EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr A Harris		M G Seven Ltd (trading as Gainsborough Flower)

Heard at: London Central Employment Tribunal

On: 17, 18 February 2022

Before: Employment Judge Adkin

Representations

For the Claimant: Ms K McCarthy, McKenzie Friend
For the Respondent: Mr P Maratos, Legal consultant

JUDGMENT

(1) The claim of unfair dismissal pursuant to section 91 of the Employment Rights Act 1996 succeeds subject to the following deductions:

a. 50% reduction of the basic award pursuant to section 122(2) ERA on a just and equitable basis to reflect the conduct of the Claimant in failing to communicate with the Respondent;

b. 50% reduction of the compensatory award pursuant to section 123(6) ERA to reflect the extent to which the Claimant caused or contributed the circumstances of his dismissal;

c. 25% reduction of the compensatory award under the principle in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 to reflect the possibility that a fair dismissal might have taken place in any event.

d. I have made a 10% increase in compensation for unfair dismissal under s207(A) TULRC(A) 1992 to reflect an unreasonable failure to comply with the ACAS code of practice.

(2) The claim for furlough pay (unlawful deduction from wages pursuant to section 13 of the Employment Rights Act 1996) succeeds, subject to credit being given for sums already received, in an amount to be determined.

(3) The claim for notice pay (breach of contract) succeeds in an amount to be determined.

(4) The following claims are dismissed:

a. The claim for redundancy pay is dismissed upon withdrawal.

b. The claimant for sick pay was not pursued and is dismissed.

c. The claim for unpaid annual leave does not succeed and is dismissed.

REASONS

Procedural matters

1. This hearing was an in person hearing in Victory House.

2. I heard evidence from the Claimant and from Mr Sagar the Director and manager of the Respondent.

3. The Respondent produced a 115 page bundle, to which a further 13 pages were added on the application of the parties during the course of the hearing.

4. The Claimant produced a perfunctory three paragraph witness statement at 11:35am on the morning of the first hearing, having failed to comply with a direction to exchange witness evidence sometime before the hearing. This was unsatisfactory in that it delayed the start of the hearing and unhelpful in understanding the Claimant's case.

The Claim

5. The Claimant presented his claim on 7 June 2020.

6. An agreed list of issues is attached as an appendix to this claim.

Findings of fact

Dispute

7. The Claimant worked as a delivery driver for the Respondent florist for over 20 years time that his employment came to an end.

8. The two protagonists Mr Harris and Mr Sagar have known each other for a long time and the fallout from the breakdown of their relationship has been unfortunate. The hearing before me was somewhat fractious. Unfortunately

even basic matters like the Claimant's employment start date could not be agreed.

9. I have focussed on the matters that I consider to be relevant to the issues that I needed to determine, and have not tried to resolve every factual point in dispute.

Employment history

10. On 20 April 1998 the Claimant says his employment commenced as a delivery driver. The Respondent says that the Claimant's start date is 1 October 2000. I have not seen contemporaneous evidence that supports either party's position on commencement of employment date.

11. In June 2013 the Claimant's employment transferred from Goldrock Properties to the Respondent MG Seven Ltd.

February 2019 accident

12. The Respondent's case is that the Claimant had a poor driving record and that he had a history of using the vehicle and sustaining damage outside of his employment. The Claimant disputes that his record was poor, particularly in the context of the length of employment, a period over which he maintained it would be expected that a professional driver would have had occasional accidents. I have not received evidence that the Claimant was ever made subject to a written warning, which might be expected had this been a serious disciplinary matter.

13. Mr Sagar's evidence is that the Claimant had an accident in February 2019, which led to an insurance quote of over £5,000 to continue to ensure the van that the Claimant was driving. Mr Sagar says that the Claimant offered to subsidise the insurance premium and said that he would resign if there were any further "issues". He says that the Claimant was unable to pay the contributions suggested.

14. Ultimately the solution the two men reached, apparently was that the Claimant was made the registered keeper of the van with the DVLA so that he could source his own insurance.

