, he acknowledged that the decision maker might believe that the working relationship was not salvageable and there had been a material breach of trust and confidence in the employee and opined that a dismissal was likely to fall within the band of reasonable responses.

45. Wesley King received Mr Farrar's report. The report attached all of the interview notes and the notes of Mr Farrar's disciplinary hearing with the claimant.

46. Wesley King then sent a letter to the claimant on 8 March 2021 (page 72 of the bundle). That letter confirms that the claimant was being summarily dismissed for gross misconduct. I find on balance that the claimant received that letter on 8 March 2021 and that was the effective date of termination of his employment.

47. The letter states that Wesley King had read Mr Farrar's report and the notes of the claimant's disciplinary hearing with Mr Farrar. That is inconsistent with both Wesley King's witness statement (in which he says that he considered all of the evidence and the report before he confirmed his decision) and his oral evidence in which he was clear that he only read and relied on the report itself, not its attachments. I prefer the contemporaneous evidence which is the letter itself and find that Wesley King only read the report itself and the disciplinary minutes before he confirmed his decision. He would have been aware of the investigations which he himself conducted on 25 January 2021. However, in light of his clear oral evidence, I find that his final decision to dismiss was taken in reliance on Mr Farrar's report.

48. The letter stated that Wesley King agreed with the findings and recommendations in the report, and stated that the report's recommended outcomes could be either a final written warning, or summary dismissal. The letter continues to say that Wesley King has taken the decision to agree with the recommendation for dismissal for the reasons set out in the report and that he had made a finding of gross misconduct. As noted above, this is not what the report said. He confirmed the claimant's summary dismissal from 8 March 2021 and informed the claimant of his right of appeal. I accept Wesley King's clear oral evidence that he believed the claimant had been verbally aggressive towards Duncan King.

49. Wesley King was clear in his oral evidence (and I accept) that it was his decision to dismiss the claimant. Wesley King also gave oral evidence that he only reached the decision after receiving Mr Farrar's report. I do not accept this. Duncan King, Wesley King's brother and co-owner of the respondent company, had previously dismissed the claimant in the heat of the moment and made clear in his interview with Mr Farrar that he no longer wanted to employ the claimant (page 65 of the bundle). Wesley King chose to summarily dismiss the claimant for gross misconduct in reliance on a report which did not recommend or even refer to that course of action.

50. Mr Farrar's report, and the notes of the interviews conducted by Mr Farrar, were not sent to the claimant before Wesley King confirmed his decision. The first time the claimant received the report was with the letter confirming his dismissal. Wesley King reached the final decision to dismiss the claimant without holding a disciplinary meeting with him.

51. Also, Wesley King gave evidence to the Tribunal which was inconsistent with the reason of gross misconduct which he gave at the time of the dismissal. He gave evidence to the Tribunal that he was concerned at the risk that the claimant might behave in the same way to one of the company's clients: I am not persuaded that this was in his mind at the time of the dismissal as there is no evidence that this was a concern at the time. He also gave evidence that

there had been a material breach of trust and confidence in the claimant which was not referred to in the dismissal letter itself, although it had been referred to in Mr Farrar's report with which Wesley King said he agreed.

52. Although Wesley King's final decision to dismiss the claimant was reached in early March 2021, I find the matters (at paragraphs 48-51 above) to be evidence of a predetermined outcome.

53. Following receipt of the letter to dismiss him, the claimant appealed. Mr Eddowes was appointed to deal with the appeal. At the time, he was engaged by the respondent as a consultant. He was not as senior as either Wesley King or Duncan King, and described himself as one level below them. There was no one more senior than Wesley King and Duncan King.

54. Mr Eddowes invited the claimant to an appeal meeting. By that time, the claimant had obtained alternative employment and was working Monday to Friday, 9am to 5pm. Mr Eddowes was flexible in arranging the date and time of the meeting, but did not accommodate the claimant's request for the meeting to take place on a Saturday as a note-taker would not be available. It was unnecessary for there to be a note-taker as the meeting was recorded. The appeal meeting went ahead on 1 April 2021. Taking into account the contemporaneous evidence (page 82), I prefer the claimant's evidence that the meeting took place by audio only and not video. The meeting took place during the claimant's lunch break. The claimant was, at the time of the meeting, in his works van.

