

THE INDUSTRIAL TRIBUNALS

CASE REF: 7077/19

CLAIMANT: Stephen Robinson

RESPONDENT: 4G Mobiles and Data Limited, t/a Connect Comms

JUDGMENT

The unanimous judgment of the tribunal is:

- i. The claimant was automatically unfairly dismissed by reason of the respondent's failure to complete the statutory dismissal procedures. The tribunal finds absent procedural flaws which rendered the dismissal unfair that there is a 90% likelihood that the claimant would still have been dismissed and that the claimant contributed wholly to the dismissal such that the basic and compensatory awards are reduced to nil.
- ii. The claimant's claim for notice pay is not well founded and is dismissed.
- iii. The claimant is entitled to two days holiday pay. The respondent shall pay the claimant £491.31 gross in respect thereof.
- iv. The claimant's has suffered an unlawful deduction in respect of wages. The respondent shall pay the claimant £2,613.35 gross in respect thereof.

Constitution of Tribunal:

Employment Judge: Employment Judge Bell

Members: Mrs Mary O'Kane
Mr Ian Rosbotham

Appearances:

The claimant was represented by Mr Moore of Copacetic Business Solutions.

The respondent was represented by Ms N Leonard, Barrister-at-Law instructed by MKB Law.

1. The claimant complained in his claim that he was automatically unfairly dismissed for 'violent conduct' and had been told there was no right to appeal, that he was owed notice pay, holiday pay and commission and had suffered an unlawful deduction from payments due to him in December 2018.

2. The respondent in his response resisted the claimant's claims and contended the claimant was fairly dismissed summarily for violent conduct by way of an unprovoked attack against the respondent's Sales Director; was not entitled to notice pay, had no unused holiday entitlement and that costs to the company for '*excessive damage to company car, claw back on deals*' far exceeded any accrual and commission due to the claimant.

ISSUES

3. The following issues were before the tribunal for determination:-
 - (1) Was the dismissal unfair?
 - a. Automatically unfair for failure to follow the statutory disciplinary and dismissal procedures?
 - i. Did the standard or modified procedure apply?
 - ii. Was it complied with?
 - Otherwise,
 - b. 'Ordinarily' unfair?
 - (2) If the claimant was automatically unfairly dismissed or ordinarily unfairly dismissed, what is the appropriate remedy/ what loss has the claimant suffered?
 - (3) If there was a procedural irregularity making the dismissal unfair should a percentage (**Polkey**) reduction be applied to any compensation to reflect the likelihood the claimant would still have been dismissed if the respondent had complied with correct procedures?
 - (4) Did the claimant by his conduct contribute to his dismissal such that a percentage reduction of any compensation should be applied?
 - (5) Is the claimant entitled to payment in lieu of notice?
 - (6) Has the respondent failed to pay the claimant in lieu of holidays accrued due?
 - (7) Has the claimant suffered an unlawful deduction from wages in relation to pay and commission due to be paid in December 2019?

EVIDENCE

4. The tribunal considered the claim, response, agreed bundle of documentation and witness statements of Oscar Majid (Managing Director of the respondent company) Jacqui Majid (employed as 'Operations Director' by the respondent) Brenda Thomas (employed as 'Director of Finance' by the respondent), Matthew Lee (employed as 'Sales Director' by the respondent) and Jonathan Dawson (employee in the respondent's Northern Ireland office) on behalf of the respondent, and that of the claimant, together with their sworn oral testimony.

FINDINGS OF FACT RELEVANT TO LIABILITY

5. The claimant first met Oscar Majid at the age of 21 when he was working in England in the telecoms industry and they worked together at times over the years thereafter in various companies. On the claimant's return to Northern Ireland he was unable to obtain work in the telecoms industry and carried out some work as a self-employed events manager for a charity in which his uncle was involved. In 2014 Mr Majid approached the claimant and on 1 October 2014 the claimant commenced employment for the respondent as business development manager. The claimant set up the respondent's Northern Ireland office and ultimately four people (including the claimant) were employed there.

6. The claimant's contract of employment dated 29 January 2016 provides at paragraph:

- *7. 4 The Company may deduct from the salary any money owed to the company by the employee.*

- **17 TERMINATION WITHOUT NOTICE**

17.1 The company may also terminate the Appointment with immediate effect without notice and with no liability to make any further payment to the Employee (other than in respect of amounts accrued due at the date of termination) if the Employee;

(a) is guilty of any gross misconduct affecting the business of the company....

- **20 POST-TERMINATION RESTRICTIONS**

20.1 In order to protect the Confidential Information, trade secrets and business connections of the Company to which he has access as a result of the Appointment, the Employee covenants with the Company that he shall not:

- (a) for 4 month(s) after Termination, solicit or endeavour to entice away from the Company the business or custom of a Restricted Customer with a view to providing goods or services to that Restricted Customer in competition with any Restricted Business; or*
- (c) for 4 month(s) after Termination in the course of any business concern which is in competition with any Restricted Business, employ or engage or otherwise facilitate the employment or engagement of any Restricted Person, whether or not such person would be in breach of contract as a result of such employment or engagement; or*
- (d) for 4 month(s) after Termination, be involved in any capacity with any business concern which is (or intends to be) in competition with any Restricted Business; or*
- (e) for 4 month(s) after Termination, be involved with the provision of goods or services to (or otherwise have any business dealings with) any Restricted Customer in the course of any business concern*

which is in competition with any Restricted Business’.