February 2020 accident

15. On 25 February 2020 the Claimant had a road traffic accident in a van owned by the Respondent. I have had the benefit of detailed data from a GPS tracking system in the vehicle. The accident happened at 19:01 on Craven Park, London NW10 which is marked that the Claimant remained in the vicinity for a further 17 or 18 minutes, which is consistent with dealing with the aftermath of an accident. The Claimant reported to the Respondent shortly after the accident that the other driver had admitted blame at the scene. Subsequently however, that apparent admission did not lead to the other party formally accepting liability or paying for the damage. The view ultimately taken by Direct Line the insurer of the Respondent's van was that there were not realistic

prospects of recovering the losses. It is unclear from the correspondence whether this was because of a view taken about responsibility for the accident or whether for example the other side were not good for the money.

16. The parties have differing interpretations on who was to blame for the accident.

17. I am not in this decision making any determination of blame for the accident in February 2020. This might yet be the subject of litigation elsewhere, although this may now be fairly unlikely. In any event I do not have sufficient evidence to make a decision on who is to blame.

18. The Claimant reported the accident to Mr Sagar the following day and told him that it had happened during working hours. Mr Sagar says based on the GPS data above that this was not true.

19. Mr Sagar says that the Claimant visited the address NW10 most evenings even though he had told him not to. On the Respondent's case therefore the Claimant was driving the van "after hours" for a personal reason. Mr Sagar says that was not legitimate. The Claimant disputes this rather a general way.

20. According to Mr Sagar the Claimant had completed his last delivery at 184 Blackstock Rd, London N5 at 17:26, and thereafter drove to his elderly father's address Alric Avenue, London NW10. It is common ground between the parties that at this time the Claimant's father was elderly and unwell. It seems [98] that the Claimant was at this address for approximately 12 minutes before starting again and then having the accident a couple of minutes.

21. On the balance of probabilities I find that the accident did happen after the Claimant had finished his deliveries. I have not been shown any evidence that he had been warned about driving after hours. I infer from what evidence I have heard that Mr Sagar acquiesced in the Claimant driving the van for personal reasons, even if he was not happy about it.

22. It is clear that the Claimant was entitled to drive home in the van, which is not strictly a delivery. I find that it would have been unlikely that Mr Sagar would have treated the Claimant carrying out a detour to his sick and elderly father en route as a disciplinary matter.

The damaged van

23. On or around 27 February 2020 the damaged van went into be repaired and accordingly could not be driven. It appears to have stayed in the garage for the remainder of the Claimant's employment with the Respondent. I accepted Mr Sagar's evidence that due to the absence of his driver he started to use third party bicycle couriers for deliveries, even though this was a less profitable way of performing deliveries.

Claimant's absence from work

24. Mr Sagar says that he offered the Claimant the opportunity to take annual leave and he accepted it.

25. The Claimant now says that he was injured in the accident and took sick leave. Mr Sagar denies this and asserts that no reference to an injury was made either to him or to the insurer.

26. In the claim form the Claimant described the situation as follows:

> "Boss complained he could not afford to pay me, instead he pay me a months holiday pay. as van was not in use. And I was on sick leave due to horrendous accident."

27. This supports Mr Sagar's account that the period after the accident, for a month was holiday pay.

Last payment of "ordinary" salary

28. On 28 February 2020 the Claimant received his ordinary monthly salary of £1,148.97. This figure is consistent with earlier monthly salary figures.

Temporary return to work.

29. On 11 March 2020 the Respondent rented a van from Sixt [AS21] [102] – this ran until 19:00 on 14 March 2020. Mr Sagar says he did this because the Claimant pleaded with him to come back to work, and he hired the van even though this ultimately was a loss making decision.

30. Mr Sager's evidence is that this was for Mother's day and that he paid the Claimant in cash additional to what he was already receiving on payroll as annual leave. I found this somewhat difficult to understand given that Mother's Day was Sunday 22.3.20. Mr Sagar conceded on the second day of evidence that he was wrong about it being Mother's Day.

31. On 13 March 2020 a payment £200 was made by the Respondent into the Claimant's bank account of reference "Valentine". This must be a reference to hours worked on or before 14 February 2020, i.e. Valentine's day, which is inevitably a busy period for florists.

