**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr I Lymar**

**Respondent:** **K & D Joinery Ltd**

**Heard at:** **East London Hearing Centre**

**On:** **6th and 7th January 2022**

**Before:** **Employment Judge Reid**

**Representation**

Claimant: In person
Respondent: Mr Green, Counsel

***This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.***

# RESERVED JUDGMENT

**The judgment of the Tribunal is that:-**

1. The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996.

   Note: Findings as to a *Polkey* deduction and under s122(2) and 123(6) Employment Rights Act 1996 (reduction for contributory fault to basic award for unfair dismissal and to compensatory award for unfair dismissal) are set out below. These mean in practice that the Claimant is not entitled to any compensation for unfair dismissal even though he has won his claim. There is therefore no need for a further hearing to decide compensation.

2. The Claimant's claim for breach of contract was withdrawn at this hearing. The Claimant withdrew it because of the effect of the £25,000 limit on damages the Tribunal can award and so that he can bring that claim in the civil courts, if he wants to. This claim is dismissed on withdrawal.

Mr Lymar – see paras 44-50 for a summary explanation of what this judgment means for you.

# REASONS

Background and claim

1. The Claimant was employed by the Respondent from 10th June 2004 until he was dismissed on 11th September 2020. He was employed as a Joiner. For a period in around 2010 - 2011 he worked on the Respondent's CNC machine before returning to his Joiner role.

2. The Claimant brought claims for unfair dismissal and for breach of contract on a claim form presented on 13th September 2020 after ACAS conciliation between 11th August 2020 and 11th September 2020. He claimed compensation only.

3. The Claimant's unfair dismissal claim (page 2) was as follows. He said (page 13) that the real reason he was dismissed was not because of misconduct by him but because before being dismissed, on 22nd February 2020, he reminded Mr Larry Kearns about a 2009 agreement they had to compensate him for the work the Claimant had done on the CNC machine and the real reason he was dismissed was because he had claimed that the 2009 agreement should be fulfilled. The Claimant in his claim form (page 13) said that he had been asked to resign or he would be disciplined and dismissed. In his witness statement he identified various matters he said made his dismissal unfair: the CCTV footage which showed the claimed misconduct was kept for too long, other employees also removed items, there had been a delay in starting the disciplinary process, he had asked for extended CCTV footage but had not been given it, the personal projects he was accused of doing at work had not been identified, he was not allowed to ask questions of other employees as part of the process, there was a difference in the wording used in the allegations (the change from it being said he had taken 'items' to taking 'products'), and other procedural failings.

4. The Respondent defended the unfair dismissal claim (page 15) saying he had not been told to resign or he would be dismissed, that the dismissal was a reasonable response to the allegations of theft and doing personal projects when at work and that a fair disciplinary procedure was followed; it was confirmed at this hearing that if the Claimant won his unfair dismissal claim the Respondent would be arguing a *Polkey* deduction and contributory fault reduction to any compensation for unfair dismissal. I explained to the Claimant what these arguments meant.

5. I explained to the Claimant the test in *BHS v Burchell* as regards a misconduct dismissal and the range of reasonable responses test.

6. The Claimant's breach of contract claim was discussed with him at the first preliminary hearing on 14th January 2021 (page 29A) and he was asked to consider whether he wanted to continue with that claim because the claim was for £100,000 per year since around 2010 and that total was considerably in excess of the maximum the Tribunal could award, of up to £25,000 (page 9 total claim £1.2m). The breach of contract claim was a claim that Mr Larry Kearns the Respondent's owner and a director had verbally agreed a payment with the Claimant in 2009,

because the Claimant had made some adaptations to the CNC machine, which the Respondent was then trialling and adapting.

