



EMPLOYMENT TRIBUNALS

Claimant: Mr Tomasz Janicki
Respondent: Northcot Brick Limited (the "First Respondent")
EH Smith (Builders Merchants) Limited (the "Second Respondent")
Heard: By a Cloud Virtual Platform ("CVP") at Exeter
On: 11 and 12 November 2024
Before: Employment Judge Elizabeth Gibson (sitting alone)

Representation

Claimant: Mrs Marta Inkin –Litigation Executive at ELSG Limited
Respondent: Mr Christopher Plume – Human Resources Consultant at Easy HR Solutions

RESERVED JUDGMENT

1. All claims against the Second Respondent are dismissed.
2. The complaint of unfair dismissal against the First Respondent is well-founded. The Claimant was unfairly dismissed by the First Respondent.
3. The complaint of breach of contract (failure to give notice pursuant to s86 of the Employment Rights Acts 1996) is not well founded and is dismissed.

4. The complaint of unlawful deduction from wages between April 2023 and August 2023 is not well founded and is dismissed.
5. At the end of the hearing the Respondent admitted that it had failed to provide a written statement of employment particulars to the Claimant contrary to s1 of the Employment Rights Act 1996 and therefore the complaint of failure to provide a written statement of employment particulars is well founded and succeeds.
6. The complaint in respect of holiday pay is well-founded. The Respondent failed to pay the Claimant holiday pay in accordance with Regulation 14(2) of the Working Time Regulations 1998.
7. The Tribunal will determine remedies in respect of the successful claims at a further hearing on 26 February 2025.
8. The Claimant is entitled to an award of compensation for his unfair dismissal comprising a basic award ("Basic Award") and a compensatory award ("Compensatory Award").
9. In respect of the calculation of the Compensatory Award, there is a 75 per cent chance that the Claimant would have been fairly dismissed on a date between 04 August and 11 August 2023 if the Respondent had followed a fair procedure in dismissing him.
10. It is just and equitable to increase the Compensatory Award payable to the Claimant for his unfair dismissal by 20 per cent in accordance with section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 due to the Respondent's unreasonable failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures in respect of the Claimant's dismissal.
11. In respect of the Respondent's breach of its duty to provide the Claimant with a written statement of his employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to four weeks' gross pay in accordance with s38 of the Employment Act 2002.

REASONS

Introduction

1. The Claimant, Mr Tomasz Janicki is a Polish national and was aged 42 when he was dismissed by the Respondent.

2. The First Respondent (the "Respondent") is a private limited company the business of which is the manufacture of bricks, tiles and other construction products at Station Road, Blockley in Gloucestershire.
3. The Second Respondent is a private limited company the business of which is the sale of building materials.
4. Prior to the hearing the Claimant and the Respondent via their respective representatives agreed the Claimant was continuously employed by the Respondent between 13 January 2020 and 04 August 2023 and was not employed by the Second Respondent.
5. The Claimant worked as a brick maker and forklift truck driver for the Respondent. He was dismissed without notice on 04 August 2023.
6. Following his dismissal the Claimant has not been working due to ongoing illness including rhinitis, back ache and depression. He currently receives Personal Independence Payment.
7. The Claimant claims that his dismissal was unfair pursuant to Part X of the Employment Rights Act 1996 (the "ERA 1996").
8. He claims that his dismissal was substantively unfair pursuant to s94(1) of the ERA 1996 and procedurally unfair pursuant to s 98(4) of the ERA 1996.
9. The Claimant also claims the Respondent made a series of unlawful deductions from his wages contract to s13(1) of the ERA 1996 between April and August 2023 following a reduction in the hours he worked each week. He claimed that he had not agreed to the reduction in his working hours (from 45 to 40 hours per week) which had been unilaterally imposed on him by the Respondent.
10. He also claims the Respondent breached his contract of employment by failing to give him the required notice of termination of his employment in accordance with s86 of the ERA 1996 and that he had not been paid for the holiday leave he was entitled to pursuant to the Working Time Regulations 1998 (the "WTR 1998").
11. The Respondent initially contested all of Mr Janicki's claims. It stated the Claimant was fairly dismissed for misconduct by leaving his designated workstation for more than an hour and for gross misconduct because deliberate and/or serious damage was sustained to a forklift truck for which the Claimant was responsible.
12. The Respondent considered it was entitled to terminate the Claimant's employment without notice because of his gross misconduct in respect of damage to the forklift truck

and that the disciplinary process it undertook was fair and was conducted in accordance with the company's disciplinary procedure. It disputed it had made unlawful deductions from the Claimant's wages and stated that the Claimant was provided with all the paid annual leave to which he was entitled.

13. In respect of the claim for breach of its obligation to provide the Claimant with a written statement of employment particulars pursuant to s1 ERA 1996, the Respondent admitted such failure during the hearing.

The Hearing

14. The Tribunal heard the claims on 11 and 12 November 2024 by CVP at the Exeter Employment Tribunal. The Claimant was represented by Mrs Marta Inkin, a litigation executive at ELSG Limited and the Respondent was represented by Mr Christopher Plume, a human resources consultant at Easy HR Solutions. An interpreter provided Polish translations throughout the hearing for the Claimant because Mr Janicki confirmed this is what he needed in order to be able to understand the hearing and to answer questions. The interpreter also provided Polish to English translations of the Claimant's oral evidence.
15. The Tribunal considered a hearing bundle consisting of 205 pages of documentary evidence. Page references in this document are references to the pages in the hearing bundle.
16. The Tribunal heard oral evidence from the Claimant himself and from Mr Dale Moss general manager, Mr Kieron Payne, kiln handworker, Mr Robert Comben, works engineer, and Mr Scott Matthews, yard manager, for the Respondent.

Issues for the Tribunal to Decide

17. The parties had prepared a draft list of issues for the Tribunal to consider. The Tribunal sets out below the issues it had to address in respect of Mr Janicki's claims.

Unfair Dismissal

- a. Was the Claimant dismissed? Both parties agreed the Claimant was dismissed on 04 August 2023.
- b. What was the reason for the dismissal? The Respondent maintains that the Claimant's dismissal was a reason related to conduct which is potentially fair reason for dismissal under s98(2) of the ERA 1996.

- c. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following a reasonable investigation as was warranted in the circumstances?
- d. Whether the Respondent adopted and followed a fair procedure when dismissing the Claimant and whether the Respondent followed the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code")?
- e. Was the Respondent's decision to dismiss the Claimant a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with the facts the Respondent was faced with?
- f. If the Respondent had followed a fair procedure and the ACAS Code, was there a chance expressed as a percentage that the Claimant would have been dismissed in any event?
- g. If the dismissal was fair did the Claimant contribute to his dismissal by culpable conduct and if so what was the amount expressed as a percentage of his contributory conduct?