32. On 14 March 2020 Mr Sager's oral evidence was that he had a conversation with the Claimant about the difficulty with the van not being fixed and the cost to the business. From this time onward he says that the Claimant did not return any of his calls or any of his messages. That is not consistent with the contemporaneous documents. There was communication, by WhatsApp, email and a telephone conversation.

Payments made to the Claimant in March 2020

33. On 27 March 2020 the Respondent paid the Claimant £723.94 with the reference "Mar20", presumably relating to the month.

34. On 30 March 2020 the Respondent paid the Claimant £260.03 with a reference "Corona". The Respondent is unable to explain what this figure represents but denies that it was furlong pay.

35. The total of the two payments is £983.97. The Respondent is unable to account for the discrepancy between this and the payslip which shows that the Claimant was paid £1,065.56 on 31 March 2020 when in fact he did not receive that sum. Mr Sagar blames his accountant.

Interflora and contactless deliveries in lockdown

36. On a date prior to 1 April 2020, sometime between 17 March and the end of the month, Mr Sagar sent to the Claimant by WhatsApp a document from Interflora, which is a well-known flower delivery network, to which the Respondent business was an affiliate. I cannot be precise about the date, because the WhatsApp record is incomplete.

37. It is unclear to me which document precisely had been attached. Documents were added to the hearing bundle at 118, 119 and 120, (dated 17, 21, 23 March 2020) which were all communications from the Flora Retail Marketing Team. It must have been one of these three documents. Although each of these one-page documents contains slightly different information, there is a central theme which is a reference to *contactless deliveries*. These documents support the Respondent's case that although he had to close the shop to in person customers as a result of the first UK government lockdown in response to the Covid-19 pandemic on 23 March 2020, he was able to carry on with contactless deliveries, i.e. fulfilling orders using delivery drivers following a contactless protocol.

38. I accept Mr Sagar's evidence that notwithstanding the lockdown in fact he was extremely busy during this period, and that he believed that he was entitled to, guidance that Interflora had provided to him.

39. The Claimant, through his MacKenzie friend has argued vociferously that the Respondent was not entitled to operate at all in the lockdown, by reference to government guidance documents relating to the identity of "essential workers". I find that this was the Claimant's belief at that time, since the government lockdown was given widespread publicity.

40. I also accept however that Interflora was advising its affiliates from the third week of March 2020 onward that they could continue delivering.

41. The implication of this document, and the reason for Mr Sagar sending it to the Claimant must have been that deliveries could continue.

WhatsApp communications

42. It is worth setting out the full WhatsApp exchange between the two men.

43. On 1 April 2020 Mr Sagar wrote:

> "Andrew call me" [105].

44. According to the Response (ET3) filed by Mr Sagar

> "On April 1st, I called Andrew and asked him to set up a meeting (via the phone). I needed him to come back to work. He agreed, and we agreed to speak on the 4th of April. I never received that call and from that point onwards, Andrew failed to reply to any communication and completely disappeared, failing to engage with myself and the company." [23]

45. Oddly the alleged exchange on 1 April is not referred to in Mr Sagar's witness statement.

46. The Claimant says that the two men did speak at some stage, although he has not explained to me when this was nor exactly what was said. In the claim form the Claimant sets out:

> "Threatened 1st April 20 sending P45. Received 5/5/20 by watts app, date on p45 31/2/20."

47. On the balance of probability I find that there must have been a telephone conversation between the two men on or around 1 April 2020. I find that at the time of this conversation there was a question-mark hanging over the Claimant's future employment, hence the reference to a P45, but also I accept Mr Sagar's account that the was something further to be discussed and that he wanted the Claimant to come back to work, presumably after the expiry of the furlough period mentioned below. The damaged van was still at that stage unrepaired which must have represented a practical difficulty.

48. By this stage the month's annual leave granted after the accident must have run out. The Claimant says he was on sick leave. I have no evidence to support this. I accept Mr Sagar's evidence that the Claimant did not mention an injury to him.