7. Because his response after the first preliminary hearing was ambiguous a second preliminary hearing took place on 28th June 2021 (not in the bundle) when the Claimant confirmed that he did intend to continue with the breach of contract claim and the issues therefore to be decided were identified (para 9). I discussed this with him again at the beginning of this hearing because he was unrepresented and may not have fully understood the consequences of continuing with this claim in the Employment Tribunal and I wanted him to have a final think about it. I explained firstly that if the decision was that the dispute about the claimed CNC agreement was a dispute about intellectual property then the Employment Tribunal cannot decide it. Even if that were not the case and even if the Claimant won this claim, his damages would be limited to £25,000 maximum and he could not then go to the civil courts to claim any more than that because the claim would have been decided. If the Claimant lost this claim that would be the end of it and he could not go to the civil courts for a second attempt. I asked the Claimant to think about this in the hour and a half reading time. Having read his witness statement I explained that he had misunderstood what was a 'lead case' in the Tribunal Rules; he had understood it to mean a case by one claimant bringing two claims which were factually connected and I explained that a lead case referred to in the Rules was where two or more claimants are bring the same claim (for example an equal pay claim) and that findings on a lead case will be relevant to the other cases so that it is more efficient to hear one case as that will help decide the other cases by the other claimants on the same issue. Because he was still concerned with a possible overlap between his breach of contract claim and his unfair dismissal claim I explained to him that there is a difference between (1) claiming that the real reason he was dismissed was because he was claiming in 2020 he was owed money from a 2009 agreement with Mr Larry Kearns and (2) whether there was in fact an oral agreement in 2009 with Mr Larry Kearns and if so what the terms of it were and was there a breach. The Claimant then confirmed he wanted to withdraw his breach of contract claim because he wanted to be able to claim more than the £25,000 maximum the Employment Tribunal could award.

8. I was provided with a 188 page bundle plus witness statements from the Claimant and from Mr Larry Kearns (owner and director), Mr Costello (investigation and decision to dismiss), Mr Smith (companion at meetings) and Mr Whyborn (appeal) for the Respondent. I heard oral evidence from the witnesses. The Respondent did not call Mr John Kearns, another director, who was the person the Claimant said had given him permission to take the items the Claimant put into his car and to do personal projects during the working day. I also viewed the three CCTV clips dated 13th, 18th and 20th May 2020; the Claimant accepted it was him in the footage and that he was putting items into his car – his case was that he had Mr John Kearns' permission to do so.

9. I gave considerable assistance to the Claimant in framing his questions for the Respondent's witnesses because he struggled to identify what was relevant to his claim. By the end of the first day Mr Larry Kearns' evidence was not yet completed and Mr Whyborn's evidence was still to be heard. I re-explained to the Claimant at the end of the first day what were the relevant issues to these witnesses so he

could be more focussed the next day and to enable the time for the hearing of evidence to be fairly divided up between the parties as his evidence also had to be fitted in on the second day (which was to start early at 9.30am). The Claimant sent overnight a typed list of 97 questions for Mr Larry Kearns and 41 questions for Mr Whyborn (not copied to the Respondent, so I forwarded these lists to the Respondent's Counsel) but when I discussed these with him, again identifying the relevant issues for these witnesses, he said that since sending in the questions he had significantly reduced the list. He agreed that he could complete questions for these witnesses within my 2 hours suggested timescale and did so. I then heard the Claimant's evidence which completed by 2.40pm on the second day. The Claimant wanted submissions to be in writing but I decided that with a suitable break the Claimant could give his submissions orally taking into account I had been advising him throughout the hearing the keep a note of the points he might want to make at the end of the hearing. I scheduled a 50 minute break including an extra 10 minutes requested by the Claimant. I then heard oral submissions on each side including in relation to a *Polkey* deduction to compensation and a deduction for contributory fault (if the Claimant won his claim). The Claimant then offered to send in his typed up notes but I said he should not do so because he had read those notes out to me. He sent them in anyway after the hearing but I did not read them having already had them read out to me and it not being fair to allow the Claimant to send in his notes as a submission, but not let the Respondent do the same.