7. The respondent has an Employee Handbook which it made available online for employees to access. It sets out in its introduction: *You will have a contract of employment as a separate document and that sets out the contractual basis of your employment. It will refer to items in this handbook. However, this Handbook is not your contract of employment and no item here is a part of that contract unless that is made clear in your contract of employment.’*

8. The disciplinary policy and procedures contained in the Employee Handbook provides:

- *‘The purpose of these procedures is to ensure the safe and effective operation of our organisation and the fair and equal treatment of all employees.*

Good management will communicate its expectations effectively to employees and, in turn, listen to their needs and expectations.’

- **‘General Principles**

This procedure does not form part of your contract of employment.....

You will not be dismissed for a first breach of discipline except in the case of gross misconduct (see the relevant section) when the penalty will be dismissal without notice and without payment in lieu of notice.’

- **‘Procedure**

You will be advised of the date for any disciplinary meeting. You will be given at least 24 hours’ notice, unless we mutually agree that we should have an earlier meeting. We will tell you in writing what you are alleged to have done and provide you with details of the evidence available to us. We will also notify you of the possible consequences.

At such a meeting we will present the allegations against you. You will have an opportunity to set out your case and to answer any allegations. You may offer any mitigating circumstances that might be taken into account. This will be done before any decision is made.

In complex cases where it is relevant to call witnesses we will give you advance notice or, if you wish to call witnesses you should give us advance notice.’

- **‘Stage 3- Dismissal**

If your conduct or performance is still unsatisfactory and you still fail to reach prescribed standards, or there is any other breach of discipline, there will be a further meeting. DISMISSAL will normally result. You will be provided, as soon as reasonably practicable with the date on which employment will terminate and informed of your right of appeal.

- **‘Gross misconduct-dismissal without notice**

Gross misconduct is an offence of such a serious nature that your employment contract can be regarded as breached.

If gross misconduct is alleged you may, at the discretion of Connect Comms be suspended on full pay for five days pending completion of an investigation.

....

If it is established, after investigation, that there has been an act of gross misconduct, you may be dismissed summarily, with no notice or pay in lieu of notice. We will only make a decision to dismiss following an appropriate meeting with you.’

- **‘Disciplinary rules**

- Gross misconduct**

The following are examples of misconduct that may be regarded as Gross Misconduct. In this context the word ‘serious’ implies such severity as to mean a complete breakdown of trust in the employee. This list does not cover every possibility but is intended to indicate the type of misconduct that could lead to summary dismissal.

- Fighting or assault on another person.’

9. The claimant was provided with a company car from January 2015. Initially the company purchased its own cars and the claimant normally received Mr Majid’s ‘hand-me-down’. In February 2018 a new arrangement to lease company cars was implemented and a Driver Handbook was prepared. The Driver Handbook set out at:

- **‘17. Return/ handover of vehicle**

....

The cost of rectifying body damage, which would normally be repaired under the terms of the insurance policy, will be charged to the driver.’

- **‘22. Declaration**

I confirm that I have read and understand the company drivers’ handbook/policy and will abide by the rules etc. contained within.’

10. A copy of the driver’s handbook, signed by the claimant, was not produced at hearing.

11. The claimant considered himself as the ‘go to man’ for sales. In 2017 Mr and Mrs Majid’s daughter got married to Mathew Lee. A month later the respondent employed Mr Lee in the role of ‘Sales Director’. The claimant was deeply annoyed by Mr Lee’s appointment as the respondent’s head of sales and which made him

the claimant's line manager. The claimant considered Mr Lee to have no relevant experience in the telecoms industry, that his own experience far surpassed that of Mr Lee and frustrated when he felt he had to explain matters to Mr Lee as his superior. The claimant considered Mr Lee to have only been given the Sales Director position because of his marriage.

12. Mr Majid was aware of the claimant's annoyance over the appointment of Mr Lee and subsequently gave the claimant the title of head of sales in Northern Ireland.