49. Notwithstanding Mr Sagar's account that the two men agreed to speak again on 4 April, in fact he wrote the following day, 2 April 2020:

> "call me"

50. The Claimant did not call back.

51. On Sunday 5 April 2020 the Respondent sent to the Claimant a Word document "Furlough letter". This document stated:

> "Due to the economic impact of COVID-19, MG7 Ltd Trading are implementing measures to ensure the financial stability of the company. The current pandemic situation has impacted our business significantly, and as a result, we find that we must make some difficult decisions.
>
> Effective from the 16/03/20 until the 06/04/20, MG7 Ltd Trading is implementing a temporary furlough of certain positions. This notice is to inform you that your position is included in this furlough. It is important to note that your employment continues to be at-will and nothing in this notice or other furlough communications is intended as an express or implied contract."

52. The Claimant says that he was not able to access this letter. I can see in the electronic version of the tribunal hearing bundle, which is in colour, that there are two blue ticks indicating that this document, or at least the message attaching it has been opened by the Claimant. What the Claimant did not do is respond saying that he did not understand what the letter contained. It is difficult for me to know either way but on balance I infer that he was able to access it in some way.

May 2020

53. There was then a gap in the correspondence until Saturday 2 May 2020 [106] when Mr Sagar wrote to the Claimant:

> "Morning, I am getting furlough money next week for your first week in April. I need to send you a P45. You need to tell me Mother's day extra date. And the car. You need to sell it back to me. I paid £450 to the garage. You need to claim it from Direct Dales."

54. Mr Sagar explained in his oral evidence that Direct Dales is a reference to the insurance company direct line and that when he said "sell it back to me" he was talking about the formality of changing the registered driver with the DVLA, rather than actually carrying out the transaction of selling it.

P45

55. Also on 2 May 2020 Mr Sagar sent a P45 by WhatsApp.

56. The P45 document notifying HM Revenue & Customs of the termination of the Claimant employment was dated 5 May 2020 and gives the leaving date as 8 April 2020.

57. In response to the P45 Claimant "Alex can I call you on Monday instead, a little tied up today". The following exchange continued:

> R: Yes, no probs
>
> C: text me your email address zander
>
> R: [supplies email address]

58. Also on 2 May 2020 it seems likely based on a later letter that the Claimant sent an email on this day. Neither side has provided this email, so I have been unable to make factual findings about whether it was sent and if so the content of it.

59. On 5 May 2020 Mr Sagar wrote "can you call me. Today is Tuesday"

60. Two days later on 7 May 2020 Mr Sagar followed up with "I am trying to speak to you from April 1 you are not replying. Call me"

61. I do not have any evidence that this WhatsApp message was replied to by the Claimant.

62. On 7 May 2020 the Claimant sent a letter by post to Mr Sagar at 1 Moxon St, London W14. This was not the shop at which the Claimant worked. In this letter he queried the dismissal and wrote:

> "As you know I have been unable to attend work due to the Accident which occurred during working hours which we have discussed and you are aware thus am currently off work due to ill health" [112].

Reasons for absence

63. The Claimant's evidence in this Tribunal hearing is that Mr Sagar knew the reason that he was not at work was because he was nursing his elderly father who was unwell. Mr Sagar accept that he knew that the Claimant's father was unwell, but not that the Claimant was nursing him, nor that this was a reason for him not being at work. His evidence was that the Claimant had a number of siblings who would also have some responsibility for his father and he had no idea that the Claimant in particular was shouldering the burden.

64. The Claimant's case has put on the basis that he obviously could not attend work because of the first Covid-19 lockdown and because of his father's illness. Those reasons do not seem however to be supported by the contemporaneous letter sent 7 May 2020 which states that the reason for absence was related to "the Accident".

65. Mr Sagar initially that he did not receive this until June 2020, as it was at a shop that he did not know visit and this was during the first Covid 19 lockdown. He acknowledged that he may have received this in made 2020

Letter of 22 May 2020

66. On 22 May 2020 at 18:30 Mr Sagar, having taken some advice, wrote the following email to the Claimant:

> "Andrew,
>
> I have been really disappointed that you have completely failed to engage with me. I found that your email of the 2nd May 2020 and letter of the 7th May 2020 didn't relate to what was happening or the fact that you had not been communicating with me. On the 2nd May you said you would call me on the 4th May in a message after I gave you my email address. You didn't call me and you have continued to refuse to engage or speak.