Findings of fact

10. I find that when the Claimant was moved back full-time into his Joiner role after his work in 2010/2011 on the CNC machine. I find that he was bitter and angry about this and felt his work had not been recognised (even though it had involved the offer of a pay rise, page 33). That bitterness and resentment and his complaints about other matters during the following years, were evident in his approach to what happened in 2020 – see findings below – because he had the habit of making quite extreme allegations against the Respondent including during this hearing, without justification. Without making any findings of the existence or not of any oral agreement in 2009 with Mr Larry Kearns about compensation for his work on the CNC machine, the Claimant clearly felt over the years that the Respondent owed him (page 62 a letter dating back to 2012). It was evident that his overall resentment had resulted in a lack of perspective and the allegations he was making affected his credibility as set out below.

11. The Claimant accused the Respondent of blackmail and of starting previous disciplinary proceedings against him because they wanted to get rid of him (page 13). He said Mr Larry Kearns had created intimidating and unbearable working conditions (even though the Claimant also said Mr Larry Kearns had not spoken to him between 2011 and 2020) and said he had encouraged others to harass the Claimant. In his witness statement (page 3) he said Mr Kearns had from when he was working on the CNC machine been looking for an opportunity to dismiss him and (page 4) that at the time of disciplinary proceedings in 2011 Mr Larry Kearns had told him to resign to avoid dismissal, an allegation which would re-emerge in 2020 against Mr Costello. He assumed that Mr Larry Kearns (who was not responsible for the Claimant day to day and had limited contact with staff, that being handled by other managers) was deliberately ignoring him (page 4) and creating an intimidating and hostile atmosphere for the Claimant on purpose. He

claimed (page 12) that he only signed his updated contract in 2012 (when moving back to being a Joiner) after a month of blackmail and bullying from Mr John Kearns. He said for 4 years Mr Larry Kearns and Mr John Kearns were trying to get rid of him (page 5) and provoking the Claimant into arguments so that there would be misconduct. He said the 2016 disciplinary issue had been orchestrated (pages 6-7) and to provoke him into misconduct. He said that in 2017 when CCTV was introduced they were trying to provoke him (page 8). He claimed bullying and discrimination (page 10) about the furlough scheme and breach of contract even thought he had agreed to the 20% reduction in pay which was also how the scheme worked for everyone. He said the meeting in June 2020 with Mr Costello about his queries on the furlough scheme was orchestrated to blackmail him into resigning rather than face disciplinary action. He said that Mr Larry Kearns had been forcing him to resign since 2011 (page 15). During the hearing he put it to Mr Costello that Mr Costello had been bribed to dismiss him. At the end of the hearing in submissions the Claimant said for the first time that the anonymous report from another employee about the Claimant's actions (which had triggered the 2020 disciplinary process) was in fact fake, having accepted in cross examination that an employer faced with such a report would be reasonable to investigate it (so implicitly accepting it was a real report). He also said in submissions that certain documents were fake or were made up and backdated, that Mr Larry Kearns had viewed him as 'easy prey' and claimed that the witnesses were not credible because they had accepted cash payments on top of their furlough pay.

12. The Claimant's claim of a longstanding conspiracy dating back to 2011 to dismiss him and allegations of blackmail at various stages without evidence (both of which were entirely inconsistent with his continued employment since 2011), affected his credibility in four particular areas: (1) his claim in his claim form that the real reason for his dismissal was because he had in February 2020 raised the claimed 2009 CNC agreement with Mr Larry Kearns (or alternatively at the hearing that the real reason was raising the 2009 agreement plus raising questions about his pay under the furlough scheme) (2) his claim that the minutes of the investigation meeting on 21 July 2020 were wrong and that he was able to spot very specific errors some two weeks later, even though he had taken no notes at the meeting and the changes were very specific as to the particular words said to have been used (3) whether the Claimant in fact had permission from Mr John Kearns to take items or to do personal projects when at work (4) his claim that prior to the start of the disciplinary process Mr Costello had said he should resign or he would face a disciplinary procedure.