55. There were audio delays and this meant that, at times, Mr Eddowes spoke when the claimant was speaking, cutting the claimant off. I accept this was not intentional on Mr Eddowes' part, but the effect was that the claimant was being interrupted and felt that he was not being listened to. The meeting ended before its natural conclusion. There was a dispute about who ended the meeting and on balance I prefer Mr Eddowes' persuasive evidence that it was he who ended the meeting.

56. Following the meeting, Mr Eddowes sent Mr Farrar's notes of his interviews with Duncan King, Paul Cornford and Phil Hodges. On balance I find that the claimant had not received these previously as Mr Eddowes agreed to supply these to the claimant as part of the appeal.

57. Also, due to the difficulties experienced during the appeal meeting and Mr Eddowes being unclear as to the claimant's grounds of appeal, Mr Eddowes wrote to the claimant (pages 86-87 of the bundle). He set out some questions for the claimant to answer. He gave the claimant until 6 April 2021 to respond, five days later. Mr Eddowes thought that this timescale would accommodate the claimant's working hours as he would have time off over the Easter weekend. Further, Mr Eddowes considered that the timescale was reasonable as the claimant would already have prepared for the appeal meeting which had already happened.

58. The claimant responded on 6 April (pages 82-86 of the bundle). He complained about the short timescale, the difficulties experienced with the audio during the appeal meeting, and then set out further detail as to his grounds of appeal.

59. Mr Eddowes carefully reviewed the claimant's grounds of appeal, together with his 6 April email, Mr Farrar's report and its attachments. Having done so, he reached his decision to uphold the claimant's dismissal. As stated above, the claimant had been summarily dismissed for gross misconduct. He did not revert to the claimant before doing so.

60. In reaching his decision, Mr Eddowes relied only on the evidence of the claimant and Duncan King. He agreed with the claimant that, based on the locations of everyone involved, he could not be certain whether the other witnesses saw and heard everything clearly. He therefore disregarded their evidence. Mr Eddowes explained in his oral evidence that he disregarded the evidence of Mr Hodges after visiting the location himself using the claimant's floor plan (page 100 of the bundle). He took the view that it would not have been possible for Mr Hodges to see the claimant and Duncan King unless he had gone to the window because the claimant had gone downstairs in an agitated state (which he denied). Mr Eddowes reasoned that Mr Hodges would therefore have missed the start of the incident because he would have had to walk to the window. Mr Eddowes had taken a photograph to evidence this and accepted in oral evidence that this ought to have been sent to the claimant. The photograph was not before me. Mr Eddowes also did not believe that Mr Hodges could have heard clearly.

61. It is clear that Mr Eddowes had also carried out further interviews with Duncan King, Wesley King and Phil Hodges (pages 80, 90). The claimant was not sent notes of those interviews and therefore was unable to comment on them.

62. Mr Eddowes believed that Duncan King had used some industry language, but the incident was, "more a personal attack from [the claimant]." I accept Mr Eddowes' evidence that he believed the claimant to have been verbally aggressive, in summary, for shouting and swearing at Duncan King in the context of a verbal altercation between them, during which the claimant had called Duncan King a "fat c*nt," and told him to go back to sleep. Mr Eddowes accepted in his witness statement that Duncan King tends to swear. He also accepted in cross-examination that industry language was accepted in the organisation. However, Mr Eddowes emphasised the significance of the claimant's derogatory comments and language towards a director and owner of the respondent company in reaching his decision. Mr Eddowes also gave conflicting oral evidence that his concern was not about the claimant's actions to an individual but the risk he posed to others potentially: I am not persuaded that this was in his mind at the time of the appeal as there was no evidence that this was a consideration at the time.