> I arranged for the P45 to be sent to you because I considered you were breaching your terms of employment and you would not communicate with me and so I considered that I had no choice with you failing to attend or communicate.
>
> I confirmed to all staff on furlough leave that we would have work from the 7th April 2020 and I sent the guidance form Interflora. You never engaged with me or acknowledged that you would attend work. I sent you messages asking you to call me on the 1st Apri, 2nd April, and the 5th April.
>
> I am not in a position to employ an employee who does not engage or communicate with his employer and who is in breach of his terms of employment.
>
> Alex.

67. On 25 May 2020 the Claimant's father sadly passed away.

Claim

68. On 7 June 2020 the Claimant presented his claim to this tribunal.

LAW

Resignation by conduct

69. IDS Employment Law Handbooks on Contracts of Employment provides the following guidance:

> "11.14…
>
> An employee's conduct may sometimes lead to a finding that he or she has resigned. In *Harrison v George Wimpey and Co Ltd* 1972 ITR 188, NIRC, H became sick at Christmas and stayed away for four months without communicating with his employer, although he was in fact obtaining sick notes every two weeks. Sir John Donaldson said: 'Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated.' The NIRC upheld a tribunal's finding of implied resignation by H, but also pointed out that the employer was under a duty to make enquiries and to warn the employee of its intentions.
>
> 11.15
>
> Similarly, in *Oram v Initial Contract Services Ltd* EAT 1279/98 O failed to return to work after a disciplinary penalty had been

> reduced from dismissal to a final written warning because the company had not answered concerns she had raised. ICS Ltd was of the view that the terms of her return were clear and that any matters of concern would be discussed once she had come back. The EAT upheld an employment tribunal's finding that O had resigned. ICS Ltd had not imposed any conditions on O's return, failure to perform which would be regarded as a resignation; rather, she had attempted to challenge its control of the disciplinary process by imposing conditions of her own. When she refused to confirm that she would return to work, the company assumed that she had decided to resign.
>
> In practice, **it is only in exceptional circumstances that resignation will be the proper inference to draw from an employee's conduct**. It used to be open to an employer to argue that, if resignation could not be inferred, the employee's conduct nevertheless amounted to a fundamental breach of the employment contract and had ended the contract automatically. This concept of 'constructive resignation', or 'self-dismissal', was firmly rejected by a majority of the Court of Appeal in *London Transport Executive v Clarke* 1981 ICR 355, CA, which held that a repudiatory breach by an employee — such as taking a seven-week holiday without permission — did not bring the contract to an end automatically. The contract would only terminate when the employer accepted the employee's breach — i.e. by dismissing the employee.
>
> …
>
> Accordingly, the concepts of self-dismissal and implied resignation now seem to have little - if any – application."

[**emphasis** added]

CONCLUSIONS

(10) Was the claimant dismissed when the respondent sent him a P45 on 5 May 2020? What was the termination date of the claimant's employment?

70. There are two competing legal interpretations of how the termination occurred in this matter.

71. The Respondent's case is that there was resignation by conduct, and that this resignation was "accepted" by the Respondent in issuing the P45. The Respondent relies on, first, the amount of time that passed between the conversation on 14 March 2020, which is the last date that the Claimant worked and the last date that Mr Sagar says hehad any satisfactory communication with him and 2 May 2020. Secondly, the failure of the Claimant to communicate with Mr Sagar and to answer his requests to speak.

72. Mr Maratos argues that the Claimant constructively dismissed himself.

73. The Claimant argues that there was a dismissal by deliberate action of the R on 2 May 2020 in issuing a P45 by WhatsApp.

74. Having considered the matter carefully, I consider that the Claimant is correct.

75. **There was a dismissal rather than a resignation**.

76. The concept of constructive resignation has been rejected by the Court of Appeal in *Clarke*.

77. It is only in exceptional circumstances that resignation will be the proper inference to draw from an employee's conduct. Were there exceptional circumstances in this case?