<u>The disciplinary procedure</u>

13. The Claimant's case (C witness statement end page 11 and oral evidence) was that there was a suspicious delay between the date of the CCTV footage (13th – 20th May 2020) and the start of the disciplinary process (a letter sent to him dated 14th July 2020, page 112A) and that it was started when it was because the Claimant had the day before repeated his demands to Mr Larry Kearns for unpaid CNC compensation (page 104, the reference to the issue outstanding for many years) and had raised furlough issues in the meeting on 22nd June 2020 (page 97). I find based on Mr Larry Kearns' oral evidence that he had become used to receiving letters from the Claimant on a variety of issues over the years (for example in 2017 about a new health and safety policy and CCTV (page 71-72) in

2017 about an incident with another employee (page 76) in 2017 about health and safety and staffing (page 78), in 2018 about parking (page 79), in 2019 about safety issues (page 80) and in 2020 about freezing conditions (page 81). I find based on his oral evidence that when getting a staff communication he would pass it on to Mr John Kearns to deal with it as Production Director because Mr Larry Kearns' role was to deal with clients and designing and not with staff issues. Responses were sent to the Claimant by Mr John Kearns on various issues (pages 61,74,77). I therefore find Mr Larry Kearns was not usually involved in employment issues though he was informed of anything important and was aware of the disciplinary procedure against the Claimant. I find (also taking into account the above credibility findings) that Mr Larry Kearns did not give an instruction for the disciplinary process to be started because he had received the February 2020 letter referring to a claim to be owed money for his work on the CNC machine (page 81) because I find Mr Larry Kearns either did not read it or it was something he only glanced at and handed it on to be dealt with by someone else, as was his habit. I find the same in relation to the letter dated 13th July 2020 (page 104). Mr Larry Kearns had been made aware of the anonymous tip off by Mr Wright (page 106) and had asked Mr Wright to look at the CCTV footage for May 2020. Mr Wight's statement does not give a date when he had the discussion with Mr Larry Kearns but I find that it is likely to have been either on or shortly after Mr Wright received the tip off on 20th May 2020 as it was a serious matter he is likely to have raised with a director quickly. The decision to act on the tip off and the CCTV footage (and specifically to save three short clips for an investigation as it would otherwise be wiped) was therefore made before the meeting on 22nd June 2020 about the Claimant's furlough questions and before the letter he sent dated 13th July 2020.

14. I find the relatively short delay between May 2020 (discovery of the CCTV footage) and July 2020 (when the disciplinary process was started) was reasonable in the context of the pandemic and because Mr Costello, who was to investigate the anonymous tip off and the CCTV footage, had been furloughed till around June 2020 and it was on his return that he was asked to deal with it. The Respondent had already decided it merited an investigation because Mr Larry Kearns had asked Mr Wright to save the footage. The Claimant claimed that the Respondent breached its own policy (page 74) by relying on footage kept for longer than a month but taking into account the above findings of fact the footage had been found on or shortly after 20th May 2020 when it was still within a month of the events shown on 13th- 20th May 2020 in any event. It had then been preserved before it had been wiped; this was a reasonable decision by the Respondent and it was not required to delete the May 2020 footage (the three short clips) as that would render CCTV pointless if the Respondent could not keep extracts of the footage which showed potential misconduct (or any other serious matter, for example a health and safety breach or an accident) and had to delete it a month after the date of the incident. The Claimant misunderstood the policy. The Claimant also claimed that Mr Wright was not the senior director authorised to access the CCTV recordings (page 74) but I find Mr Wright was a data controller in his own right. He was also asked by a director to review all the May 2020 footage. I therefore find that the CCTV was not unlawfully accessed or unlawfully used. In any event the Claimant accepted that he had taken items shown in the footage – the issue was whether he had permission to do so.

15. Taking into account the above credibility findings I find that Mr Costello did not say to the Claimant at the meeting on 22nd June 2020 that the Claimant should resign or he would face disciplinary action.