63. Mr Eddowes' appeal response does not grapple with the evidence in relation to the allegation that the claimant had acted in a threatening or aggressive manner (which I find to be a reference to aggressive or threatening behaviour rather than verbal aggression). Having decided to rely only on the evidence of the claimant and Duncan King, Mr Eddowes did not decide which version of events he preferred in that regard. Although Mr Eddowes upheld the dismissal for all three allegations, he considered the claimant to have been verbally aggressive towards Duncan King – and not necessarily physically aggressive.

64. Towards the end of the appeal meeting, Mr Eddowes opined that the relationship was not salvageable; that is, before the subsequent exchange of emails between himself and the claimant about the appeal. Mr Eddowes gave

evidence to the Tribunal that both the claimant (in the appeal meeting) and Duncan King had said that the relationship was not salvageable.

65. In fact, Duncan King had not said this (as to which, see paragraph 41 above).

66. As for the claimant, he had previously indicated to Mr Farrar that the relationship was salvageable. His oral evidence to the Tribunal, which I accept, was that it was only by the time of the appeal meeting that his views had changed. The claimant disputed that he had told Mr Eddowes that he believed the relationship was not salvageable and pointed out that he had not signed the minutes, but on balance I find that he did say this as it reflected his view at the time. In the claimant's appeal submissions, he was essentially saying that he had lost faith in the process by the time of the appeal.

67. Mr Eddowes' evidence to the Tribunal was, in summary, that the parties had confirmed that the relationship was not salvageable and that had played a part in his decision to uphold the dismissal for gross misconduct. This reasoning is confused as it conflates the issue of the appropriate sanction for the claimant's conduct with the relationship of trust and confidence between the parties. Although Mr Eddowes gave clear and persuasive evidence that he felt free to reach his own decision on the appeal, I find that the matters at paragraphs 62-66 and this confused reasoning are evidence that his decision was tainted by these factors and moulded to fit a pre-determined outcome.

68. The claimant did not receive a formal response to his grievance as it was not concluded before his dismissal. However, there was considerable overlap with the disciplinary proceedings and I have made findings in relation to how it was dealt with above.

Findings relevant to contributory fault

69. Taking into account all of the evidence, I find on balance that the claimant challenged Duncan King about the use of the claimant's computer and email system in his absence and that Duncan King responded by approaching the claimant, telling him that he could do what he liked as he was the boss, referring to Mr Cornford having completed 40 reports in two days, and then referring to the claimant as a lazy c*nt. The reference to someone else completing a large number of reports gives context for his reference to the claimant as lazy, and by contrast there is no evidence which might explain why the claimant would have called Duncan King lazy first. In making this finding, I take into account that the interview notes with Emily King and Laura Klitynska only refer to the claimant calling Duncan King a "lazy fat c***" or a "fat lazy c***" as he re-entered the building. This supports my finding that it was more likely that Duncan King called the claimant a lazy c*nt first as they did not hear it.

70. Duncan King did not give evidence to the Tribunal. There is insufficient persuasive evidence on which to find that the claimant behaved in a threatening or physically aggressive manner.

71. However, I do find that the claimant swore and shouted at Duncan King, who was one of the directors and owners of the respondent. That behaviour was culpable and played an important part in the decision to terminate his employment.

Other findings relevant to remedy

72. The claimant commenced employment on 19 March 2018 and was dismissed on 8 March 2021. He had 2 complete continuous years' employment at the date of dismissal and was aged 43 at the effective date of termination ('EDT').

73. His gross weekly earnings were £769.23. His net weekly pay was £593.50.

74. He started alternative employment on 15 March 2021 at the same level of salary and benefits.

The issues

75. The issues as to liability and remedy to be determined were agreed at the start of the final hearing as follows:

    75.1. What was the effective date of termination of the claimant's employment?

    75.2. Was the claim brought in time?

    75.3. What was the reason or principal reason for dismissal? The respondent relies on conduct or, in the alternative, some other substantial reason justifying dismissal as potentially fair reasons for dismissal.

76. If the respondent has satisfied the Tribunal that there was a potentially fair reason for dismissal, did it act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the claimant?