Christmas 2018

13. Mr Dawson was a good friend and confidant of the claimant.
14. The respondent arranged for a Christmas party to take place for staff on Saturday, 15 December 2018 near its head office in Bury.
15. On 15 December 2018 the claimant was feeling 'low' due to difficult personal circumstances that he was experiencing.
16. The claimant and other Northern Ireland employees attended the airport for a 10.00 am flight on 15 December 2018 to Manchester to attend their work Christmas party later that day. The claimant had a bottle of beer to drink at the airport before the flight left. On arrival at Manchester the claimant and his colleagues were met by a bus laid on by the respondent, on which the respondent had provided beer for the employees to drink. The claimant drank a can of beer on the transfer journey to Bury.
17. After arriving in Bury the claimant and Mr Dawson did some shopping before going to a pub for lunch where they met colleagues and a few friends of Mr Lee, whom the claimant knew. Mr Lee also joined his colleagues in the pub that afternoon. The claimant drank about five pints of beer, and Mr Lee three pints of beer, in the pubs visited by them in the course of the afternoon.
18. During the afternoon the claimant considered one of the Northern Ireland employees was being annoying, disrespectful and abusive and so told him to '*knock it on the head*', Mr Dawson who knew the employee better told the claimant to let him deal with the matter.
19. At approximately 6.00 pm the claimant and his colleagues attended a presentation at the respondent's offices. Mrs Majid noticed that the claimant appeared to be unusually subdued. The claimant and Mr Lee each drank one bottle of beer at the presentation before a bus transferred staff members to a hotel approximately 20 minutes away.
20. On arrival at the hotel, the respondent's staff members were met with pre-ordered drinks. The claimant had a glass of wine and thereafter a bottle of beer to drink. Mr Lee also had more to drink,
21. Shortly after arrival at the hotel, the claimant became very emotional arising from his personal circumstances, and Mr Dawson spent some time with him to help him regain his composure. Mr Dawson considered at that point that the claimant had had '*a lot of alcohol to drink*'.

22. Subsequently Mrs Thomas sat beside the claimant in the hotel function room and the claimant spoke with her regarding his status in the respondent company. The claimant felt that his involvement in the development of the respondent's Northern Ireland office had been so significant that it warranted recognition and he threatened that if he was not given shares in the respondent company that he would leave (albeit that he did not intend to carry through with his threat). Mrs Thomas considered that the claimant was becoming upset and angry and that it would be best to move their conversation out from the function room into the hotel foyer where it would be less visible to others.
23. Mr Majid at the claimant's request joined Mrs Thomas and the claimant at a table in the hotel foyer. A conversation took place during which the claimant in recognition of his opening and expansion of the Northern Ireland office sought 20% of any re-sale value of the respondent company. We accept Mr Majid to try to placate the claimant put to him that he would talk to the claimant the following week about the matter.
Mrs Majid, having come out to look for her husband, on approaching the table overheard Mr Majid say *'I'm not talking about this now Stephen-we'll talk about it on Monday'* whereupon he got up and left. Mrs Majid sat down with the claimant and Mrs Thomas to see what was wrong. The claimant was agitated and put that he should own part of the company and Mr Lee had only got the Sales Director job because he married Mr and Mrs Majid's daughter. Mrs Majid and Mrs Thomas tried to calm the claimant down putting to him that it was not the time for this type of conversation and they would arrange for him to fly over to head office to discuss matters in the week commencing 7 January 2019. Mrs Majid and Mrs Thomas reminded the claimant that it was the Christmas party for everyone and they should all get on with enjoying the evening.
24. They all thereafter returned to the function room and as per the claimant's evidence a lot more alcohol was consumed *'between all work colleagues'*.
25. After dinner there was music and dancing in the hotel function room. We on balance find more credible the evidence of Mrs Thomas and Mrs Majid to that of the claimant that Mrs Thomas subsequently observed the claimant as having climbed up onto the main table to dance and that he was asked by security to come down, and that Mrs Majid saw the claimant to have removed his shirt and to drink directly from a large bottle whereupon she asked staff further down the table to tell him to put his shirt back on straightaway.
26. Subsequently Mr Lee ended up sitting at the main hotel function room table beside the claimant. The claimant wanted to discuss work. As per the claimant's own evidence he wanted to *'get one over'* on Mr Lee and he deliberately set out to goad him and to try to get a reaction. The claimant put to Mr Lee that he had spoken that evening with the respondent company's two directors, Mr and Mrs Majid, and they had told the claimant that they were making him a director of the company and that he was coming back to Bury the week after to finalise paperwork to make his promotion official. The claimant then put to Mr Lee that he only got into his position in the company because he was married to the managing director's daughter and said to Mr Lee that he was *'Oscar Majid's puppet'*. The claimant was pleased to see Mr Lee get angry. It was in dispute whether Mr Lee then stood up and took a swing at the claimant which missed but resulted in the buttons being torn off the

claimant's shirt, or whether Mr Lee simply told the claimant that he was not happy with what the claimant was saying and walked away. Either way, the claimant followed and then made physical contact with Mr Lee resulting in Mr Lee falling to the floor whereupon bystanders intervened and restrained the claimant on the floor while hotel security were called. Mr and Mrs Majid both witnessed the incident, Mrs Thomas witnessed the aftermath. The claimant admitted in his evidence that he had been fighting with Mr Lee and that he had pushed him, but disputed having punched or head-butted him. Mr Lee sustained a mark to his forehead during the incident. There was no evidence of anyone having witnessed Mr Lee attempt to punch the claimant. We note in particular the evidence of Mr Dawson of the conversations he had shortly after the incident with the claimant – *that he had a fight with Mr Lee*- and conversation with Mr Lee- *that the claimant had head-butted him*- and the reaction of bystanders who intervened and restrained the claimant, it is clear the encounter was violent and we find on balance the respondent's evidence more probable that the claimant instigated an unprovoked physical assault upon Mr Lee, that the claimant head-butted Mr Lee resulting in a mark to his forehead and causing Mr Lee to fall to the ground.