16. The Claimant was invited to an investigation meeting (page 105). The letter referred to the allegations being theft and abuse of trust. No further details were given as to theft of what and when and what the abuse of trust was, even in brief terms. There was no reference to doing personal projects. The letter did not need to go into great detail but it unreasonably did not tell the Claimant in basic terms what the claimed acts of misconduct were, so he could consider them before the investigation meeting, even if at the actual meeting matters were gone through more thoroughly – a couple of sentences would reasonably have told him this. The letter did not comply with para 9 of the ACAS Code of Practice because it did not enable the Claimant to prepare for the meeting.

17. Though he was later to disagree with the accuracy of the minutes (see below) the Claimant accepted at the investigation meeting that he did personal projects during working hours but that he had permission to do so from Mr John Kearns. He accepted (page 109-110) that the CCTV clips he was shown showed him putting items in his car which he said was an empty can, and two lots of offcuts but said that Mr John Kearns had also given him permission for this.

18. The Respondent then asked Mr John Kearns about the claimed permission (page 112). It was not suggested that Mr John Kearns was shown the CCTV footage (or told its date) so that he could fix the relevant period in his mind or told the period being referred to (unlike with Mr Eidukonis, who was asked about May 2020, page 119) and he was asked if the Claimant had asked Mr John Kearns if could take some items 'recently'. Mr John Kearns wrote the statement on 27th July 2020 around two months after the incidents shown on the CCTV clips and in recent months the Claimant had been at work but was then re-furloughed. Given the circumstances (not working normally but periods of work and periods of furlough) and given the period of time between the May 2020 footage and asking Mr John Kearns the question, it was particularly important that he identify even if only approximately what period he was referring to ie was it weeks, months or longer than that because Mr John Kearns was not saying he had <u>never</u> given permission. The other matter (claimed permission to do his own personal projects during working hours) was not put to Mr John Kearns and so he did not respond on it.

19. The Claimant was given the opportunity to put a question about 'recently' to Mr John Kearns (page 120) but did not do so. He accepted in his evidence that he had not questioned it in writing until his witness statement (page 13). He said he raised it in the undocumented disciplinary hearing on 10th August 2020 but I find that had he done so he would have mentioned it in his appeal letter (page 142) in the long detailed letter at page 134 (largely about other matters but referring to his dismissal by then page 140) or at the appeal hearing (page 144). I however find that the Respondent should, if acting reasonably, on its own initiative have gone back to Mr John Kearns to clarify what he was saying as regards the use of the term 'recently' he has been asked about and what period he was referring to. It would not have been onerous on the Respondent to ask him to clarify or to ask him the question

again and explain that what was being referred to was something happening in May 2020. A reasonable employer would also have done this given the seriousness of the allegation as the Claimant was at risk of dismissal for something involving dishonesty.

20. After being sent the minutes the Claimant wanted to make some corrections (page 121) even though they had been created using a recording. He wanted to vary what the notes recorded, to change what the notes recorded he had said about doing personal projects during working hours, to record that he had said at the meeting that he did this but it was during breaks or after clock out. He wanted to correct where it was he had said he got the empty glue can from. He wanted to correct that he had not said at the meeting that he got permission once a week but had said that that the permission was long standing over years. Taking into account the above credibility findings, the absence of him or Mr Smith having taken their own notes and the lapse of by now around two weeks since the investigation meeting. I find that the Claimant was seeking to re-draft the minutes to reflect what he wished he had said rather than what he had in fact said. Whilst the 'once a week' comment might reasonably have referred to the taking of items around once a week with permission (rather than the asking for permission once a week), the Claimant accepted in his oral evidence that he did use this phrase at the investigation meeting. However that was contrary to page 121 which had said he did not use this phrase at all and instead referred to long standing (for years) permission, quite a different account. I therefore find that Mr Costello reasonably took the view that the Claimant was in these comments trying to backtrack from what he had already said at the investigation meeting.