77. If there is a compensatory award, how much should it be? The Tribunal will decide:

    77.1. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

    77.2. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

    77.3. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

78. Would it be just and equitable to reduce any basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

79. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

80. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under

section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay. Would it be just and equitable to award four weeks' pay?

Submissions

81. After the evidence had been concluded, the parties filed written submissions addressing the issues in this case. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions. It is enough to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision.

Relevant law

Unfair dismissal

82. Section 94(1) of the ERA provides that an employee has the right not to be unfairly dismissed by his employer.

83. Section 98 of ERA provides, so far as is relevant:

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

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(b) relates to the conduct of the employee…

(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.

84. Section 98(1) ERA requires the employer to demonstrate that the reason or, if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in section 98(2) ERA or for 'some other substantial reason justifying dismissal'.

85. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson [1974] ICR 323, CA*.

86. To amount to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, the reason must be of a kind which could be a substantial reason other than a S.98(2) reason, must not be whimsical, capricious or dishonest; and must not be based on an inadmissible reason such as race or sex. The reason for dismissal needs to be genuine: *Harper v National Coal Board 1980 IRLR 260, EAT*. To amount to a substantial reason to dismiss, there must be a finding that the reason could justify dismissal: *Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC*.

87. Once the employer has shown that there was a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably under S.98(4) in dismissing for that reason. The burden here is neutral. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a Tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the Tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. The Tribunal must not decide the case on the basis of what it would have done had it been the employer, but rather on the basis of whether the employer acted in a reasonable way given the reason for dismissal.

88. If an employer has shown that there was a substantial reason for dismissal which was a potentially fair one, the Tribunal must decide whether the employer acted reasonably under S.98(4) in dismissing for that reason by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt, taking into account the guidance in *Iceland Frozen Foods Limited v Jones [1983] ICR 17*.

89. In misconduct cases, the approach which a Tribunal takes is guided by the well-known decision of *British Home Stores v Burchell [1978] IRLR 379, EAT*. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

    (ii) Did the employer believe that the employee was guilty of the conduct complained of?

    (iii) Did the employer have reasonable grounds for that belief?

90. In assessing the reasonableness of the employer's response, it must do so by reference to the objective standard of the hypothetical reasonable employer (*Tayeh v Barchester Healthcare Ltd [2013] IRLR 387, CA, para 49*). Dismissal can be a reasonable step even if not dismissing would also be a reasonable

step. However, this discretion is not untrammelled, and dismissal may still be too harsh a sanction for an act of misconduct. It is not for the tribunal to substitute its own view of the appropriate penalty for that of the employer.

91. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: *Sainsbury plc v Hitt [2003] I.C.R. 111, CA*. The fairness of a process which results in dismissal must be assessed overall.

92. All the above requirements need to be met for the dismissal to fall within the band of reasonable responses. If the dismissal falls within the band, it is fair. If it falls outside the band, it is unfair.

Remedy issues

93. If the Tribunal concludes that the dismissal is unfair procedurally, it must go on to consider what chances there would have been of the employer dismissing the employee in any event, and it may make a consequential reduction in the compensatory award accordingly. This is the Polkey principle, from the House of Lords' decision in *Polkey v AE Dayton Services Ltd [1998] ICR 142, HL*. It is essentially an assessment of what would have happened had the respondent followed correct procedures.

94. The Tribunal must then go on to consider whether there was an unreasonable failure by one or other of the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and, if so, to make an adjustment of up to 25% up or down to the compensatory award under s.207A of the Trade Union and Labour Relations Act 1992.

95. If a dismissal is found to be unfair, under section 123(6) ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (*Swallow Security Services Ltd v Millicent [2009] ALL ER (D) 299, EAT*). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have caused or contributed to the dismissal: *Nelson v BBC (No2) [1980] I.C.R. 110, CA*. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. Langstaff J offered tribunals some guidance in the case of *Steen v ASP Packaging [2014] I.C.R. 56, EAT*, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

96. There is an equivalent provision for reduction of the basic award, section 122(2) which states that 'where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of

the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

97. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

98. Where a Tribunal finds in favour of an employee in a complaint of unfair dismissal, and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

99. The claimant was dismissed by the respondent. The effective date of termination was 8 March 2021. The claim was brought in time.