78. I find that the background circumstances were exceptional, given that this was the beginning of the Covid-19 pandemic and associated lockdown in the UK.

79. I conclude that the circumstances of the Claimant's conduct and communication were not exceptional. The Claimant had not for example used offensive or intemperate language or run away out of the country. He was not completely incommunicado. There was a channel of communication between Mr Sagar and the Claimant via WhatsApp. It is possible to see by that medium whether or not the message has been read. The two men had spoken by telephone around the beginning of April 2020.

80. While the frustration of Mr Sagar at the lack of satisfactory communication may have been understandable, it was not safe to assume that the Claimant had simply resigned, particularly given the fact that these events were occurring in the first few days of the first lockdown. The unresolved matter of the damaged van seems not to have been resolved, leaving the matter in a kind of limbo.

81. I do not accept that the Claimant had resigned or that he had pre-committed in 2019 to resign in the event of an accident. His letter dated 7 May 2020 is quite clear that he was completely surprised and disappointed to receive notice of his dismissal. Had he resigned, I find on balance, he would not have written this letter.

82. I find that **the processing of the Claimant as a leaver through the P45 process and sending this to the Claimant was a dismissal**.

(11) If he was dismissed, what was the reason for dismissal? Was it a potentially fair reason under section 98 of the Employment Rights Act 1996?

83. Given that the Respondent denies that there was a dismissal, it is on the back foot in respect of establishing a potentially fair reason.

(12) If it was for a fair reason, did the respondent follow a fair dismissal procedure and act reasonably taking account of the size and administrative resources of the

respondent company and in accordance with equity and the substantial merits of the case?

84. The bare minimum process required for a procedurally fair dismissal is that the employee is given notice that dismissal is being considered, that they are able to attend a meeting to challenge that proposal and put forward and mitigating circumstances and finally the right of appeal.

85. Even taking account of the extenuating circumstances of the Covid-19 pandemic and associated lockdown, which might mean that an in-person disciplinary hearing was not practical, the Respondent failed to provide any basic process for considering dismissal in this case. Simply sending the Claimant a P45 was not any sort of process. It did not give him the opportunity to explain what was going on nor to put forward any mitigating circumstances as to the reason for absence. It became clear from the Claimant's letter of 7 May 2020 that he explained that he was off work due to ill-health. This was a matter that was mitigating circumstance and ought to have been taken account of by the Respondent.

86. **I find that this outside of the range of reasonable responses, and that the dismissal was unfair**.

(13) The claim for a redundancy payment was withdrawn during the preliminary hearing.

(14) Was the claimant paid his notice pay and if not, was he entitled to his notice pay?

87. The Respondent has not established a serious breach of contract or gross misconduct.

88. **The Claimant was entitled to be paid notice pay**.

89. The compensation for failure to pay notice pay is likely to overlap for unfair dismissal, since the Claimant cannot double recover losses.

(15) Was the claimant entitled to any furlough pay? The claimant is aware that employers are not obliged to furlough their employees. The respondent said that he furlough the claimant for one month but accepts that he did not pay him any furlough pay. The furlough pay was at 80%.

90. This part of the claim has been particularly puzzling, given that Mr Sagar gave completely contradictory evidence on first and second days of the hearing.

91. Initially he accepted that the Claimant was entitled to pay for March 2020 and also the first week of April 2020. He was so convinced of this during his evidence that he seemed content that I make an order to this effect. He told me that he owed £1,065.56, the sum on the March 2020 payslip, plus a further week for the beginning of April 2020, which would be loosely speaking a quarter of month's pay.

92. On the second day of the hearing he contradicted this position at the resumption of his evidence and explained that in fact the claimant had been

paid. This was by reference to the bank statements provided by the Claimant as an additional document on the first day.

93. The Claimant was paid a sum relating to "Corona" in March 2020.

94. **I find that the Claimant should have been paid furlough pay at 80% of his usual wage from 16 March 2020 to 6 April 2020 in line with the furlough letter of Sunday 5 April 2020**. He was obviously paid something, as can be seen from the two payments in the bank statements received in March 2020. Credit must be given for these.