21. The disciplinary hearing was held on 10th (or 11th) September 2020 (there was some dispute between the parties, although the date is not critical to the issues in this case). There were no minutes despite the hearing having been recorded. Mr Costello did not give a reason why that was the case in his witness statement and when asked in cross-examination said no-one had told the Claimant he would get minutes of that meeting even though it was accepted that it had been recorded. Whilst I accept that the dismissal letter at page 132 gave a summary of what was discussed it was unlikely to contain the detail which notes of what was said would contain. I therefore find that there were no minutes for this meeting without a reasonable explanation from the Respondent; having the recording and the minutes was reasonably a matter the Respondent should have ensured were produced and sent to the Claimant, particularly given the Claimant's delayed comments on the investigation meeting notes had said the notes were wrong.

22. I find that it was Mr Costello who took the decision to dismiss and that he was not influenced by Mr Larry Kearns. The Respondent's policy (page 180) said that only a Director could dismiss an employee but it retained the right (page 179) to vary procedures. He decided (page 132) on the first allegation that the Claimant did not have permission from Mr John Kearns to take what Mr Costello now called 'products'. Whilst the Claimant claimed to be confused about the change of terminology to 'product' I find that in practice he was not really confused and knew what the Respondent was referring to ie things previously called 'items', because he had been shown the CCTV footage and identified himself what he was carrying on each of the three occasions in the CCTV clips. Mr Costello also concluded on

the second allegation that the Claimant had worked on his own personal projects during working hours and that permission would never have been given for that – that conclusion was not reasonable given Mr John Kearns had not been asked if he had given permission to the Claimant to do personal projects, whether during working hours or during breaks/after the end of the day. Whilst Mr Costello reasonably decided the Claimant was changing his story as to when exactly in the day he did his personal projects, he did not have reasonable grounds to conclude Mr John Kearns had not given permission because Mr John Kearns had not been asked that question, whether that was about during working hours or during breaks/at the end of the day. The overall conclusion of a breakdown in trust was however reasonably reached on the basis of the first allegation alone.

23. Both Mr Costello and Mr Whyborn said in their evidence that for them the reason they dismissed/did not uphold the appeal was for the first allegation (taking items which they treated as theft). That is not however what either of said in their respective letters to the Claimant – in the case of Mr Costello (page 132) he included it as a reason for dismissal and in the case of Mr Whyborn (page 147) he upheld the dismissal on the basis of both the two allegations. Mr Whyborn also said that when Mr John Kearns had been questioned he had said he had not given permission to the Claimant for personal projects – which Mr John Kearns had not said because not asked about it. The decision to dismiss (upheld on appeal) therefore included a decision on the second allegation on which there was no reasonable belief.

24. I find that Mr Costello undertook the investigation and took the decision to dismiss. Whilst accepting that the Respondent is not a very large employer with a large management team I find based on Mr Larry Kearns' oral evidence that there are two layers of management, namely the five directors (Mr Larry Kearns, Mr John Kearns, Mr Whyborn, Mr Sheehy and Mr Jakabauskis) and company secretary (Mr Larry Kearns' wife, Mrs Kearns) at the top and then the next level down made up of Mr Stanley, Mr Costello, Ms Bones (office manager) and Mr Congole (accountant). Mr Stanley had reasonably stepped back from being the minute taker in the investigation because of a personal animosity towards him from the Claimant. Mr John Kearns could not be involved in taking decisions about the Claimant as he was a witness on the permission issue. Mr Sheehy had also provided a statement (page 111). Whilst accepting that a director had to be kept for any appeal and Mr John Kearns, Mr Larry Kearns and Mr Sheehy were reasonably not to be involved, this was not a situation where the Respondent was so limited in the managers it had available that the investigation and the decision to dismiss reasonably had to be undertaken by the same manager or director because there weren't enough managers to allocate it to two different people. I therefore find that this was not a situation covered by para 6 of the ACAS Code of Practice because it was practicable that a different person should investigate and take the decision to dismiss. The Respondent therefore breached the ACAS Code of Practice in this respect.