Remedy – Unfair Dismissal

- a. What Basic Award is payable to the Claimant, if any?
- b. Would it be just and equitable to reduce the Basic Award because of any culpable conduct of the Claimant before the dismissal? If so, to what extent?
- c. If there is a Compensatory Award, how much should it be? The Tribunal will need to decide:
 - i. What financial losses has the dismissal caused the Claimant?
 - ii. Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the Claimant be compensated?
 - iv. Is there a chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed by the Respondent?
 - v. If so, should the Claimant's Compensatory Award be reduced and if so, by how much?

- vi. Did the ACAS Code apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it.
- vii. If so, is it just and equitable to increase or decrease the Compensatory Award payable to the Claimant and, if so, by what proportion up to 25 per cent?
- viii. If the Claimant was unfairly dismissed did he cause or contribute to his dismissal by blameworthy conduct?
- ix. If so, would it be just and equitable to reduce his Compensatory Award and, if so, by what proportion?

Unauthorised Deduction from Wages

- a. Whether the Respondent made unauthorised deductions from the Claimant's wages contrary to s13 of the ERA 1996 and if so, how much was deducted?

Breach of Contract - Entitlement to Notice

- a. It is not in dispute that the Respondent dismissed the Claimant without notice.
- b. Whether the Respondent can prove on the balance of probability that it was entitled to dismiss the Claimant without notice because the Claimant fundamentally breached his contract of employment by committing gross misconduct?
- c. If not, how much notice was the Claimant entitled to?

Written Statement of Employment Particulars

- a. Did the Respondent fail to provide the Claimant with a written statement of the Claimant's employment particulars contrary to s1 of the ERA 1996?

Holiday Pay - Working Time Regulations 1998 (the "WTR 1998")

- a. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?
- b. If so, what was the Claimant's leave year and?
 - i. How much of the leave year had elapsed at the effective date of termination of 04 August 2023?

- ii. In consequence, how much leave had accrued for the year under regulations 13 and 13A of the WTR 1998?
- iii. How much paid leave had the Claimant taken in the leave year?
- iv. How many leave days remain unpaid by the Respondent?

The Law

Unfair Dismissal

18. Section 94 of the ERA 1996 gives employees the right not to be unfairly dismissed. Enforcement of this right is by way of complaint to an Employment Tribunal under s111 of the ERA 1996.
19. In such cases a claimant must show that she or he was dismissed by a respondent under s95 of the ERA 1996. In this case the Respondent admits that it dismissed the Claimant on 04 August 2024.
20. Section 98 of the ERA 1996 deals with the fairness of dismissals. Section 98(1) of the ERA 1996 sets out:
- (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, it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it - (a) ...
 - (b) relates to the conduct of the employee,
 - (3)
 - (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.

21. In order to determine whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of the dismissal.
22. In assessing the reasonableness of the Claimant's dismissal, the Tribunal is not permitted to substitute its view as to whether it considers the Claimant's actions constituted misconduct or what it would have done in the circumstances if it had been the employer.
23. The seminal case of *British Home Stores v Burchell* [1978] IRLR 379 sets out the tests to be considered when dealing with conduct dismissals (there is a neutral burden of proof for these tests) in determining whether what occurred with respect to the dismissal fell within the range of reasonable responses of a reasonable employer (the "Burchell Test". These are:
 - a. As a question of fact did the Respondent genuinely believe in the misconduct of the Claimant?
 - b. If yes, was this belief based on reasonable grounds?
 - c. Was a reasonable investigation undertaken in the circumstances? For this test, the case of *J. Sainsbury plc v Hitt* [2003] ICR 111 CA is relevant as it held the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached; and
 - d. Was the Claimant's dismissal within the band of reasonable responses open to a reasonable employer in the circumstances.
24. As well as the test described in (c) (above), the Tribunal also needs to consider whether the procedure adopted by the Respondent in dismissing the Claimant was fair and reasonable, and whether it complied with the ACAS Code.
25. If the Tribunal finds that the procedure was not fair and reasonable and the Respondent did not comply with the ACAS Code, the Tribunal is required to consider the chance, expressed as a percentage, that the procedural failure would have made no difference to the outcome and the Claimant would have been dismissed in any event (*Polkey v AE Dayton Services Limited* [1987 UKHL 8] ("Polkey Reduction").

Unfair Dismissal – Remedy Issues

Polkey Reduction

26. Where a claimant has been unfairly dismissed because of procedural unfairness, if the Tribunal considers there is some likelihood the claimant would have still been dismissed had a fair process been undertaken by the employer, the Tribunal must make a Polkey Reduction in the Compensatory Award to reflect this.
27. In making a Polkey Reduction the Tribunal must consider:
- a. If a fair process had been followed by the employer would it have affected when the employee would have been dismissed?
 - b. What chance was there of the employee being dismissed at some point in any event, despite the procedural unfairness?

Contributory Fault/Conduct

28. Section 122(2) of the ERA 1996 provides:

"Where the tribunal considers 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."

29. Section 123(6) of the ERA 1996 provides:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

30. As can be seen from ss122(2) and 123(6) of the ERA 1996 both the Basic Award and the Compensatory Award can be reduced as a consequence of a claimant's contributory fault or conduct on the basis it is just and equitable to do so.

31. The test which the Tribunal must apply to these considerations is whether a claimant's conduct is culpable, blameworthy, foolish or similar and which includes conduct that falls short of gross misconduct or does not necessarily amount to breach of contract (Nelson v British Broadcasting Company (No 2) 1979 IRLR 346 CA).

ACAS Code

32. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that where it appears to a tribunal that the claim to which the proceedings relate concern a matter to which the ACAS Code applies, that an employer has failed to comply with such code and that failure was unreasonable, if the tribunal considers it is just and equitable in all the circumstances to do so, to increase the award it makes to a claimant by up to 25 per cent. Section 124A of the ERA 1996 provides such an increase only applies to the Compensatory Award for unfair dismissal.

Unauthorised Deduction from Wages

33. Section 13 of the ERA 1996 provides that an employer shall not make deductions from the wages of a worker employed by it except in certain circumstances (which are not relevant to this matter).
34. Section 13(3) of the ERA states that a deduction occurs when the:

"total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker..."

Breach of Contract – Entitlement to Notice

35. At common law an employer faced with a repudiatory or fundamental breach of contract by an employee can terminate the contract, which results in immediate or summary dismissal.
36. Unlike a claimant's claim for unfair dismissal where the focus of the Tribunal is on the reasonableness of the employer's decision(s), the Tribunal's decision in respect of breach of contract claims where an employer has failed to make payments in lieu of notice is to decide for itself whether the claimant was guilty of conduct serious enough to entitle the employer to terminate the employment contract without notice.