95. Unfortunately parties are muddled on this point. The schedule of loss does not clearly identify how much the Claimant should have been paid (i.e. 80% of his salary). The Respondent was struggling to identify in the hearing what the payments in the bank statement represented, given that these did not match the payslip.

96. It seems likely that Claimant has been slightly underpaid. The exact figure should be capable of calculation and agreement by the parties. In the event that a remedy hearing is needed and the parties cannot agree the figure, the Tribunal will have to decide the figure.

(16) Is the claimant entitled to be paid for any accrued untaken holiday pay as at the date of termination of his employment?

97. The Claimant has failed to satisfy the burden of proof on him to demonstrate that a sum owed is unpaid.

(17) Is the claimant entitled to any sick pay? The claimant admits he did not provide any medical certificates as evidence of the reason for his absence at the time which he says was due to lockdown restrictions.

98. This is not pursued by the Claimant.

(18) What were the claimant's dates of service?

99. Unfortunately the witness evidence conflicted on this point and there is no other evidence to corroborate either party's case on this.

100. Given that there is to be a remedy hearing, **I will defer making a decision on this point until that hearing. I would expect each side to explain in witness evidence why they believe their date is correct, and to produce any evidence they have (e.g. P60's, HMRC documentation, bank statements) which may assist the Tribunal in making a decision.**

101. The Claimant may be to identify his previous employment history to the extent that it assists. HMRC may be able to provide a record of national insurance payments made.

(19) – Should there be any reduction in award under *Polkey* or because the Claimant caused or contributed to the circumstances of dismissal?

Contribution

102. Did the Claimant cause or contribute to the circumstances of his dismissal?

103. I do not consider that there is cogent evidence from which I could conclude that the Claimant was to blame for the accident in February 2020 such as to make a reduction for this figure.

104. I do not conclude that the use of the van after working hours was plainly a disciplinary matter such as to contribute to dismissal. I infer that the Claimant was entitled to drive home at the end of his working day. He took a detour to see his elderly and unwell father. It seems that the employer has acquiesced in such personal use previously. He had never given him a written warning. I do not consider that this amounted to blameworthy conduct such that I should reduce any award.

105. I do find however that by failing to communicate adequately with his manager throughout April 2020 the Claimant set the stage for the dismissal. This was blameworthy conduct. It was clear that Mr Sagar wanted to speak to the Claimant and the Claimant disregarded this, putting Mr Sagar in a difficult situation.

106. In my assessment the appropriate reduction is **50%, which should be made both to the basic and compensatory award**.

107. This is on the basis that had the Claimant properly communicated with his manager the need for the dismissal may well have been avoided. The two men had on Mr Sagar's account resolved a difficulty in February 2019. There was some prospect of the two of them doing so again.

'Polkey'

108. What was the chance that had a fair process been followed, the Claimant would have been dismissed following *Polkey v AE Dayton Services Ltd* [1987] IRLR 503?

109. Mr Sagar also says that the Claimant's attitude had deteriorated significantly and that he was rude on the phone and was uncooperative with other staff.

110. The difficulty is that none of these matters are documented, and I have not found Mr Sagar to be an entirely reliable witness. Even on important matters that are relevant to this claim he gave one answer only to change his position later on.

111. The Respondent has tried to suggest that the Claimant had in effect made himself unemployable due to the high insurance cost caused by his poor record as a driver. It seems however based on paragraph 13 of Mr Sagar's witness statement that this problem had been resolved by making the Claimant the registered keeper and getting him to sort his own insurance.

112. It is possible that the Respondent might have come to the conclusion that the Claimant ought to be dismissed for failing to communicate. However in the very unusual circumstances of the lockdown, the Claimant suffering an injury and the mitigating circumstances of his grandfather being unwell, it seems to me that the likelihood of such a fair dismissal was quite low. Had Mr Sagar taken some steps to invite the Claimant's representations in response to a possible decision to dismiss, it would be fairly unlikely to be outside of the range of reasonable responses to dismiss.

113. There was a difficulty caused by the delivery van being out of commission and the high insurance costs. I note that Mr Sagar started to use third-party bicycle couriers rather than getting a new or repaired van with another employed driver. I find that there was a possibility that this situation might have been fairly described as a redundancy situation falling under section 139 ERA or alternatively some other substantial reason. Again, however, in my view there was every prospect of the two men resolving the matter without the need for the Claimant to be dismissed.

114. In the circumstances I consider that the likelihood of a potentially fair dismissal was 25% and accordingly reduce the compensatory award by **25%**.

Order of adjustments

115. The deductions for *Polkey* and contribution should be made consecutively not simultaneously.

ACAS

116. An award for compensation can be increased or reduced, by up to 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULRC(A) 1992).

117. There was an unreasonable failure to comply with the ACAS code (*Code of Practice on disciplinary and grievance procedures*, published 11 March 2015) which would provide for a fact finding process, letter inviting an employee to a disciplinary hearing, the hearing itself and a right of appeal. None of these was provided.

118. I consider that the appropriate increase in the overall award is 10%. I have set this figure at a low level for three reasons. First, the Respondent is a very small organisation without an established HR function. Second, material events took place at the time of the Covid-19 pandemic, when it was difficult for most organisations to carry out normal processes. Third, the Claimant was making it difficult to communicate with Mr Sagar.

Statutory cap

119. Any compensatory award in this case would be capped at 52 weeks' gross pay.

Schedule of loss

120. There is no basis to award an injury to feeling award or a claim for injury to feeling, since there is no jurisdiction in a claim of ordinary unfair dismissal.

Remedy Hearing - ORDERS

121. A one day remedy hearing has been listed on **Friday 13 May 2022 in person commencing at 10am**.

122. The parties are of course encouraged to explore settlement.

123. The parties are ordered as follows:

123.1. By **28 March 2022** the parties must exchange a list of documents relevant to remedy, together with copies of those documents. In the case of the Claimant this should include evidence of his attempts to find work since the date of dismissal, since he was under a duty to mitigate his loss.

123.2. By **11 April 2022** the Claimant shall provide to the Respondent and copy the Tribunal with an updated schedule of loss, removing

123.3. By **18 April 2022** the parties should identify which documents they require in the remedy bundle.

123.4. By **25 April 2022** the Respondent shall provide to the Claimant a counter schedule of loss and an electronic bundle of documents for the remedy hearing.

123.5. By **9 April 2022** the parties shall exchange witness statements relevant to remedy. Both parties should justify their differing dates for commencement of employment. In the case of the Claimant he should what steps he took to find alternative employment following the termination of his employment with the Respondent. If he has not made attempts to find work he should explain this and explain why.

124. In the event that either party unreasonably fails to comply with these orders, the Tribunal may consider striking out parts of that parties' case or the making of costs orders.

_____

Employment Judge Adkin

Date 2 March 2022

WRITTEN REASONS SENT TO THE PARTIES ON

..02/03/2022.

.....

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX: LIST OF ISSUES

(10) Was the claimant dismissed when the respondent sent him a P45 on 5 May 2020? What was the termination date of the claimant's employment?

(11) If he was dismissed, what was the reason for dismissal? Was it a potentially fair
reason under section 98 of the Employment Rights Act 1996?

(12) If it was for a fair reason, did the respondent follow a fair dismissal procedure and
act reasonably taking account of the size and administrative resources of the respondent company and in accordance with equity and the substantial merits of the case?

(13) The claim for a redundancy payment was withdrawn during this hearing.

(14) Was the claimant paid his notice pay and if not, was he entitled to his notice pay?

(15) Was the claimant entitled to any furlough pay? The claimant is aware that employers are not obliged to furlough their employees. The respondent said that he furlough the claimant for one month but accepts that he did not pay him any furlough pay. The furlough pay was at 80%.

(16) Is the claimant entitled to be paid for any accrued untaken holiday pay as at the
date of termination of his employment?

(17) Is the claimant entitled to any sick pay? The claimant admits he did not provide
any medical certificates as evidence of the reason for his absence at the time which he says was due to lockdown restrictions.

(18) What were the claimant's dates of service?