27. Mr Lee thereafter was guided to the other side of the function room whilst the claimant was restrained awaiting the arrival of hotel security staff whereupon the claimant was escorted out of the function room by hotel security staff.
28. Following this incident the claimant joined Mr Dawson and other Northern Ireland colleagues in the hotel's smoking area. As per Mr Dawson evidence the claimant's shirt was open (although he did not look closely enough to be sure whether it was just unbuttoned or buttons torn off) and was covered in red. Mr Dawson asked the claimant what had happened and what was on his shirt, the claimant replied it was red wine and that he had had a fight with Mr Lee. Mr Dawson found the claimant dismissive of what had just happened with Mr Lee and that the claimant laughed and joked about it. The claimant gave no indication to Mr Dawson of Mr Lee having started the fight. Mr Dawson subsequently spoke with Mr Lee who showed Mr Dawson a red mark on his face and said to Mr Dawson that the claimant had head-butted him.
29. Shortly after the incident the respondent's staff members, save those staying at the hotel, left the hotel to go home.

Sunday 16 December 2018

30. In or around 1.00 pm on Sunday 16 December 2018 Mrs Majid phoned and invited both Mrs Thomas and Mr Lee to come to her and Mr Majid's house for a senior management meeting. Mrs Thomas and Mr Lee both attended and a meeting took place mid-afternoon between them and Mr & Mrs Majid. The events of the night before were discussed, each confirmed what they had personally witnessed and they discussed what action should be taken. Mr Lee expressed his opinion that the company directors Mr and Mrs Majid (who were the only people with the authority to make a dismissal decision) should dismiss the claimant. We accept that Mr and Mrs Majid were of the genuine view that the claimant had instigated an unprovoked assault upon Mr Lee and that his conduct was clearly misconduct. Whilst discussions took place Mrs Majid had her laptop open and was typing, ultimately producing a dismissal letter addressed to the claimant. It was decided that Mr Majid and Mr Lee would fly to Belfast the following morning to hold a meeting with the claimant. The senior management meeting came to an end after approximately one

hour. No notes of the meeting were kept.

31. At 20.07 that evening the claimant sent an email to Mr Lee and Mr Majid which read:

'Hi all

My behaviour last night was unmissable. I'm not putting this down to drink because my head has been up my arse. I have a lot going on and I'm not that bad person everybody thinks I am. I was a disrespectful f!?!ker last night. You are both good guys. Sorry....'

Monday 17 December 2019

32. On Monday, 17 December 2019 Mr Majid and Mr Lee took an early morning flight and attended the respondent's Belfast office for 8:30 am.
33. The claimant did not arrive for work at 9.00 am. At approximately 9:50 am Mr Lee tried unsuccessfully to contact the claimant by telephone. Mr Dawson was thereafter asked to try to contact the claimant which he successfully did and informed him that Mr Majid and Mr Lee were in the Belfast office and wanted to discuss matters with the claimant.
34. When the claimant arrived in the Belfast office at approximately 11:30 AM he was very subdued. Mr Dawson was asked to remain in the room whilst other staff members were sent out to get coffee. The claimant agreed that Mr Dawson stay. Mr Majid attempted to speak with the claimant but the claimant did not engage or try to explain the incident that had taken place with Mr Lee but instead spoke only a few words, stating that he understood and it was fine. The claimant began to clear out his desk. Mr Majid asked the claimant before going to leave behind his laptop (which was on the desk), his work sim card and keys to his company vehicle. Mr Majid handed the claimant the pre-prepared dismissal letter before the claimant left the office and Mr Dawson was asked to give the claimant a lift home.
35. The letter handed to the claimant by the respondent was dated 17th December 2018 and set out:

'Dear Stephen Robinson,

Confirmation of summary dismissal

Following the disciplinary hearing held on 17 December 2018 at the NI offices with Oscar Majid and Matthew Lee, and in view of the seriousness of this matter, the decision has been made to terminate your employment with 4G Mobiles and Data T/A Connect Comms by reason of your gross misconduct.

The reason for this decision is that at the above hearing it was found that your conduct was unsatisfactory in the following respects: Violent Conduct.

Your conduct amounts to a serious breach of the following clause(s) of the contract of employment: clause(s) section 17. This is a particularly serious issue for our business because violent conduct against another employee.

This conduct is serious enough to merit dismissal in its own right. This is the case even though we have taken into account the fact that you do not have an active warning on your disciplinary record.

The arrangements in respect of your dismissal are:

- *Your dismissal is effective immediately and your final day of employment is therefore 17th of December 2018 (Termination Date).*
- *You are not entitled to any period of notice or payment in lieu of notice.*

.....

- *Your final payment of salary shall be made on 31st of December 2018, less normal deductions of tax and national insurance contributions and we will forward your p 45 to you in due course.*
- *You will remain bound by clause sections numerals 18–21 of your contract of employment which relate to: refer to sections 17–21.*

.....