Reason for dismissal

100. The reason or principal reason for dismissal was the claimant's conduct. Although the respondent's evidence was inconsistent as to the reason for dismissal, I conclude that the principal reason was the claimant's behaviour towards Duncan King. He was summarily dismissed for gross misconduct. That was a reason related to his conduct. That is a potentially fair reason for dismissal.

Fairness

101. Having reached that conclusion, the complaint of unfair dismissal turns on section 98(4) of the ERA. I must apply the law as per the guidelines in *Burchell* and not substitute my opinion for that of the respondent.

102. The essential question is whether the respondent (acting through Wesley King and Mr Eddowes) acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal in all the circumstances. The respondent is a relatively small employer with an outsourced human resources function.

Did the respondent genuinely believe that the claimant had done the thing for which he was dismissed?

103. It is first necessary to consider who made the decision to dismiss the claimant. I conclude that Wesley King made the decision to dismiss the claimant and Mr Eddowes made the decision to uphold that dismissal on appeal.

104. It is then necessary to consider what the claimant was dismissed for. All three of the allegations against the claimant were upheld at the time of his dismissal and his appeal. Wesley King reached his final decision to dismiss the claimant in reliance on Mr Farrar's report in which the claimant was said to have admitted to all three allegations. I conclude on balance that Wesley King did genuinely believe that the claimant had done these things.

105. Mr Eddowes had read all the evidence carefully and reviewed the claimant's appeal submissions. It would have been clear to him that the claimant had not admitted to all three allegations in their entirety: this is clear on a careful reading of the minutes of Mr Farrar's disciplinary meeting as well as the claimant's position in the appeal that he had sworn once in retaliation for being sworn at. I accepted Mr Eddowes' evidence that he believed the claimant to have been verbally aggressive, in summary, for shouting and swearing at Duncan King in the context of a verbal altercation between them, during which the claimant had called Duncan King a "fat c*nt," and told him to go back to sleep. Mr Eddowes also believed that the derogatory comments and language used towards a director and owner of the company were unacceptable. However, as is clear from my findings, the disciplinary allegations against the claimant were wider than this. Mr Eddowes disregarded all witness evidence except that of the claimant and Duncan King, but did not reach a conclusion as to which individual's evidence he preferred as to the remaining allegations. As such, I conclude that he did not genuinely believe the claimant to have done all the things for which he upheld the dismissal.

In forming that belief, did the respondent carry out a reasonable investigation?

106. Wesley King carried out interviews with the claimant, Duncan King and other individuals who had seen or heard all or part of the incident.

107. Mr Farrar conducted further interviews, and a disciplinary hearing with the claimant. As part of his investigation, Mr Farrar considered the key aspects of the claimant's grievance. However, by the time of the disciplinary hearing with Mr Farrar, the claimant had not seen the notes of Mr Farrar's further interviews with the witnesses and so he was unable to comment fully on the evidence used to formulate Mr Farrar's report and recommendations.

108. Wesley King read Mr Farrar's report but did not carry out a disciplinary meeting with the claimant before confirming his decision to dismiss. As such the claimant did not have an opportunity to comment on the contents of Mr Farrar's report in which, amongst other things, he was said to have admitted all of the allegations against him. Wesley King only read the report and the minutes of the claimant's disciplinary hearing with Mr Farrar, although he would have also had some knowledge of the other witnesses' accounts from his interviews on 25 January 2021. The claimant therefore did not have a proper opportunity to comment upon the evidence and report relating to the allegations before his dismissal. I conclude that no reasonable employer would have conducted its investigation in this way.

109. As to the appeal, I have found that the claimant was sent Mr Farrar's report itself (without its attachments) and the notes of his disciplinary meeting

with Mr Farrar before he lodged his appeal. He therefore lodged his appeal without the benefit of the notes of Mr Farrar's further interviews.