<u>Did the Claimant in fact have permission to take the items and to do personal projects?</u>

25. Taking into account the above credibility findings I find that the Claimant did not have permission to take the items he accepted he took as shown in the May 2020

CCTV footage. Although Mr John Kearns was not called to give evidence at this hearing as to whether he had in fact given such permission or not, I conclude looking at the evidence overall that he did not give the permission and that the Claimant's conduct was blameworthy, taking into account the Claimant does not say in his witness statement how he went about getting that permission and approximately when. I find it unlikely Mr John Kearns would not tell the truth on this issue because he would not have been in trouble had he in fact given permission because as a director he would have had the authority to give permission if he thought it appropriate given the items were things which might otherwise probably be disposed of as rubbish. This was blameworthy conduct by the Claimant because even if he thought the items were destined for the rubbish and were not items the Respondent intended to use, he should still have got permission to take them.

26. Taking into account the above credibility findings and looking at all the evidence I find that the Claimant also did not have permission to do personal projects during the working day, whether that was during breaks/after clock off or not. I did not have any evidence from Mr John Kearns on this issue but having accepted that he did do personal projects at work the Claimant still argued he had not been given evidence about that or the projects identified when he accepted he had done such projects so would know what they were. He also did not in his witness statement identify how he went about getting that permission or the personal projects he accepted he had done and changed his story as to when in the day he did it after the investigation meeting. Looking at the evidence overall I find it unlikely he had permission. This was also therefore blameworthy conduct by the Claimant.

Relevant law

Unfair dismissal

27. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

28. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 23*.

29. *Shrestha v Genesis Housing Association Limited [2015] I.R.L.R. 399* considered the extent to which an employer is required to investigate possible defences raised by the employee in order to meet the *Burchell* test, deciding that this depended on the circumstances as a whole.

30. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

31. Where an employee asserts that the reason given for dismissal by the employer is not the real reason, he/she must produce some evidence supporting this positive case. It is sufficient for the employee to challenge the evidence produced by the employer to show its reason for dismissal and produce some evidence of a different reason. Having heard the evidence on both sides, it is for the Tribunal to consider all the evidence as a whole and to make a primary finding of fact on the reason(s) for dismissal. This may be on the basis of direct evidence or by reasonable inferences from the primary facts established by the evidence (*Kuzel v Roche Products Ltd [2008] IRLR 530*).

Compensation for unfair dismissal

32. Compensation for unfair dismissal is made up of a basic award calculated under s119 Employment Rights Act 1996 and a compensatory award calculated under s123 Employment Rights Act 1996.

33. The compensatory award calculated under s123 ERA 1996 is such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to the action of the employer.

34. An employee is under a duty to mitigate his losses by making reasonable efforts to find other work .The burden of proving a failure to mitigate is on the employer. In calculating an employee's loss this duty must be considered by the Tribunal (s123(4) Employment Rights Act 1996).

35. It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*). *Software 200 Limited v Andrews* [2000] ICR 82 identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

36. s207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an award may be reduced or increased by up to 25% where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), if just and equitable in all the circumstances to do so. This can apply to a breach by either party of its obligations under the ACAS Code.

37. The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where any conduct of the employee before dismissal was such (whether or not the employer knew about it) that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*).

38. The compensatory award for unfair dismissal can be reduced under s123(6)

Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee before the dismissal in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. If the employer did not know about the conduct, no deduction can be made. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*) but does not have to amount to gross misconduct or a breach of contract (*Jagex Ltd v McCambridge [2020] IRLR 187*).

Reasons

Reason for dismissal

39. Taking into account the above findings of fact I find that the only reason for the Claimant's dismissal was the two conduct allegations made against him (which also lead to a breakdown in trust). The reason for dismissal was not the fact that he had from February 2020 again been raising a claimed 2009 oral agreement to be compensated for his work on the CNC machine or because he had raised furlough issues. Conduct is a fair reason for dismissal.