Written Particulars of Employment

37. Section 1 of the ERA 1996 provides that where a worker commences employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

Holiday Pay

38. The Claimant's claim for untaken holiday outstanding at the termination of his employment was pleaded under the WTR 1998.
39. The WTR 1998 give workers the entitlement to 5.6 weeks leave each leave year, this amount being made up of four weeks leave in accordance with the Working Time Directive 2003 (see regulation 13 of the WTR 1998) and 1.6 weeks leave in accordance with domestic law (see regulation 13A of the WTR 1998).
40. Holiday entitlement relates to a leave year. If the leave year is set out in writing (usually in the statement of employment particulars as provided for in s1 of the ERA 1996) that leave year will apply. If there is no leave year set out in writing regulation 13(3)(b)(ii) of the WTR applies which states; "...on the date on which that employment begins and each subsequent anniversary of that date."

Evidence and Findings of Fact – the Dismissal

41. There was a degree of conflict between the parties on the evidence. The Tribunal considered the whole of the evidence, both documentary and oral, and listened to the factual and legal submissions made by or on behalf of the parties. Where the Tribunal has had to resolve any conflict of evidence this is referred to at the material point. The Tribunal found the following facts proven on the balance of probability.
42. The Claimant initially worked for the Respondent between 2008 and 2018. He stopped working for the Respondent for personal reasons but was told he would be welcome back. The Claimant was not subject to any disciplinary matters during this time.
43. The Claimant returned to work as a brickmaker for the Respondent on 13 January 2020. Upon his return to work, the Claimant was not provided with a written statement of his particulars of employment in accordance with s1 of the ERA 1996. This was admitted by Mr Moss, the Respondent's general manager, in his oral evidence and by the Respondent's representative Mr Plume in his closing submissions.

The Claimant's Targets

44. The Respondent did supply the Claimant with an undated handwritten document (at page 45 of the hearing bundle) which set out that Mr Janicki would be working for 45 hours a week at an hourly rate of £12.82 and that if he met a weekly target of "5000 bricks + pugging" he would receive a bonus of £345 a month (the "Target").
45. The Tribunal considered five handwritten forms completed by the Claimant which showed the number of bricks he had made each week (pages 163 to 167 of the hearing bundle). It was not clear from all of the forms what weeks they related to. It was clear however that in respect of these forms the Claimant never achieved the Target.
46. Mr Moss confirmed in his oral evidence that the Claimant never reached the Target and said when the Claimant was first employed by the Respondent, he was regularly making 5000 bricks in a week.
47. The Claimant in his evidence said no person could make 5000 bricks in a 45hour week and the Target was not achievable.
48. The Tribunal concluded on the balance of probability that the Claimant did not reach the Target for some of the weeks between 13 February 2023 and 10 June 2023. It preferred Mr Moss' evidence to that of the Claimant.
49. The Tribunal's finding of fact in relation to the Target is relevant to the issue of remedies to calculate the Claimant's weekly wage.
50. In a letter dated 13 February 2023 the Claimant was informed that the Respondent would be operating a "non-contractual" discretionary bonus which had commenced on 01 January 2023 with payments being based on attendance, timekeeping, productivity (meeting targets), safe working practices and disciplinary record.
51. There was no evidence (either documentary or oral) to show that the Claimant was entitled to any discretionary bonus. The Claimant said in oral evidence that this new bonus scheme would mean he earned less money. Consequently, he decided to "go slow" when at work.

The First Disciplinary Process

52. In April 2023 the Respondent instigated formal disciplinary proceedings against the Claimant relating to alleged bullying and disruptive behaviour (the "First Allegations").

53. By letter dated 30 March 2023 the Claimant was suspended on normal pay by the Respondent pending investigation into the First Allegations. He was subsequently invited to a disciplinary meeting with Mr Moss, by letter dated 11 April 2023 which set out some details of the First Allegations.
54. This letter confirmed the disciplinary meeting would be conducted in accordance with the Respondent's disciplinary procedure and warned the Claimant that as the First Allegations would constitute gross misconduct and if proven meant his employment contract could be terminated without notice (the First Disciplinary Process").
55. The Respondent provided no documentary evidence in support of the veracity of the First Allegations by way of witness statements or as to the nature of the investigations it had undertaken. The Claimant was not asked to participate in any investigatory meeting.
56. The Respondent provided no documentary evidence that it undertook any formal or informal discussions with the Claimant in respect of the First Allegations or that it asked someone other than Mr Moss to undertake the investigations.
57. A request from the Claimant in an undated letter (at page 58 of the hearing bundle) for an independent translator to help him in the disciplinary meeting was not acknowledged or acted on by the Respondent.
58. The disciplinary meeting was held on 21 April 2023 and the First Allegations were upheld by the Respondent. A letter dated 24 April 2023 confirmed this and the Claimant was issued with a final written warning for a period of 12 months (the "Decision Letter"). The Claimant did not take up his right to appeal against this decision. The Respondent lifted the Claimant's suspension and the Claimant returned to work on 25 April 2023.
59. In oral evidence Mr Moss said:
 - a. In the last 18 months the Claimant's work had gone downhill and sometimes he only met 50 per cent of the Target;
 - b. He had spoken to the Claimant many times about the deterioration in his productivity and was told by Mr Janicki that he had lots of problems and issues;
 - c. When carrying out exit interviews with a number of employees, allegations of bullying were made against the Claimant which included Mr Janicki telling employees not to hit their brick making targets or produce more bricks than he was making;

- d. Some of the allegations of bullying were from Iranian refugee workers who wanted to remain anonymous and he did not provide witness statement from these people because he was concerned they were frightened of any repercussions if they were identified to the Claimant;
 - e. During the investigations he had spoken to other brickmakers and managers;
 - f. There was no paper trail in respect of the investigations and he did not speak to the Claimant at this time and refused to reveal more details of the First Allegations at the disciplinary hearing of 21 April 2023;
 - g. Bullying was not acceptable to the Respondent and was gross misconduct according to its disciplinary procedure but as he considered that the bullying alleged against the Claimant was not "vicious" bullying that he therefore decided the appropriate sanction was not dismissal but was a final written warning lasting for 12 months;
 - h. There were no notes or minutes from the disciplinary hearing;
 - i. It appeared he had breached the Respondent's disciplinary procedure;
 - j. The Claimant agreed he had told his co-workers not to hit their targets and that he had back problems and general issues with his health;
 - k. As a result of the discussions in respect of the Claimant's health it was agreed by them both that Mr Janicki would cut his hours to 40 hours a week and that he would take up a new role as a forklift truck driver.
60. In light of this evidence and Mr Moss' admission, the Tribunal makes a finding of fact that the First Disciplinary Process was not conducted in accordance with the Respondent's disciplinary procedure.
61. The Respondent sent a second letter to the Claimant on 24 April 2023 confirming that his hours would be reduced from 45 to 40 hours a week and that his role would be changed to that of a forklift operator in the kiln area. The Claimant did not appeal against these changes (the "Employment Changes").
62. In his witness statement the Claimant disputed that he had agreed to the Employment Changes but in cross examination admitted he had agreed to

them. The Claimant also admitted in cross examination that he has slowed down at work.