110. As part of the appeal, Mr Eddowes held a meeting with the claimant, in which there were audio difficulties. It became clear that the claimant had not been sent the notes of Mr Farrar's further interviews before the appeal meeting. Mr Eddowes supplied these to the claimant following that meeting. There was written correspondence between him and the claimant about the grounds of appeal, which enabled the claimant to comment in writing on the notes of those further interviews.

111. Mr Eddowes considered the claimant's floor plan and visited the location where Mr Hodges was said to have been at the time and took a photograph. The claimant was not given the opportunity to see and comment on Mr Eddowes' photograph of Mr Hodges' location before the appeal was concluded. Further, Mr Eddowes referred in the appeal meeting to Mr Hodges having said that he could not see unless he was standing on something. That was new evidence. Mr Eddowes' appeal response also refers to discussions with both Duncan King and Wesley King as part of his investigations. The claimant was not sent notes of those interviews and did not therefore have a proper opportunity to comment on those as part of the appeal. That was important as it prevented him from responding to Mr Eddowes' view that Mr Hodges' evidence (which was that Duncan King swore first) ought to be excluded. I conclude that Mr Eddowes applied his mind in a reasonable way to the exclusion of the other statements.

112. I therefore conclude that Mr Eddowes did not carry out a reasonable investigation as part of the appeal.

Did the respondent have reasonable grounds for its belief?

113. I conclude that it did not.

114. The final decision of Wesley King to dismiss the claimant was taken in reliance on the claimant's purported admissions and other evidence that he had used a raised voice and offensive language. The claimant had accepted that he had sworn at Duncan King, albeit only on one occasion and in response to being sworn at. I have already concluded that the claimant was not given an opportunity to comment on all of the evidence before the decision to dismiss him was confirmed. As such, Wesley King did not have reasonable grounds for his belief at the time he confirmed the claimant's dismissal.

115. As to the appeal, as I have concluded above, Mr Eddowes did not genuinely believe that the claimant had done the things he was dismissed for and there had not been a reasonable investigation by the time the appeal was concluded. I therefore conclude that Mr Eddowes did not have reasonable grounds for believing that the claimant had done the things he was dismissed for.

Was the sanction of dismissal reasonable?

116. I conclude that the sanction of dismissal was not within the band of reasonable responses. Wesley King and Mr Eddowes accepted during the hearing that they believed the claimant had been verbally aggressive and had

not necessarily been physically aggressive. Although the respondent's decision-makers took the view that the claimant's behaviour towards a director/owner of the business was the 'root cause' of the issue, it was accepted that industry language was accepted within the organisation, Duncan King had a tendency to swear and indeed he had sworn at the claimant using the same language as the claimant used. Also, neither Mr Farrar's report (upon which Wesley King relied in reaching his final decision) nor Mr Eddowes concluded that they preferred one version of events over another. So, it was just as possible that the claimant had, as he submitted, simply responded to Duncan King swearing at him as vice versa.

117. In that context, a reasonable employer would not have dismissed the claimant.

118. Reference was also made in Mr Farrar's investigations and report, during the appeal stage and in the evidence before the Tribunal to whether or not the relationship was salvageable. This would potentially be relevant to a dismissal for some other substantial reason justifying dismissal; however, I have found that was not the sole or principal reason for dismissal. In any event, it was not reasonable to conclude that the relationship was not salvageable on the basis of Duncan King's remark saying the opposite (see paragraph 41 above), the claimant's inconsistent remarks in this regard, the fact that no attempt had been made to reconcile the claimant and Duncan King and the fact that the claimant worked mainly for Wesley King with whom he got on well. Further, the claimant had previously indicated that he thought the relationship was salvageable and it was only by the time of the appeal that he indicated it was not. A reasonable employer would not have relied on an employee having lost faith in the process to justify his earlier misconduct-related dismissal.

119. I conclude that the sanction of dismissal was outside the band of reasonable responses.

Did the respondent follow a fair procedure?

120. In assessing this aspect of fairness, I consider that procedural issues do not sit "in a vacuum" and should be considered together with the reason for dismissal, in assessing whether, in all the circumstances, the employer acted reasonably in treating the reason as a sufficient reason for dismissal (*Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15*). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

121. The background to the claimant's dismissal was that, during the verbal altercation on 25 January 2021, the claimant and Duncan King swore and shouted at each other and Duncan King had '[fired the claimant] on the spot'. That dismissal was quickly rescinded with the claimant's agreement.