You have the right to appeal against dismissal and the above may be revoked or varied if your appeal is successful. If you wish to appeal, you should inform the Operations Director in writing by 24th December 2018, stating your grounds of appeal in full and your appeal will be dealt with in accordance with the company's disciplinary policy. The dismissal will still take effect as described above if you appeal, but if your appeal is successful, you will be reinstated with retrospective effect to the Termination Date and any lost pay will be reimbursed.'

36. On the way home the claimant expressed to Mr Dawson that he had thought '*things would blow over*'.
37. After the claimant left, Mr Lee and Mr Majid inspected and took photographs of his company car. They noted dents and scratches thereon so Mr Majid instructed Mr Dawson to obtain a repair quotation. A local garage subsequently advised that the car had previously been repaired and the wrong paint used (which was contrary to the terms of the respondent's leasing arrangement). A repair estimate in the sum of £2,587.20 was obtained. The respondent chose not to make an insurance claim for damage to the claimant's company car and has not to date undertaken full repair works estimated for but stated that its intention is to postpone doing so until closer to when the car is due for return under its leasing arrangement in 2020. Whilst indicating that some repairs had been carried out, no vouching documentation was produced at hearing for any repair expenditure incurred to date.
38. On 18 December 2018 the claimant wrote to Mr Majid setting out:

'Oscar

Thanks for the time at Connect Comms, please accept this confirmation I will

not be appealing the decision of gross misconduct. Can I ask for my certificate for my number plate to be emailed over to me. If Johnny requires any help with the outstanding business ask him to call me as I do not want to see any customers not connected, as I know exactly where the deals lie.

Thanks'.

39. On 31 December 2018 the claimant emailed Mr Majid at 13:47 *'I presume you are not paying me today???'*

Mr Majid replied at 17:30 'Yes you're quite right, and the reason is we have a £2500.00 car bill which I have to spend to get the BMW put right. I am sorry if this puts in a difficult position but fair is fair.'

The claimant responded at 17:42 'I would like to know the damage of the car, £2500 is quite a bit, common decency would have been to let me know. Anyway it doesn't surprise me onwards and upwards. All the best boys'.

Mr Majid replied at 17:47 'Why do you have the money? I also have a quote from BMW which we would have sent to you but we don't have an email? Yes Stephen onwards and upwards.'

The claimant replied at 18:04 'Oscar, You have my email address, if this is the thanks I get no problem for years of business, great. I would appreciate the quote for the work carried out.'

40. The claimant presented his claim to the Office of the Industrial Tribunals on 11 March 2019.

RELEVANT LEGISLATION

Unfair dismissal

41. Under Article 126 of the Employment Rights (Northern Ireland) Order 1996 ('ERO') an employee has the right not to be unfairly dismissed by his employer.
42. A dismissal may be regarded as automatically unfair under Article 130A (1) ERO where one of the statutory dismissal and disciplinary procedures which applies in relation to the dismissal procedure has not been completed, and, the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements. There are two types of statutory dismissal and disciplinary procedure - the Standard Procedure and the Modified Procedure - which where applicable must be followed as a bare minimum by an employer contemplating a dismissal. Usually the standard procedure will apply unless the following conditions for the application of the modified procedure are satisfied [Regulation 3 (1) of The Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004]:
- (a) the employer dismissed the employee by reason of his conduct without notice;
 - (b) the dismissal occurred at the time the employer became aware of the conduct or immediately thereafter;

- (c) the employer was entitled, in the circumstances, to dismiss the employee by reason of his conduct without notice or any payment in lieu of notice; and
- (d) it was reasonable for the employer, in the circumstances, to dismiss the employee before enquiring into the circumstances in which the conduct took place,

43. The standard procedure consists of three steps. In summary, at Step 1 an employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee and send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter. Step 2 requires a meeting. Step 3 is the provision of an appeal. The modified procedure requires at Step 1 the employer to set out in writing the employee's alleged misconduct which has led to the dismissal, what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and the employee's right to appeal against dismissal, and send the statement or a copy of it to the employee. Step 2 is the provision of an appeal. [Schedule 1, The Employment (Northern Ireland) Order 2003].

44. Where a dismissal is not automatically unfair, Article 130(1) ERO provides that 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 principle reason) for the dismissal, and
- (b) that it is either a reason falling within Paragraph (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.

Reasons falling within Paragraph (2) include at Article 130(b) if it relates to the conduct of the employee.

45. Under Article 130(4) ERO where the employer has fulfilled the requirements of Paragraph (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.

46. The task for the tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating

shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case”.