63. In considering the evidence set out in paragraphs 61 to 62 (above) the Tribunal finds that on the balance of probability the Claimant agreed to the Employment Changes.

The Second Disciplinary Process

64. By letter dated 28 July 2023 the Respondent wrote to the Claimant inviting him to a disciplinary meeting in respect of allegations of time wasting (the "Second Allegations") and deliberate and/or serious damage to the Respondent's property, namely damage to the fork tynes on the forklift truck the Claimant was responsible for (the "Third Allegations"). Both the Second Allegations and the Third Allegations were said to have occurred during late June and early July.
65. This letter (the "Second Disciplinary Letter") confirmed a disciplinary meeting (the "Second Disciplinary Process") would be conducted in accordance with the Respondent's disciplinary procedure and that the Claimant should be aware that the Third Allegations were considered by the Respondent to be gross misconduct and because he had been in receipt of a final written warning he could be dismissed without notice.
66. The Second Disciplinary Letter made no mention of the Respondent undertaking an investigation into the Second and Third Allegations and enclosed purported documentary "witness evidence" from three people in respect of the same (the "Witness Evidence").
67. The Tribunal considered the Witness Evidence (at page 63 of the hearing bundle) and listened carefully to Mr Moss' oral evidence about this document. Mr Moss was unable to confirm with clarity how and when this document had been produced and whose signatures related to the individual "statements" within the Witness Evidence. To this end the Tribunal was unable to conclude that Mr Moss had undertaken a reasonable investigation because the Witness Evidence was unclear and unreliable.
68. The hearing bundle also included documents (at pages 159 to 162) which appeared to be notes made by Mr Robert Comben (dated 24 July 2023) Mr Moss (undated), Mr Scott Matthews (dated 03 August 2002) and Mr Kieron Payne (dated 03 August 2023) outlining their recollections in respect of the First Allegations and the Second Allegations (the "Notes of the First and Second Allegations")

69. It was never made clear to the Tribunal what the purpose of these Notes of the First and Second Allegations were and their relevance to the factual findings the Tribunal was seeking to make. The Tribunal considered these may have been notes Mr Moss and the other three witnesses used to inform their witness statements.
70. Given the lack of clarity on the Notes of the First and Second Allegations the Tribunal was unable to conclude whether they showed that Mr Moss had undertaken a reasonable investigation in respect of the First and Second Allegations.
71. A disciplinary meeting was held on 02 August 2023 and was conducted by Mr Moss. The outcome of the disciplinary meeting was relayed to the Claimant by the Respondent by a letter dated 02 August 2023 (the "Dismissal Letter") (at page 64 of the hearing bundle).
72. The Dismissal Letter stated:
- "On w/c 3rd July serious damage was sustained to the forklift truck for which you were responsible and operating at the time. This matter was potential gross misconduct.
Having considered the evidence and your responses during the meeting I have found that an act of gross misconduct was committed by you as you failed to show proper care and attention when operating the forklift truck. This is a potentially dangerous piece of equipment and failure to use correctly can result in not only damage to company property but serious injury to persons.
- After further investigations since our meeting I have decided that an appropriate and proportionate response is the termination of your employment on the grounds of gross misconduct. You are not entitled to notice, or payment in lieu of notice and the last day of employment will be Friday 4th August 2023."
73. The Tribunal heard from three witnesses, who each worked for the Respondent, in relation to the Second Allegations and the Third Allegations. The relevance of much of their evidence relates to the question of whether the Claimant's conduct was culpable and contributed to his dismissal.
74. Mr Matthews, yard manager, said that on 21 June 2023 he questioned another worker, Mr Payne, about the whereabouts of the Claimant and was told the Claimant "...kept disappearing for half an hour at a time". Mr Matthews said he informed Mr Moss and later confirmed to Mr Moss that the

Claimant did not return to his workstation that day, although he was seen on his forklift truck driving around.

75. Mr Matthews confirmed this was the only incident with respect to the Second Allegations that he was aware of.
76. Mr Payne, kiln hand worker, confirmed the conversation set out in paragraph 74 (above) and said he was asked by Mr Matthews why he was not working. He said he was meant to be pushing bricks up into the kiln but was unable to do so because the Claimant had disappeared. He said he was asked the same question on two occasions that day by Mr Moss. Mr Payne confirmed although the Claimant reappeared in the work area he did not complete any work and sat on the forklift truck smoking.
77. Mr Comben, works engineer, said the Claimant had consistently damaged his forklift truck's fork tynes and this was either due to him "rubbing then along the ground to which I've seen him do, [or] aligning stillages by side shifting." This was confirmed in a typed note dated 24 July 2023 which Mr Comben sent to Mr Moss (at page 159 of the hearing bundle).
78. Mr Comben said in his witness statement that he complained to Mr Moss around the first week of July that on numerous occasions the Claimant was moving the skip when it was full which resulted in walls being hit causing damage to the tynes of the forklift truck. Mr Comben added it took about two hours to realign the forks.
79. In cross examination Mr Comben said the damage to the forklift truck started when the Claimant commenced working as a driver but he had only complained about this to Mr Moss in the first week of July.
80. In cross examination Mr Moss said:
 - a. The Claimant received no new training from a professional trainer when he started his new role driving a forklift truck because the Claimant had obtained the necessary certificated training when he previously worked for the Respondent.
 - b. In respect of the Second Allegations the Claimant was regularly disappearing from his place of work but he could not confirm how many times this had happened; he had no written record about this and the CCTV at the works was not operational at the time;
 - c. It was not until he witnessed the Claimant's absence himself on 21 June 2023 that he considered taking disciplinary action;

- d. To this end he asked his yard manager, Mr Matthews, to let him know at what time the Claimant returned to his workstation after the Claimant's earlier disappearance;
 - e. In cross examination there was no further investigation into the Claimant's disappearances because he had witnessed one incident himself firsthand;
 - f. He could not remember whether anything other than the Witness Evidence had been disclosed to the Claimant in respect of the Second Allegations.
 - g. In the week commencing 03 July 2023, his works engineer Mr Comben complained to him about the Claimant deliberately bending the tynes on the forklift truck he was driving;
 - h. He received complaints that the Claimant was endangering others by not putting bricks on the stillages correctly;
 - i. Although the Witness Evidence stated that photographs were taken of the Claimant's alleged unsafe working methods, he could not be sure what photographs were taken and he could not say whether they were disclosed to the Claimant;
 - j. The Claimant denied the Second Allegations and the Third Allegations in the disciplinary meeting; and
 - k. After considering the evidence he decided he had sufficient grounds to dismiss the Claimant for gross misconduct and sent the Claimant the Dismissal Letter.
81. The Respondent's disciplinary procedure (at pages 53 to 57 of the hearing bundle) provided that the Second Allegations would fall within the definition of misconduct and that the Third Allegations would fall within the definition of gross misconduct and which included "...deliberate and/or serious damage to property belonging to the Company..."
82. The non exhaustive list of examples of gross misconduct did not specifically include failure to show proper care and attention when operating equipment or failure to use equipment correctly so as to risk damage to company property or serious injury to persons. However it did include serious breach of the Respondent's health and safety rules.