Dismissal

40. Turning to the dismissal and the procedure and taking the above findings of fact into account I conclude that the Respondent did not have reasonable grounds to believe the Claimant was guilty of the second allegation (personal projects). The investigation was not reasonable in the circumstances because Mr John Kearns was not asked to clarify the period of time he was referring to or about permission for personal projects. Other procedural failures were the lack of detail in the invitation to the disciplinary hearing, the absence of minutes for the disciplinary hearing without an explanation/good reason and the fact that Mr Costello unreasonably acted as both investigator and decision maker.

41. The Claimant was unfairly dismissed by the Respondent when it treated his conduct as a sufficient reason to dismiss, looking at all the circumstances and taking into account the size of the Respondent and its resources. The dismissal was outside the band or range of reasonable responses. I also find that there were specific breaches of the ACAS Code of Practice as set out above which I conclude were unreasonable breaches.

Would the Claimant have been dismissed in any event (meaning compensation for unfair dismissal is reduced) (a *Polkey* deduction)?

42. Taking into account the above findings of fact I conclude that despite the above unreasonable failures by the Respondent (the lack of detail in invitation letter to the investigation meeting, the failure to ask Mr John Kearns on the' recently' issue, the absence of evidence to support the conclusion that Mr John Kearns had not given permission to the Claimant to do his personal projects when at work, the absence of minutes for the disciplinary hearing and the fact that Mr Costello did both the investigation and took the decision to dismiss) that the Claimant would have been dismissed for the first allegation (taking items without permission) even if a fair

procedure had been followed. It was a serious issue involving dishonesty (even if the Claimant viewed it as just taking items which the Respondent would not be using itself) and the Respondent would have reasonably been entitled to take a firm view on it and to dismiss only for that first allegation even though some of the items (eg the glue can) may have been in the rubbish. Given that the Claimant did not in fact have permission from Mr John Kearns to take the items (the issue which might potentially have made a difference if handled differently) so had the Respondent followed up on the 'recently' issue the answer from Mr Kearns would still have been that the Claimant did not have his permission, I assess that chance of dismissal as 100%. I find that the other failings set out above would also not in fact have resulted in a different conclusion, even if they had not happened.

Contributory conduct (reducing compensation for unfair dismissal)

43. Taking into account the above findings of fact, I assess the contribution deduction at 100% for both the basic award and the compensatory award.

44. The following paragraphs are included for the benefit of the Claimant because he is not represented and struggled at times during the hearing to understand what the relevant issues were in his unfair dismissal claim and understandably may not understand what this judgment means for him. These paragraphs do not form part of the judgment but are a summary.

45. Mr Lymar – you have won your claim for unfair dismissal because I have decided that the Respondent got some parts of the disciplinary process wrong. However I have also decided two things which affect (ie reduce) possible compensation. Firstly I have decided that even if the Respondent had got those things right, there is a 100% chance you would still have been dismissed. Secondly I have decided that you contributed 100% to your own dismissal by your actions.

46. There are two parts to compensation for unfair dismissal a basic award and a compensatory award.

47. This decision means that your basic award for unfair dismissal (which is a payment taking into account your age, length of employment and weekly pay) is reduced by 100%, meaning you will not be awarded a basic award.

48. This decision also means you will not be awarded a compensatory award (an award looking at your net losses because you were dismissed) because firstly there will be a reduction of 100% to your figures for losses and secondly at the end of any calculation the reduction for contributory fault at 100% will be applied. This means you will not be awarded a compensatory award.

49. Because you have won your claim for unfair dismissal you are entitled to a decision which says this – see page 1. However there will be no need for another hearing to decide compensation because you will not be awarded any compensation.

50. If you are not clear what this decision means you should take advice eg from the CAB.

**Employment Judge Reid**

**13 January 2022**