47. The Northern Ireland Court of Appeal decision in the case of **Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47** endorses the **Burchell** approach and outlines the task for the tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer’s act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.
48. The case of **Connolly v Western Health and Social Care Trust [2017] NICA** confirms that the task of the tribunal is not to substitute its view for the employer’s. The tribunal must decide in a gross misconduct case whether dismissal was an appropriate sanction particularly where an employee is summarily dismissed for a first offence. The tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the tribunal must look at whether a lesser sanction was appropriate in the circumstances.
49. Where an industrial tribunal finds that the grounds of a complaint of unfair dismissal are well-founded the Orders it may make by way of remedy are set out at Article 146 ERO and include reinstatement, or re-engagement, and otherwise compensation. How compensation is to be calculated is set out at Articles 152 to 161.
50. Article 154(1A) ERO provides that where an employee is regarded as unfairly dismissed by virtue of Article 130A(1) the industrial tribunal shall increase the basic award where the amount is less than four weeks’ pay to the amount of four weeks’ pay (save as provided therein at 1(B)).
51. Articles 156(2) ERO provides: *“Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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.”*
52. The starting point for the calculation of the compensatory award is Article 157 (1) ERO: *‘(1) Subject to the provisions of this Article and Articles 158, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer’.* The compensatory award should not be increased

out of sympathy for the claimant or to express disapproval of the respondent. The onus is on the respondent to show the claimant as unreasonable in the steps taken or not taken to mitigate his loss.

53. Article 157(6) ERO 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.* The tribunal must firstly, consider whether the claimant was guilty of blameworthy conduct that contributed to the employer's decision to dismiss; and, secondly, whether it is just and equitable to reduce the award by a percentage to reflect the extent of the contributory fault. The test is whether the claimant's behaviour was perverse, foolish or 'bloody-minded' or unreasonable in the circumstances. If contributory fault is found both the compensatory and basic awards may be reduced and the percentage deduction can go as high as 100%. [*Dalzell v McIlvenna CRN: 1799/13*]. In *GM McFall & Co Ltd v Curran [1981] IRLR 453* the Court of Appeal (NI) determined that, as a general rule, any deductions from the basic and compensatory award should be the same.
54. The case of *Polkey v Dayton Services LTD 1987 3 All ER 974 HL* makes it clear that, if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if following the procedures correctly would have made no difference to the outcome. There can be no Polkey deductions of the basic award.
55. Under Article 154(1) ERO where an employee is regarded as unfairly dismissed there is provision at Article 17 of the Employment (Northern Ireland) Order 2003 for an uplift to be applied to awards in proceedings before an Industrial Tribunal relating to a claim under any of the jurisdictions listed in Schedule 2 (which includes unfair dismissal under Article 145 ERO) by an employee where it appears to the Industrial Tribunal that a claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies, the statutory procedure was not completed before the proceedings were begun, and the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure, in which case it shall (save where there are circumstances which would make an award or increase of that percentage unjust or inequitable) increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50%.

Notice

56. Minimum notice entitlements are required to be given by an employer or employee to terminate the contract of employment under Article 118 ERO save where the contract is terminable without notice by reason of the conduct of the other party.
57. Gross misconduct is misconduct by the employee so serious that it completely undermines the employer's trust and confidence in the employee to perform his duties.
58. Under the Industrial Tribunal Extension of Jurisdiction Order (Northern Ireland) 1994 an employee may bring a claim for damages for breach of his contract of

employment or for a sum due under that contract, or any other contract connected with his employment, before an industrial tribunal if the claim arises out of or is outstanding on termination of his employment.

Holidays

59. The Working Time Regulations (Northern Ireland) 2016 provide under Regulations 15 and 16 for a worker to have minimum leave in a year of 5.6 weeks.
60. Under Regulation 17 of the 2016 Regulations where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) therein which sets out the formula to be used in the absence of provision in a relevant agreement.

Unlawful Deduction

61. A worker has a right not to suffer unauthorised deductions from wages by his employer under Article 45 ERO. A deduction occurs when the employer pays less than the amount due on any given occasion and includes a failure to make any payment. Protection does not apply to a deduction made in pursuance of any arrangements which have been established in accordance with a relevant provision of the worker's contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or otherwise with the prior agreement or consent of the worker signified in writing [Article 46 ERO]. A complaint may be presented in respect of unauthorised deduction to an Industrial Tribunal under Article 55 ERO.

AUTHORITIES

62. The following authorities were referred to by the parties and have been taken into consideration by the tribunal:

Claimant:

O'Neil v Wooldridge Ecotech Limited UKEAT/0282/07/LA
Zimmer Ltd v Brezan [2009] UKEAT 0294 08 0304
Norbrook Laboratories (GB) Ltd v Adair & Anor [2008] EWHC 978 (QB)
Polkey v A.E Dayton Services Ltd [1988] A.C. 344

Respondents:

Maud v Penwith District Council [1984] IRLR
Rogan v South Eastern Health and Social Care Trust [2009] NICA 47
Iceland Frozen Foods Ltd v Jones [1983] ICR 17
British Home Stores Ltd v Burchell [1980] ICR 303
Connelly v Western Health and Social Care Trust [2017] NICA 61
Neary and Neary v Dean of Westminster [1999] IRLR or 288
Polkey v A.E Dayton Services Ltd [1988] A.C. 344
Software 2000 Ltd v Andrews and others 2007 IRLR 568