83. In his witness statement the Claimant said that the Respondent had fabricated the Second Allegations and the Third Allegations in order to have an excuse to dismiss him.
84. He said it was impossible for him to disappear for long periods of time and that any damage to the forklift truck he was driving was accidental and the fact that he had not recently been given independent training supported this.
85. He said that he was not given the notes by Mr Comben, Mr Moss, Mr Matthews and Mr Payne (at pages 159 to 162 of the hearing bundle) about the Second Allegations and the Third Allegations during the Second Disciplinary Meeting.
86. The Claimant said in respect of the Dismissal Letter he did not take up the offer of an appeal because he believed the Respondent wanted to "get rid of him" and that an appeal would not change the Respondent's decision to dismiss him.
87. He claimed the Second Disciplinary Process breached the Respondent's disciplinary procedure and that it had not been undertaken promptly given that the Second Allegations were made in June and early July 2023.
88. In respect of the Third Allegations the Tribunal directed itself to the words "deliberate and/or serious damage" as set out in the Respondent's disciplinary procedure in applying the Burchell Test, particularly in respect of whether the Respondent genuinely believed that the Claimant was guilty of gross misconduct and whether this belief was based on reasonable grounds.
89. The Tribunal finds that it was open to the Respondent to conclude that the Claimant deliberately damaged the fork tynes on his forklift truck and therefore fell within the Respondent's definition of gross misconduct which could lead to dismissal without notice.
90. In coming to this conclusion, the Tribunal finds that although the Claimant's forklift truck was damaged when the Claimant was operating it there was little evidence as to the nature of the damage to the forklift truck tynes apart from that of Mr Comben who said it could take up to two hours to realign them. There were no photographs of the damage and no evidence as to the cost of putting the damage right.
91. The Tribunal then went on to consider the evidence that the Respondent had at the time so as to determine whether the Respondent could genuinely believe on reasonable grounds that the Claimant deliberately damaged the forklift truck tynes.

92. To summarise, Mr Moss:
- a. Had the Witness Evidence;
 - b. Had some of the Notes of the Second and Third Allegation (including that of Mr Comben); and
 - c. Personally witnessed the First Allegations on 21 June 2023.
93. The Claimant said in his witness statement that at the 02 August 2023 disciplinary meeting he was not provided with any further evidence against him. He explained to the Respondent that it was impossible for him to just disappear for over an hour, that he rarely took toilet or water breaks, and if I did it was for a maximum of five to ten minutes.
94. He told Mr Moss there was one time where he got a flat tire in his forklift and had to have it fixed which may have taken an hour and there should have been a written record of this along with pictures from the site's CCTV.
95. The Claimant denied deliberate damage at the time and said it could have been accidental. Under cross examination he admitted damaging the fork tynes but it was not put to him whether this was accidental or deliberate.
96. The Tribunal then considered in detail Mr Comben's evidence. He said in his witness statement that he had complained to Mr Moss on around the first week of July that the Claimant "consistently" damaged the fork tynes and that on "numerous" occasions he had seen the Claimant move a full skip and "that the walls were being hit when moving stillages causing damage to the forks."
97. Mr Comben did not state that this damage could be accidental. He also said that on one occasion damage to the fork tynes happened three times in one week.
98. The Tribunal in finding that the Respondent was capable of genuinely believing on reasonable grounds at the time that the Claimant's damage was deliberate, took into account Mr Comben's description of how the damage was inflicted and that the Claimant damaged the forks more than once.
99. In coming to this conclusion, the Tribunal was mindful of the Claimant's allegation that the Respondent was seeking to dismiss him and that the damage could have been accidental, but it noted there was no independent evidence to suggest that Mr Comben was falsifying his account or that he had any motive to malign the Claimant.

100. The Tribunal also noted that the timeframe in Mr Comben's witness statement in respect of when the damage to the fork tynes was inflicted (around the first week of July) was corroborated by Mr Moss.
101. Furthermore, Mr Comben's integrity was not impugned, and it was not put to him that he was seeking the Claimant's dismissal.
102. In light of this evidence, the Tribunal concluded on the balance of probability both Mr Comben and Mr Moss genuinely believed on reasonable grounds that the Claimant deliberately damaged the forklift truck.
103. On this basis and in accordance with the Respondent's disciplinary procedure that deliberate damage to its property could constitute gross misconduct it was open to the Respondent to instigate the Second Disciplinary Process.
104. The Tribunal then considered how the Second Disciplinary Process was conducted. As with the First Disciplinary Process, there was evidence that the Second Disciplinary Process was procedurally unfair because it was neither undertaken in accordance with the Respondent's disciplinary policy nor the ACAS Code.
105. The evidence of procedural unfairness was persuasive. The Tribunal considered the evidence set out below as well as that of Mr Moss as set out in paragraph 80 (above).
 - a. The investigation into the Second Allegations and the Third Allegations was peremptory;
 - b. The Claimant was not invited by Respondent to participate in any investigation prior to the disciplinary meeting and he was not formally interviewed by Mr Moss or any other manager of the Respondent.
 - c. The Witness Evidence was fundamentally flawed for the reasons set out in paragraphs 66 and 67 (above).
 - d. The Claimant was not given the opportunity to interrogate the Witness Evidence, and
 - e. It appears that after the Second Disciplinary Meeting, Mr Moss undertook further investigations as described in the Dismissal Letter (at page 64 of the hearing bundle) without any recourse to the Claimant.

Evidence and Findings of Fact – Failure to Provide Written Particulars, Notice and Unauthorised Deduction from Wages

106. As set out in paragraph 13 (above), the Respondent admitted that it had failed to provide the Claimant with written particulars of his employment when he returned to work for the Respondent on 13 January 2020.
107. As set out in paragraph 89 (above) and notwithstanding any findings in respect of unfair dismissal, the Respondent was entitled in principle to summarily dismiss the Claimant without notice for gross misconduct because of the deliberate damage he caused to the forklift truck.
108. The Tribunal found on the balance of probability the Claimant agreed to the Employment Changes including reducing his weekly hours of work from 45 to 40 hours. When the Respondent paid the Claimant for 40 hours a week only it was not making unlawful deductions from the Claimant's wages between April 2023 and August 2023 contrary to s13(1) of the ERA 1996.