122. However, as set out above, the Tribunal's finding of fact is that the claimant's dismissal in March 2021 was predetermined i.e. essentially decided upon on 25 January 2021. At the time, Wesley King had carried out several interviews from which there was evidence that the claimant had sworn at Duncan King but much of the other detail was in dispute. Wesley King

confirmed his decision to dismiss the claimant in March 2021 without properly examining the evidence or holding a disciplinary hearing with the claimant to discuss it, and without the claimant having had a proper opportunity to comment on all the evidence or Mr Farrar's interpretation of the evidence. Wesley King also confirmed the decision to summarily dismiss the claimant for gross misconduct in reliance on Mr Farrar's report – when the report did not make that recommendation. The Tribunal concludes that the process which followed the claimant's dismissal in January 2021 and Wesley King's decision were deliberately moulded to fit a predetermined outcome.

123. The appeal was not sufficient to cure the earlier defects in the process. By the end of the appeal meeting (page 81), and before the claimant had commented on the notes of Mr Farrar's further interviews, Mr Eddowes had already concluded that the relationship was not salvageable.

124. Further, Mr Eddowes referred in the appeal meeting to Mr Hodges having said that he could not see unless he was standing on something. That was new evidence. Mr Eddowes' appeal response refers to discussions with both Duncan King and Wesley King as part of his investigations. The claimant was not sent notes of those interviews and did not therefore have a proper opportunity to comment on those as part of the appeal. That was important as it prevented him from responding to Mr Eddowes' view that Mr Hodges' evidence (which was that Duncan King swore first) ought to be excluded.

125. Mr Eddowes was less senior than Duncan King who had made it clear that he wanted the claimant to leave and no longer wanted to employ him (page 65). He was also less senior than the dismissing officer, Wesley King, who had dismissed the claimant for gross misconduct in reliance on Mr Farrar's report which did not recommend that course of action. I have also found that Mr Eddowes' evidence to the Tribunal about his reasons for upholding the claimant's dismissal to be confused and that the procedure followed in the appeal was flawed. In particular, he upheld the dismissal for gross misconduct but referred in his evidence to the Tribunal to the impact of other factors on his thinking. The Tribunal concludes that his decision was tainted by these factors and moulded to fit a pre-determined outcome.

126. The respondent failed to follow the provisions of the ACAS Code on disciplinary and grievance procedures. The claimant's initial dismissal 'in the heat of the moment' was rescinded but set in motion the subsequent, pre-determined decision to dismiss the claimant. Further, the claimant was not provided with all of the evidence relied upon and Wesley King (who reached the final decision to dismiss) did not hold a disciplinary hearing with the claimant. I conclude those failures to follow the ACAS Code to have been unreasonable on the part of the respondent.

127. The claimant raised his concerns about procedural irregularities at the time. I must consider whether, taking into account the size and administrative resources of the respondent, the decision to dismiss was fair in all the circumstances. On balance and taking this into account I am satisfied that the failure to follow due process does create a procedural unfairness such that the decision to dismiss is unfair.

128. I conclude that the procedure was outside of the band of reasonable responses.

Conclusion

129. The respondent dismissed the claimant for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, the respondent acted unreasonably in treating that conduct as a sufficient reason to dismiss the claimant. The claimant was unfairly dismissed.

Conclusions on Remedy

Unfair Dismissal

Contributory conduct

130. The claimant's behaviour in swearing and shouting at one of the directors and owners of the respondent should be reflected in the remedy for unfair dismissal. That behaviour, after all, was important in the reasoning of Wesley King and Mr Eddowes for the claimant's dismissal. It contributed significantly towards the decision to terminate his employment.

131. The claimant's behaviour was culpable in the sense described by the Court of Appeal in *Nelson v BBC*. The Claimant understood that his behaviour was not appropriate and accepted that some form of sanction was appropriate.