APPLYING THE LAW TO FACTS FOUND

63. Mr Moore submitted that the respondent did not in its response or pleadings make any reference such that it was going to seek to rely on the modified disciplinary procedure and contended that the standard rather than modified procedure properly applied supported by ***O'Neil v Woodridge Ecotech Ltd UKEAT/0282/07/LA***. He submitted that the claimant's dismissal was substantively and procedurally unfair, there was no investigation, no hearing and the dismissal letter provided to the claimant was neither compliant with statutory requirements or contractual requirements. He contended the dismissal was automatically unfair and sought a 50% uplift of the compensatory award for failure to follow the statutory dismissal procedures.
64. Ms Leonard contended that the respondent was entitled to rely upon the modified procedure and sought to distinguish the present case from that of ***O'Neil v Wooldridge*** in which the incident took place during the working day, the individual who witnessed it was also responsible for hiring and firing and had discussed the matter on the telephone with the two company owners the same day, after which he decided to dismiss the employee, but did not do so until the following day. Ms Leonard submitted in the present case the incident of gross misconduct took place late in the evening at a work event and most witnesses accept that alcohol had been taken. Mr Lee was the victim and did not have authority to dismiss the claimant. After the incident the claimant was escorted by security staff to the smoking area and the respondent witnesses left separately making immediate dismissal impossible and inappropriate. Ms Leonard contended that the views of all the senior management team were required to decide if dismissal was appropriate and this was done as soon as possible with a senior management meeting being called the next day where senior management exchanged full accounts of what they had witnessed; this was when the respondent became fully aware of the circumstances of the incident; the claimant was back in Belfast; Mr Majid and Mr Lee travelled to Belfast first thing on the Monday morning and were in the office before 9.00 am and it was not possible to dismiss the claimant any sooner than this. Ms Leonard furthermore contended that in ***Wooldridge*** the modified 'step one' was not carried out, but was in the present case.
65. Ms Leonard contended in the alternative if found that the standard procedure applied, that the height of the respondents' investigation was done at the meeting on 16 December 2018; pertinent that all those who attended the meeting were witnesses themselves to the events of the night before; and Mr Majid and Mr Lee subsequently received an email from the claimant apologising for his behaviour. Ms Leonard accepted that the claimant was not invited to a meeting in advance of 17 December 2018 but contended he was asked to have a discussion on 17 December 2018, Mr Dawson was asked to witness that meeting and this was agreed by all parties, the meeting on the respondent's evidence had lasted 20 minutes and it was the respondents' witness evidence that the claimant refused to engage. Ms Leonard submitted that the dismissal letter issued to the claimant complied with step 3 of the standard procedure.

66. The tribunal is not persuaded that the modified procedure was applicable in this case. Mr Majid, Mrs Majid, Mrs Thomas and Mr Lee were all present at the time of the incident, Mr & Mrs Majid witnessed it, Mr Lee was party to it and Mrs Thomas witnessed the aftermath. Mr & Mrs Majid were the actual Company directors and only individuals with the authority to dismiss. Mr Majid did not dismiss the claimant at the time of the incident, or thereafter on the Saturday evening upon which it occurred. Instead a senior management meeting was called the following afternoon at which the aforementioned senior management team discussed what had happened, what action the Company directors should take and together compiled a dismissal letter drafted on the preposition that a disciplinary hearing would first be held with the claimant. Mr Majid and Mr Lee both received an email from the claimant that Sunday evening which they considered to be apologetic. The following morning, after an unsuccessful request for the claimant to partake in a meeting, to take place there and then, Mr Majid proceeded to dismiss the claimant by asking him to leave his company laptop and company car and by handing to the claimant the pre-prepared dismissal letter. It is clear the dismissal did not occur in accordance with the statutory requirement under Regulation 3.1 (b) *at the time* the employer became aware of the claimant's conduct or *immediately* thereafter. The tribunal do not consider either that the statutory requirement at (d) is met *that it was reasonable for the respondent in the circumstances to dismiss the claimant before enquiring into the circumstances in which the conduct took place* noting the respondents own acknowledgement in its pre-prepared dismissal letter that it was appropriate to allow the claimant a hearing before proceeding with a dismissal. We consider in the circumstances the standard procedure applied and that step one thereof was not met at the fault of the respondent. We find accordingly the dismissal was automatically unfair under Article 130A (1) ERO, the non-completion of the dismissal and disciplinary procedures being wholly attributable to the failure by the respondent to comply with its requirements.
67. The tribunal consider the dismissal was otherwise 'ordinarily unfair'. We consider that the third stage of the Burchell test was not met and that the process and procedures followed by the respondent fell outside the band of reasonable responses for a reasonable employer in the circumstances, in particular by way of the inclusion of Mr Lee in the decision to dismiss the claimant at the senior management meeting albeit that he had been a party to the incident; the dismissal of the claimant prior to reasonable notice of and provision of a fair hearing/opportunity to put forward any mitigation; the presence of Mr Lee on the 19 December 2018 when Mr Majid sought to discuss matters with the claimant and that Mr Majid's mind as per his evidence was already made up and he would not have changed his decision to dismiss irrespective of anything the claimant might have said. In the circumstances taking into account equity and the substantial merits of the case we consider the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant when it did.

FACTS AND CONCLUSIONS RELEVANT TO REMEDY

68. The claimant sought compensation only.
69. The effective date of termination (EDT) was 19 December 2018 at which time the claimant had 4 complete years continuous employment.
70. The claimant's daily rate of pay including commission was approximately £245.65 gross.