Evidence and Findings of Fact – Holiday Pay

109. The evidence presented to the Tribunal in respect of the amount of time the Claimant took off as paid holiday leave prior to his dismissal was unclear and incomplete.
110. In the Particulars of Claim the Claimant set out at paragraph 9 (at page 16 of the hearing bundle) under "Other Allegations" that "Pursuant to the Working Time Regulations 1998 the Claimant was entitled to 5.6 weeks of paid annual leave per year payable upon termination of employment – Reg 13(9)(b) of the Working Time Regulations 1998." He claimed for "accrued outstanding annual leave" (page 20 of the hearing bundle). The Claimant did not state how much annual leave he had taken in the relevant annual leave year or how much untaken leave he had accrued before his employment terminated on 04 August 2023.
111. In the Claimant's Schedule of Loss (at page 71 of the hearing bundle) the Claimant's outstanding annual leave pay was noted to be confirmed and stated "13.01.2023 - 04.08.2023 Respondent to provide pay slips for June and July 2023 and list of annual leave payments between 13.01.2023 and 04.08. 2023."
112. The pay slips for June and July were not included in the hearing bundle and neither was a list of annual leave payments for the dates set out in paragraph 111 (above).

113. The hearing bundle (at page 205) included a colour-coded table (yellow for authorised leave which the Tribunal understood as being for annual leave, red for unauthorised leave and green for sick leave) with a series of random dates, for example from 06 December 2021 to 31 December 2021 and from 18 July 2023 to 14 August 23 (the "Time Off Table").
114. The Claimant in cross examination did not think he had taken annual leave in the "last year" and he did not know whether he had asked the Respondent for annual leave when he been off work due to sickness.
115. The Claimant was taken to the Time Off Table and was asked whether during the period of 14 March 2023 to 15 May 2023 (where 12 blocks were shaded in green (sick leave) and which appeared to account for 12 days of time off) he had been paid by the Respondent. The Claimant said some of this time was when he was suspended and that he had also been off work with backache but that he could not remember whether he was paid.
116. In re-examination he said he did not understand the Time Off Table did not know what six blocks shaded yellow meant between 18 July and 14 August 2023. He said he was not on annual leave between these dates.
117. The Claimant said from 01 April 2023 to 15 May 2023 he was suspended. The Tribunal noted this was at odds with Mr Moss' witness statement which stated that the Claimant was suspended from 30 March 2023 until 25 April 2023.
118. Mr Moss in cross examination on the question as to how much annual leave the Claimant had taken said he was unsure. The Tribunal questioned him on the Time Off Table and Mr Moss admitted it appeared the Claimant had authorised time off (i.e. annual leave) on one day between 17 January 2023 and 13 February 2023 and five days off between 18 July 2023 and 14 August 2023 (the six blocks were each shaded in yellow) notwithstanding the Claimant was dismissed on 04 August 2023. Mr Moss confirmed he was unsure whether the appearance of this authorised time off was right or wrong.
119. The Claimant's pay slips in the hearing bundle (at pages 74 to 79) for January, February, March, April, May and August 2023 shed no further light on Mr Janicki's annual leave.
120. In her closing submissions the Claimant's representative Mrs Inkin said the Claimant's annual leave year commenced on 13 January (the date the Claimant commenced his employment with the Respondent in January 2020.) Therefore, between 13 January and 04 August 2023 he was employed for 203 days and this equated to 0.56th of the year.

121. She said the days between 18 July and 14 August 2023 which were marked yellow in the Time Off Table was when the Claimant was suspended. The Tribunal considered this was a mistake on Mrs Inkin's part and there was no evidence of the Claimant being suspended at this time.
122. On this evidence and submissions made Tribunal found on the balance of probability:
 - a. That for the purpose of calculating the Claimant's holiday leave entitlement between 13 January and 04 August 2023 he was entitled to 16 days (or 3.1 weeks) of annual leave;
 - b. Taking the Claimant's evidence at its highest he did not take any annual leave;
 - c. Taking the Respondent's evidence at its highest the Claimant took six days annual leave while he was employed during 2023; and
 - d. On the termination of his employment the Claimant was entitled to be paid for either 16 or ten days of untaken holiday leave.
123. The Tribunal makes a finding of fact that on the balance of probability the Claimant did not take any of the annual leave in 2023 to which he was entitled.
124. In coming to this finding, the Tribunal took into account:
 - a. The Claimant did not particularise any annual leave he had taken because he had not taken any and this was why he was unsure during cross examination;
 - b. Mr Moss was unable to confirm with any confidence any annual leave the Claimant had taken;
 - c. Information the Claimant requested from the Respondent was not forthcoming; and
 - d. Both the Claimant and Mr Moss were unclear as to what the Time Off Table meant or described.

Discussion, Further Findings and Conclusions

125. In reaching its decision the Tribunal considered all the evidence it was directed to throughout the hearing and where the Tribunal was directed to part of a document it read the whole of such document along with the witness statements. It also listened carefully to the oral evidence of the witnesses and the submissions of both parties. Not every matter is referred to in these reasons which are provided to assist the parties in understanding why the Tribunal came to the decisions it made.

Unfair Dismissal

126. First of all, the Tribunal reminded itself that in considering whether the Claimant's dismissal was fair or unfair it must not substitute its own view for that of the Respondent and that this claim must be considered on the basis of the reasonableness of the Respondent's beliefs and decisions at the time they were made and whether its actions were within the range of reasonable responses as set out in the Burchell Test.
127. It was agreed by the parties at the outset of the hearing parties that the Claimant was dismissed on 04 August 2023 and the reason for the dismissal was in respect of the Claimant's conduct. Conduct is a potentially fair reason for dismissal under s98(2) of the ERA 1996
128. The Tribunal was satisfied on the balance of probability that the Respondent genuinely believed that the Claimant has committed misconduct for time wasting and gross misconduct for deliberately damaging the fork tynes on the forklift truck the Claimant was working with for the reasons set out in paragraphs 130 and 131 (below).
129. The Claimant disputed wasting time and deliberately damaging the forklift truck and said the Second Allegations and the Third Allegations were fabricated and consequently the Respondent's belief was not genuine. Mr Moss was not challenged about whether his belief in the Claimant's guilt was genuine during the hearing.
130. The Tribunal therefore considered the evidence in respect of the Respondent's belief whether the Claimant had or had not committed the Second Allegations and the Third Allegations.
131. The Tribunal finds Mr Comben's and Mr Moss' evidence the most persuasive in assessing the Respondent's belief. This was particularly so in respect of Mr Comben's evidence set out in paragraphs 77 to 77 and 97 to 102 (above) and that Mr Moss was clear in his oral evidence about why he dismissed the Claimant and that his Dismissal Letter was unequivocal.

132. The next question the Tribunal asked itself was whether there were reasonable grounds for the Respondent's belief that the Claimant had committed misconduct and gross misconduct.
133. The Tribunal therefore considered whether the Respondent acted reasonably in concluding that the Claimant had committed misconduct and gross misconduct.
134. In considering this question the Tribunal turned to Mr Comben's and Mr Moss' evidence as well as that of Mr Payne and Mr Matthews and contrasted this with that given by the Claimant.
135. In respect of the Second Allegations (the June 21 2023 time wasting), Mr Moss said he saw the Claimant was absent for some time from his workstation himself and this was corroborated by Mr Payne and Mr Matthews. The Tribunal took into account that the evidence related to a single incident.
136. Notwithstanding the evidence was in respect of a single incident of time wasting and the blanket denial of the Claimant, the Tribunal concluded the Respondent's genuine belief that the Claimant has committed misconduct by time wasting was based on reasonable grounds because three witnesses corroborated the Second Allegations. Therefore, it was open to the Respondent to initiate the Second Disciplinary Process in respect of the Second Allegations.
137. In respect of the Third Allegations (gross misconduct) the Tribunal was persuaded by Mr Comben's evidence for the reasons outlined in paragraph 131 (above) and particularly his references to the Claimant "consistently" damaging the fork tynes and that he had complained to Mr Moss about this on "numerous" occasions.
138. On this basis the Tribunal concluded the Respondent's genuine belief that the Claimant had committed gross misconduct by deliberately damaging the forklift truck was based on reasonable grounds. Therefore, it was open to the Respondent to initiate the Second Disciplinary Process in respect of the Third Allegations.
139. The Claimant argued that the Respondent did not undertake a reasonable investigation in respect of the Second Allegations and the Third Allegations. Mr Moss confirmed he did not consider a formal investigation was necessary because he witnessed the time-wasting himself and he spoke to the three witnesses who gave oral evidence and that in respect of the Third Allegations he had independent evidence from Mr Comben.

140. The Claimant considered that the Respondent should have interviewed him as well as providing to him further details of the Second Allegations and the Third Allegations including CCTV and photographic evidence and that instead Mr Moss held a disciplinary meeting the outcome of which he had already decided
141. The next element in the Burchell Test which the Tribunal considered was whether the Respondent's decision to dismiss the Claimant was a fair sanction or in other words whether it was within the range of reasonable responses open to a reasonable employer when faced with the facts the Respondent was faced with at the time.
142. In this consideration the Tribunal was mindful of the case of J. Sainsbury plc v Hitt [2003] ICR 111 CA where it held the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached.
143. The Tribunal finds that a reasonable employer in the Respondent's position would have carried out a formal investigation into the Second Allegations and the Third Allegations and at a minimum would have interviewed the Claimant to give him the opportunity to provide his version of events.
144. The way in which Mr Moss assessed the Claimant's explanation in respect of the Second Allegations and the Third Allegations is relevant to whether he had reasonable grounds as to what penalty he imposed and to the procedure he followed. This is because the range of reasonable responses test applies to all aspects of what the Respondent did.
145. Although the Claimant disputed the Second Allegations and the Third Allegations during the disciplinary meeting, the Tribunal was satisfied that the decision to dismiss the Claimant was potentially open to Mr Moss because the Second Allegations were for misconduct and the Claimant was on a final written warning and the Third Allegations were for gross misconduct which allowed for immediate dismissal as set out in the Respondent's disciplinary procedure.
146. There was no evidence presented by the Claimant to suggest that dismissal for due to the Second Allegations or the Third Allegations was outside the band of reasonable responses. Instead the Claimant submitted that both the Second Allegations and the Third Allegations were fabricated and Mr Moss had already made up his mind to dismiss him.
147. Although the Claimant was invited to the Second Disciplinary Meeting, he was not called to Mr Moss' investigation and there was little evidence that the three witnesses were interviewed to any great extent.

148. The Tribunal concluded that the Respondent at the disciplinary meeting did not reasonably consider the Claimant's explanations for the Second Allegations and the Third Allegations and therefore the outcome in Moss' mind was a foregone conclusion. Mr Moss did not maintain that he had followed a fair process as this was not put to him.
149. In respect of the Second Allegations, despite the Claimant's explanation, Mr Moss was clear that as he had witnessed time-wasting himself on one occasion that a formal investigation was not needed. He considered the Second Disciplinary Process should have been conducted and that the Second Allegations coupled with the Third Allegations as well as fact the Claimant was on a final written warning (because of the First Disciplinary Process) he had every right to dismiss the Claimant.
150. The Respondent contended that the Claimant's dismissal was squarely within the band of reasonable responses especially because the Third Allegations were acts of gross misconduct.
151. In considering these elements of the claim, the Tribunal had the band of reasonable responses clearly in mind in reaching its conclusion and that it is immaterial what decision the Tribunal would have made if it was the Respondent.
152. On the evidence the Tribunal finds on the balance of probability the Second Disciplinary Process was procedurally unfair for the reasons set out in paragraphs 139 to 143 (above).
153. Furthermore Mr Moss did not take into account the Claimant's explanations for the Second Allegations or the Third Allegations to any significant extent - there was no investigation into the Claimant's explanations for either the Second Allegations or the Third Allegations or his version of events and the fact that no photographic was produced of the damage to the forklift truck was telling.
154. The Claimant's view that Mr Moss had decided to dismiss him prior to the disciplinary meeting was not unreasonable at the time and in the circumstances
155. The Tribunal finds that no reasonable employer in the Respondent's position would have undertaken the Second Disciplinary Process in the way Mr Moss did and that the Tribunal considered Mr Moss gave the impression to the Claimant that the outcome of the Second Disciplinary Process was a foregone conclusion.
156. For these reasons the Tribunal finds that the Respondent's decision to dismiss the Claimant was outside the range of reasonable responses.
157. The Tribunal's focus was on the reasonableness of the Respondent's and Mr Moss' management actions in response to the Claimant's conduct. The Tribunal

also considered the size of the Respondent's undertaking. This is a relatively small employer with a well-drafted disciplinary procedure. In dismissing the Claimant, it followed a flawed and unfair formal disciplinary process. In considering the range of reasonable responses, the Respondent's size and resources do not excuse the fundamental procedural unfairness of Mr Moss' actions in this case. For the avoidance of doubt the Tribunal finds Mr Moss' approach to procedure was not reasonable and not one which fell within the range of reasonable responses.

158. The Tribunal finds therefore that the Claimant was unfairly dismissed by the Respondent within s98(4) of the ERA 1996.

Remedies Unfair Dismissal – Polkey Deduction

159. The Tribunal then went on to consider in general terms the remedies for unfair dismissal.
160. The Tribunal considered whether a Polkey Deductions should be made to the Claimant's Compensatory Award on the grounds that if a fair process had been undertaken by the Respondent the Claimant may have been fairly dismissed in accordance with the principles in *Polkey v AE Dayton Services Limited* [1987] UKHL 8; *Software 2000 Limited v Andrews* [2007] ICR 825 EAT; *W Devis & Sons Limited v Atkins* [1997] 2 All ER 40 HL and *Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604. CA.
161. In undertaking this analysis, the Tribunal was also mindful of the decision in *Hill Governing Body of Great Tey Primary School* [2013] IRLR 274 at paragraph 24 and that it must consider what the Respondent (i.e. this employer) would or might have done - not what the Tribunal would or might have done.
162. The Tribunal finds that even if Mr Moss had undertaken the Second Disciplinary Process fairly, had taken proper account of the Claimant's explanations in respect of the Second Allegations and the Third Allegations and had not seemingly made up his mind before the disciplinary meeting was a realistic chance the Respondent would have dismissed the Claimant.
163. The matters the Tribunal took into account in reaching this conclusion are:
- a. The fact of the First Disciplinary Process and that Mr Moss issued the Claimant with a final written warning despite the seriousness of the First Allegations;

- b. The Claimant's admission that he was "going slow" because of the change in the Respondent's bonus scheme arrangements; and
 - c. Mr Comben's evidence as set out in paragraphs 77 to 79 (above) and the Tribunal's findings of fact in this respect.
164. Weighing up these factors carefully and taking into account what is just and equitable, the Tribunal finds that the Compensatory Award should be reduced by 75 per cent to reflect the likelihood of the Respondent fairly dismissing him in any event notwithstanding the procedural unfairness of the Second Disciplinary Process.

Remedies Unfair Dismissal – Contributory Fault/Conduct

165. The question of whether the Claimant's conduct caused or substantially contributed to his dismissal pursuant to ss 122(2) and 123(6) of the ERA 1996 was now considered by the Tribunal.
166. In determining this question, the Tribunal considered whether there was evidence that the Claimant's conduct was blameworthy and culpable.
167. Neither the Claimant nor the Respondent addressed the Tribunal on the question of whether the Claimant's conduct contributed to his dismissal despite this issue being included in their draft list of issues submitted to the Tribunal.
168. However, the Tribunal concluded from the evidence of the Claimant's behaviour and admissions during the First Disciplinary Process and the fact the Third Allegations were in respect of deliberate damage to the Respondent's property that the Claimant's conduct was blameworthy.
169. The Tribunal then went on to consider whether the Claimant's conduct would inevitably merit an adjustment to the Basic Award and the Compensatory Award.
170. It decided it would not be just and equitable to reduce the Basic Award or further reduce the Compensatory Award.
171. This is because the Tribunal's imposition of a 75 per cent Polkey Deduction has already accounted for the Claimant's gross misconduct for his deliberate damage to the forklift truck, and to impose further penalties for his behaviour would be to "double account" for the same thing.

Remedies Unfair Dismissal – ACAS Code

172. The Tribunal finds that there were breaches of the following paragraphs of the ACAS Code in respect of the Second Disciplinary Procedure, namely:
- a. Paragraph 5 - there was no investigatory meeting with the Claimant;
 - b. Paragraph 11 – there was a delay of more than a month in Mr Moss commencing the Second Disciplinary Process; and
 - c. Paragraph 18 – there was evidence Mr Moss' decision to dismiss the Claimant on 04 August 2023 could have been predetermined.
173. The Tribunal finds that the Respondent's failure to follow the ACAS Code was unreasonable and that it is just and equitable to increase the Compensatory Award by 20 per cent. The Second Disciplinary Process was unfair but a process was followed by the Respondent and as such this is not a case where the maximum penalty should be imposed. It also took into account that the Claimant did not take up his right to appeal in either of the First Disciplinary Process or the Second Disciplinary Process.
174. The parties' list of issues included the question of whether the Claimant breached the ACAS Code. Neither party submitted any evidence in this respect and the Tribunal did not find anything in the hearing bundle to suggest the Claimant breached the ACAS Code.

Breach of Contract – Entitlement to Notice

175. The Claimant was dismissed without notice and he brings a breach of contract claim in respect of his entitlement to three weeks' notice pursuant to s86 of the ERA 1996.
176. The Respondent claims it was entitled to dismiss the Claimant without notice for his gross misconduct in deliberately damaging the forklift
177. The Tribunal found on the balance of probability that the Claimant committed an act of gross misconduct which was a fundamental breach of his contract of employment entitling the Respondent to dismiss him without notice. In contrast to the claim of unfair dismissal, where the focus is on the reasonableness of the Respondent's decision(s), the Tribunal's decision in respect of breach of contract claims is to decide for itself whether the Claimant was guilty of conduct serious enough to warrant summary dismissal.
178. The Tribunal concludes the Claimant was guilty of gross misconduct and it was clear in the Second Disciplinary Letter that if he was found to have committed the

Third Allegations his employment could be terminated without notice or payment in lieu of notice.

179. The breach of contract claim fails and is dismissed.

Unauthorised Deduction from Wages

180. As set out in paragraph 108 (above) the Respondent did not make unlawful deductions from the Claimant's wages because Mr Janicki had agreed to the Employment Changes.
181. Consequently the complaint in respect of unlawful deduction from wages fails and is dismissed.

Written Particulars of Employment

182. At the end of the hearing the Respondent admitted it had breached the requirement of s1 of the ERA 1996 to provide the Claimant with written particulars of employment.
183. When the proceedings commenced (on the date the claim form (ET1) was presented which was 27 November 2023), the Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to four weeks' gross pay in accordance with s38 of the Employment Act 2002.
184. The claim for the Respondent's failure to provide the Claimant with a written statement of his employment particulars is well founded and succeeds.

Holiday Pay

185. The Claimant's claim for untaken holiday outstanding at the termination of his employment was pleaded under the WTR 1998.
186. As the Respondent did not provide the Claimant's with a written statement of his particulars of employment, the Claimant's leave year started on 13 January 2023.
187. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of their employment, irrespective of how the employment came to an end.

188. For the reasons set out in paragraphs 122 to 124 (above) the Tribunal found that the complaint in respect of holiday pay was proven on the balance of probability. The Respondent failed to pay the Claimant for untaken annual leave as provided for in Regulation 14(2) of the WTR 1996.

189. The payment due under Regulation 14(2) of the WTR 1996 is set out in Regulations 14(3)(a) and (b) of the WTR 1998 and is:

"(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula -

$$(A \times B) - C$$

where-

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date."

190. There was no "relevant agreement" for the Claimant to turn to in this case and therefore Regulation 14(3)(b) of the WTR 1998 applies.

191. For the purposes of the calculation of the payment due to the Claimant it is necessary to turn to the Tribunal's findings of fact set out in paragraph 123 (above) and that time between 13 January 2023 and 04 August 2032 equated to 0.56th of the year.

192. Substituting figures for the letters in the formula set out in Regulation 14(3)(b) of the WTR 1998

$$5.6 \times 0.56 - 0 = 3.1 \text{ weeks which equates to 16 days.}$$

193. The complaint in respect of holiday pay is well-founded and succeeds. The Claimant is entitled to 16 days holiday pay from the Respondent.

194. The case is listed for a remedy hearing on 26 February 2025.

Employment Judge Elizabeth Gibson

12 November 2024

Judgment and Reasons sent to the Parties on 18 December 2024

For the Tribunal Office