132. Stepping back and having regard to the overall size of the award, I consider a reduction of 40% in respect of both basic and compensatory award to be just and equitable. This reduction reflects the significance of the claimant's behaviour without penalising him unduly. In my judgment that does justice to the claimant and the respondent on the evidence I have heard and seen.

Polkey

133. I have concluded that the sanction of dismissal was outside the band of reasonable responses. As such, the employer would not have been able to dismiss the claimant fairly in any event.

134. In any event, a reduction is to be applied for contributory fault. In my judgment it is not appropriate to apply a further reduction for the same conduct under Polkey as that would amount to a double penalty for the same conduct.

ACAS Code

135. The ACAS Code applied to the claimant's dismissal for misconduct but was not followed by the respondent. The claimant's initial dismissal 'in the heat of the moment' was rescinded but set in motion the subsequent, pre-determined decision to dismiss the claimant. Further, the claimant was not provided with all of the evidence relied upon in reaching the final decision to dismiss him and Wesley King (who reached the final decision to dismiss) did not hold a disciplinary hearing with the claimant. I conclude those failures to follow the ACAS Code to have been unreasonable on the part of the respondent.

136. In my judgment it is just and equitable to award an uplift because of the failure to follow the ACAS Code. The respondent's failures were significant and were key to the unfairness of the claimant's dismissal. In my judgment an uplift of 20% is just and equitable. Stepping back and looking at the overall size of the award and the impact of this uplift, this is a proportionate uplift.

Basic Award

137. The claimant's schedule of loss sets out his basic award (before reduction) at £1,632. I calculate it to be £1,614 (1.5 (age multiplier) x 2 weeks' pay (2 years' continuous service, a week's pay was capped at £538 in March 2021). Therefore, applying a 40% reduction, this results in a basic award of £968.40.

Compensatory Award

138. The claimant's schedule of loss claims an award of £500 in respect of loss of statutory rights. Mrs Letts did not argue against that amount. The claimant also claims financial loss. Mrs Letts noted that the claimant mitigated his loss within one week of his dismissal. However, in accordance with the principles of *Norton Tool Co Limited v Tewson [1973] All ER 183* an unfairly dismissed employee will not need to give credit for earnings received from a new job during the notice period where good industrial practice would have required payment in lieu of notice to the employee. In my judgment the principles of Norton Tool apply here. The sanction of dismissal was outside the band of reasonable responses and good industrial practice would have required payment in lieu of notice to him.

139. Therefore, the Claimant's compensatory award is £1,687 (made up of an award of £500 to compensate him for the loss of his statutory rights and £1,187 for net loss of earnings (2 weeks' net pay)). I apply the uplift and reduction below.

Section 38 Employment Act 2002

140. The claimant has succeeded in his unfair dismissal claim. An award of additional pay under section 38 Employment Act 2002 for failure to provide a written statement of employment particulars is, therefore, possible.

141. It was common ground that the claimant was an employee of the respondent. He was, therefore, entitled under section 1 ERA to be provided with a written statement of employment particulars by not later than 2 months after the start of his employment i.e. by mid-May 2018. It was common ground that the claimant was not given a written statement of employment particulars at any time. The respondent has not put forward any evidence of any exceptional circumstances which would make it unjust or inequitable to order them to pay the claimant an additional amount for this failure, in accordance with section 38 Employment Act 2002.

142. I must, therefore, order the respondent to pay an additional two weeks' pay and may, if I consider it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay. In this case, there had been a complete failure to provide any written particulars of employment for the duration of the claimant's employment. However, he had only been employed

for two years. In these circumstances, I consider it would be just and equitable to order the respondent to pay an additional 3 weeks' pay i.e. 3 x £538 (the statutory limit at the time of the dismissal) = £1,614.

Adjustments and final compensatory award

143. Adding the compensatory award to the additional award for failure to provide written particulars gives £3,301. Applying the 20% uplift in relation to the ACAS Code gives £3,961.20. Deducting 40% from that amount for contributory fault gives a final compensatory award of £2,376.72.

Employment Judge L Robertson

18 April 2023