71. Mr Majid considered that there was 'no way back' for the claimant in terms of continuing his employment following the assault that he had witnessed by the claimant upon Mr Lee at the Christmas party.
72. The respondent was unaware of the statutory minimum disciplinary and dismissal procedures at the time of dismissing the claimant.
73. The claimant is in receipt of Universal Credit. The claimant has been unsuccessful in securing alternative employment. The claimant has applied for approximately eight jobs since his dismissal.
74. The claimant was restricted under his contract of employment for a period of 4 months from certain operations in the telecoms industry. The claimant did not seek at any stage from the respondent a copy of his contract of employment so as to clarify any uncertainty held by him about restraint of trade covenants that he was subject to therein.

75. Mr Moore contended **Polkey** was not applicable in this case as *no procedure* was applied to the claimant for any flaw to be corrected therein and everything the respondent did was wrong. In respect of contributory fault Mr Moore contended that the claimant's conduct must be considered against the background of what happened, there having been no investigation, no interview notes, no witness statements taken and that the respondent held a 'kangaroo court' on 16 December 2018 which effectively determined the claimant's fate.
76. Mr Moore submitted that the claimant cannot be considered to have contributed because he reacted to an assault and he apologised, however nothing happened to his assailant Mr Lee, and that Mr Lee had formed a significant part of the senior management meeting on 16 December 2018 and that matters were not conducted in an impartial independent or fair way, and at most there could only be a low level of contributory fault were the tribunal to consider the claimant wrong for retaliating.
77. Mr Moore put that there is perhaps a responsibility but certainly not a statutory duty upon the claimant to mitigate his loss and that it is for the respondent to prove the claimant did not reasonably mitigate his loss and he contended that the letter from the respondent's solicitors contained a clear and obvious threat which prevented the claimant from working within the telecoms industry.
78. We consider it highly likely that the claimant would still have been dismissed in the circumstances of this case had the respondent correctly complied with the statutory dismissal procedure. We note the evidence of Mr Majid that he considered there was *no way back*. We find that a 90% 'Polkey reduction' of the compensatory award is just and equitable to reflect the likelihood that following correct procedures would have made no difference to the outcome.
79. We consider that the claimant's behaviour in the circumstances was foolish and unreasonable if not indeed 'bloody-minded', by his own admission wanting to 'get one over' on Mr Lee, setting out to goad him for a reaction, and being admittedly pleased to see him become angry. The claimant we consider was the sole instigator of events rather than a victim or acting in retaliation to the actions of Mr Lee. The claimant's behaviour we find was blameworthy conduct which entirely triggered the events of 17 December 2018 and brought about the respondent's decision to dismiss and without which the claimant would not have been dismissed. In the circumstances we consider it just and equitable to make a 100% reduction of the basic and compensatory awards to reflect the contribution of the claimant's conduct to his dismissal.
80. We furthermore accept that the respondent has shown the claimant to have been unreasonable in his efforts to mitigate his loss having made approximately only eight job applications in the course of a year and no effort to seek clarification as to restraint of trade provisions actually applicable under his contract of employment and as such are not persuaded that the claimant was unreasonably prevented from working in the telecoms industry.

Notice Pay

81. We are satisfied that the respondent was contractually entitled to terminate the claimant's contract of employment summarily for gross misconduct by reason of

fighting, which the claimant admitted to having done with Mr Lee. The claimant's claim for notice pay is not well founded and is dismissed.

Holiday pay

82. It was agreed that the claimant was due two days' pay in lieu of holidays accrued due at the effective date of termination. We are satisfied on balance that the claimant is entitled to £491.31 gross in respect thereof.

Unlawful deduction

83. In respect of the unlawful deduction from wages claim Mr Moore submitted the respondent's actions in relation to the car over Christmas and the New Year were vindictive and appalling leaving the claimant and his family with no money. He put that it is a statutory requirement for there to be a signed document which permits the deduction, but in this case there is no signed document; that we were told in evidence that there *might be a copy of the signed document on a server somewhere* but no such document was disclosed and Mr Moore submitted was being because it never existed. He contended that if there was damage to the car it could not be directly attributed to the claimant, no discovery took place and no agreement was set down. We accept on balance that there is no signed document authorising the deduction made from the claimant wages and commission due in December 2018 and that the claimant suffered an unlawful deduction therefrom as set out in the respondent's schedule of loss in the sum of £2,613.35 gross.

CONCLUSION

84. The tribunal finds that the claimant was automatically unfairly dismissed by the respondent under Article 130A(1) ERO. Taking into account the 90% likelihood that the claimant would still have been dismissed in the absence of procedural flaws and 100% contributory conduct, the basic and compensatory awards are reduced to nil. The claimant's claim for notice pay is not well founded and is dismissed. The claimant is entitled to two days' holiday pay and the respondent shall pay the claimant £491.31 gross in respect thereof. The claimant has suffered an unlawful deduction in respect of wages and respondent shall pay the claimant £2,613.35 gross in respect thereof.
85. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 9, 10 and 11 December 2019, Belfast.

Date decision recorded in register and issued to parties:

