# EMPLOYMENT TRIBUNALS

**Claimant:** Mr David Brown

**Respondent:** Evergreen Irrigation Ltd

**Heard at:** Watford Employment Tribunal **On:** 2&3 December 2024

**Before:** Employment Judge Taft

**Representation**
Claimant: Represented himself
Respondent: Mr Stanley (HR Consultant)

# RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The correct name of the Respondent is Evergreen Irrigation Ltd.

2. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

3. There is a 50% chance that the claimant would have been fairly dismissed in any event.

4. Both parties unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. Having considered the relative weight of their respective failures, it is just and equitable to increase the compensatory award payable to the Claimant by 5% in accordance with Section 207A Trade Union & Labour Relations (Consolidation) Act 1992.

# REASONS

**Introduction**

1. The parties agree that the correct legal name of the Respondent is Evergreen Irrigation Ltd and that it is appropriate to substitute the correct Respondent under Rule 34.

2. The Claimant, Mr Brown was employed by the Respondent, Evergreen Irrigation Ltd from 23 March 2019 until he was dismissed without notice on 26 September 2023. The Claimant claims that dismissal was unfair. The Respondent contends that the dismissal was fairly dismissed for misconduct on three grounds

   (a) Theft of company property;
   (b) Undertaking work for his own financial benefit in conflict with the best interests of the business, and in direct breach of his terms and conditions of employment; and
   (c) Damaging company property and/or failing to report damage to company property.

**The Hearing**

3. I heard sworn evidence from the Claimant and from Mr Jon Jinks and Mr Gareth Rees for the Respondent and considered a bundle of 58 pages containing the claim, response and documents that the parties introduced in evidence.

4. At the beginning of the hearing, I discussed the issues with the parties. The Claimant accepted that misconduct was the true reason for the dismissal, and he was not dismissed for any other reason. The parties therefore agreed that the sole issue before me was whether the Respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal.

5. In closing submissions, Mr Stanley submitted that because the Claimant's claim form referred only to allegations (a) and (b), I must find that it was fair to dismiss the Claimant for allegation (c). This was not addressed at the beginning of the hearing when we discussed the issues for me to determine. The Claimant's witness statement contains evidence in respect of all three allegations. Mr Stanley cross examined the statement in respect of all three allegations. All parties therefore proceeded on the basis that I must decide whether or not the Respondent acted fairly in respect of all three allegations. Mr Stanley suggested in closing submissions that the Claimant should have applied to amend his claim if he wanted to contest the fairness of dismissing him in respect of the third allegation.

6. I disagree. The Claimant was not asking me to add a new claim. He ticked the box at section 8.1 of his claim form to confirm that he was bringing a claim of unfair dismissal. The particulars in section 8.2 are short, and it is correct that they do not refer to the third allegation. However, further particulars are provided in his witness statement, on which the Respondent could and did cross examine him. The Claimant did not need to amend his claim to suggest that it was unfair to dismiss him in respect of the third allegation.

**Issues before the Tribunal**

7. I agreed with the parties that I needed to decide the following issues to determine liability:

(a) Whether the Respondent carried out a fair procedure before dismissing the Claimant;
(b) Whether the Respondent carried out a reasonable investigation;
(c) If so, whether the Respondent had reasonable belief that the Claimant had committed the misconduct described in the three allegations; and
(d) If so, whether dismissal was in the range of reasonable responses to the misconduct described in the three allegations.

8. I also agreed with the parties that it would be appropriate for me to determine certain issues of remedy at this stage:

(a) If the dismissal was procedurally unfair, what adjustment, if any, should be made to the compensatory award to reflect the possibility that the Claimant would have been dismissed in any event (commonly known as a *Polkey* reduction);
(b) If the claim succeeded, would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent;
(c) Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6); and
(d) Did either party fail to follow a relevant requirement of the ACAS Code of Practice on Disciplinary and Grievance Procedures, and if so, whether an adjustment, and if so in what amount, should be made to the compensatory award under Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992.

**Findings of Fact**

9. The Respondent is a small irrigation company. In early 2023, its shares were sold and new directors were appointed, including Mr Gareth Rees, Managing Director.

10. The new management had a different approach. They wanted to "tighten up" procedures including in respect of monitoring stock by way of stocktaking. The Claimant expressed that he was not happy about this, he says because he did not like carrying out stocktaking.

11. The Respondent had a written Disciplinary Procedure, which is contained in the bundle. It describes the procedure for formal investigation of disciplinary issues, including that *"statements should be taken from witnesses at the earliest opportunity"*. It goes on to give examples of minor misconduct and gross misconduct. There is some overlap between these examples. Notably both *"incompetence"* and *"failure to observe company regulations and procedures"* appear in both lists.

12. On 17 August 2023, the Claimant was given a written warning regarding his conduct with a customer, which was described as *"rude, answering back and being verbally aggressive"*. The Claimant met with his manager to discuss the incident before he was given the warning. He was not given written notice of that meeting. The Claimant said that the customer was difficult, in drink and had insulted the Claimant's wife. He admitted there

was an argument but denies he was aggressive. He did not appeal the warning but it does not on its face give the right of appeal.

13. On 24 August 2023, the Claimant was working at Wentworth Golf Club with Luke Hargreaves. It was usual for the Claimant and Mr Hargreaves to work together. Mr Hargreaves could not drive the company van so the Claimant provided this function.

14. Whilst parking the company van, the Claimant bumped into another stationary company van in the adjoining parking space, causing damage to both vehicles. The photographs of the vehicles contained in the bundle show scratches. The damage appears from those photographs to be minor and cosmetic.

15. The Claimant did not report the damage to the office. He says that his supervisor, Mr Hargreaves was in the van at the time and therefore aware of the damage. He also says that he shouted across to the driver of the other van (Gavin) to tell him about the damage, but the Claimant cannot be sure that Gavin heard him because Gavin was wearing ear defenders.

16. Somebody reported the damage to the office. None of the witnesses before me knows who that was.

17. Jon Jinks, Irrigation Manager, commenced an investigation into the incident. During the course of the investigation, employees informed him that the Claimant and Mr Hargreaves had stolen company materials from the warehouse and used those materials to undertake work for customers in competition with the Respondent.

18. Mr Jinks therefore expanded his investigation to include these new matters. It was not possible to identify whether, when or how stock had gone missing because of the previously looser stock control.

19. Mr Jinks spoke to the staff. He did not take notes of what they said. In his witness statement, he described that *"virtually everyone"* informed him that the Claimant and Mr Hargreaves were taking stock and using it to undertake work for customers at weekends. In oral evidence, Mr Jinks said that "at least five" employees said this. I accept his evidence about what he was told.

20. None of the employees Mr Jinks spoke to were prepared to give statements to his investigation to confirm what they told him. Mr Jinks described a "genuine fear factor amongst the employees", he says because Mr Hargreaves is an unsavoury character and because the Claimant had displayed his aggressive nature in his conduct with the customer that led to his warning and in respect of an incident where he had made a detrimental comment about a colleague on WhatsApp.

21. Eventually, one employee was prepared to give a short anonymous statement. Another gave more details but only verbally, and again on condition of anonymity. No notes were taken of what he said.

22. One of those details was the identity of a customer who it was said had engaged the Claimant to do work for them that might otherwise have been

carried out by the Respondent. Candy Lamond, a member of the Respondent's office staff, contacted the customer to try to obtain information about this. The customer did not want to get involved and neither confirmed nor denied that he had so engaged the Claimant.

23. Mr Jinks also looked at the tracker for the van that the Claimant used, because he says that he had been informed that the Claimant and Mr Hargreaves had disabled the tracker at weekends to hide their whereabouts. He described the tracker "going offline" on Friday evening and then coming back online on Monday morning. Although there was a printout of the tracker from Thursday 24 August in the bundle, there was no printout available to show what Mr Jinks described happening at weekends. Nevertheless, I accept his evidence about this.

24. Mr Jinks met with the Claimant on 7 September 2023. He asked the Claimant sixteen questions. The questions and answers are contained in a detailed note of the meeting. The Claimant accepts that the note is accurate.

25. The Claimant denied using company vehicles to carry out private work for customers, denied attempting to or succeeding at altering the status of company vehicle tracker units, denied approaching customers to offer them supply of materials or installation works on a private basis, denied taking stock from the warehouse, denied failing to return unused company stock and denied carrying out private work for customers.

26. The Claimant described "catching" the other company van when parking his vehicle and shouting over to Gavin that he had done so, albeit that Gavin may not have heard him. He said that Mr Hargreaves was with him. He said that he didn't think he needed to report the damage to the office because Gavin had done this. He said that he had discussed the incident with Mr Hargreaves. When asked if he had discussed it with a supervisor he replied *"I don't consider Luke to be my supervisor, just a mate"*. When asked about what he should have done he replied *"in hindsight, I realise that I should have contacted the office straight away"*.

27. Mr Jinks did not tell the Claimant that the tracker records showed it going "offline" on Friday evenings and coming back online on Monday mornings or ask him to comment on this.

28. Mr Jinks produced an investigation report in which he concluded that the Claimant had breached company rules, had failed to carry out a management instruction within his capabilities, was incompetent and had failed to apply sound professional judgment, all of which are listed in the Respondent's disciplinary procedure as examples of gross misconduct.

29. That investigation report was passed to Mr Rees, who invited the Claimant to a disciplinary hearing to discuss three allegations:

    (a) Theft of company property;
    (b) Undertaking work for his own financial benefit in conflict with the best interests of the business, and in direct breach of his terms and conditions of employment; and

(c) Damaging company property and/or failing to report damage to company property.

30. The invite was said to attach "evidence" for the Claimant to consider in advance of the hearing. Neither Mr Rees nor the Claimant could recall what was attached. The Claimant said that he had not seen the anonymous statement before the disciplinary hearing. I accept his evidence about that.

31. The disciplinary hearing took place on 22 September 2023. The notes of the meeting are less detailed than the notes of the investigation meeting, though again the Claimant confirmed that they were accurate. They describe Paul Evans, a consultant who assists the Respondent with financial and HR matters, reading out the anonymous statement. The Claimant confirmed that the substance of what was said by the other employee was also put to him in this meeting.

32. The Claimant denied theft of company stock and said that he thought there was a witch hunt. He denied carrying out private work for customers. He admitted damaging the vehicle and said that he had informed his colleague about it but with hindsight agreed that he should have reported the damage. At the conclusion of the hearing, Mr Evans told the Claimant that he would be informed of the outcome within the next few days.

33. On 25 September 2023, the Claimant sent Mr Rees a WhatsApp message asking for an approximate date that the private work was said to have been carried out for the customer identified by his colleague. The Claimant did this so that he could provide an alibi. His smartphone tracks his movements so he would be able to identify where he was on a particular date. Mr Rees received the WhatsApp message but did not reply. He said that he did not think it was appropriate to do so.

34. Mr Rees had spoken to the anonymous employee who had declined to give a statement but provided further details. He described what they said as *"basically supportive"* of the allegations. I accept his evidence that this employee told him that both Mr Hargreaves and the Claimant were taking stock, that the staff were afraid to say anything about it, that the Claimant had done private work for a particular customer (the customer that Candy Lamond contacted) and that the employee had seen that the company van had been damaged, had looked to see if there was any CCTV that might show how it had been damaged and whilst doing so, the Claimant had shouted across the car park that it was he who had caused the damage.

35. Mr Rees also spoke to Mr Jinks, who informed him that both Mr Hargreaves and the Claimant were reluctant to introduce stocktakes.

36. Mr Rees did read the Respondent's Disciplinary Procedure but did not read the section on gross misconduct before making his decision to dismiss the Claimant. He did not consult the Claimant's terms and conditions before determining whether or not the Claimant was in breach of those terms.

37. Mr Rees thought that there was a written procedure in the company handbook that confirmed that damage to company vehicles should be

reported to the office. On further questioning, he conceded that whilst his other company (Inscape) had such a procedure, he could not be sure that this was contained in the Respondent's handbook. No such procedure is contained in the bundle. The Claimant says that he was not aware of such a procedure and didn't know if there was a company handbook. I accept what the Claimant says and find as a fact that if such a written procedure exists, the Claimant was not aware of it.

38. In oral evidence, Mr Rees said that he took into account the fact that Mr Hargreaves does not drive and would therefore need someone to drive a vehicle in order to take stock, which was bulky. He could not recall putting that point to the Claimant in the disciplinary hearing.

39. Mr Rees wrote to the Claimant on 26 September 2023 to confirm that he was dismissed without notice. He described the allegations as proven and that fundamentally the Claimant was dishonest. He said that he thought carefully about to what extent he should consider the anonymous statements but concluded that it was appropriate to rely on them because they supported other circumstantial evidence. In oral evidence, Mr Rees confirmed that he was referring to the tracker going offline and the Claimant's apparent reluctance regarding stock takes. The letter does not record that Mr Rees took account of the fact that Mr Hargreaves had admitted the theft and would have needed assistance from a driver to take bulky stock.

40. The letter went on to record that there was no dispute that the Claimant had caused damage to two company vehicles and not reported it. Mr Rees said that the Claimant had taken a dishonest approach by saying that he had reported the incident to Luke Hargreaves and that this attempt to shift the blame *"did* [him] *no favours"*.

41. Neither the investigation nor disciplinary meeting minutes record that the Claimant said that he considered that he had reported the incident to Mr Hargreaves nor that he suggested that it was in some way Mr Hargreaves fault that the incident was not reported. Mr Rees' statement does not suggest that the Claimant said this but records that the Claimant had attempted to suggest that he had discharged his duty to report by shouting to his colleague (i.e. Gavin).

42. I find as a fact that the Claimant did not attempt to shift the blame onto Mr Hargreaves by suggesting that he had reported the incident to him.

43. The letter concluded by informing the Claimant that he had the right to appeal and should he wish to do so, he should set out his grounds of appeal in writing to Mr Rees. The Claimant did not appeal, he says because he thought that the same people would be making the decision and that it would not change. I find that that was a reasonable conclusion to reach given what was said in the letter, and that, given that as Mr Rees was Managing Director, there would be no one more senior to overrule his decision. It was further reasonable of the Claimant to conclude that Mr Rees was unlikely to change his mind given the damning conclusions reached in his letter.

44. Mr Hargreaves was also dismissed, in his case because he had admitted theft. The Claimant did not know about this before his own dismissal because he had been instructed not to speak to Mr Hargreaves during his suspension.

**The law**

45. Section 98 of the Employment Rights Act provides that

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is … a reason falling within subsection (2) …
>
> (2) A reason falls within this subsection if it …
>
> (b) relates to the conduct of the employee …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances … 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. When an employee has been dismissed because the Respondent believes that they have committed misconduct, the test for the Tribunal was set out by the Employment Appeal Tribunal in **British Home Stores Ltd. v Burchell [1980] I.C.R. 303**:

> *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. And 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.*

and

> *a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion*

47. In **Iceland Frozen Foods Ltd v Jones [1983] I.C.R. 17** the Employment Appeal Tribunal held that:

> *the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair*

48. On the amount of investigation required, the Court of Appeal held in **J Sainsbury plc v Hitt [2003] I.C.R. 111** [at paragraph 30] that:

> *The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.*

49. The Court of Appeal went on (at paragraph 31) to hold that:

> *The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.*

50. The Employment Appeal Tribunal established a number of principles on how an employer should treat information from employees that wish to remain anonymous in **Linfood Cash & Carry Ltd. v Thomson and Others [1989] I.C.R. 518:**

> 1. *The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.*
>
> 2. *In taking statements the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.*
>
> 3. *Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.*
>
> 4. *Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.*
>
> 5. *If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.*
>
> 6. *If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.*
>
> 7. *The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.*

8. *If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.*

9. *Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.*

10. *Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.*

51. In **Polkey v AE Dayton Services Ltd [1987] UKHL 8**, the House of Lords held that a dismissal is still unfair if a fair procedure would result in the same outcome as the unfair procedure held by a Tribunal, but that this can affect the compensation that should be awarded in such circumstances. This is often known as a *Polkey* deduction. The Tribunal must assess the percentage chance that a fair procedure would have resulted in a dismissal, and to reduce the compensation by that percentage.

52. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in Sections 122(2) and 123(6) of the Employment Rights Act 1996.

Section 122(2) provides as follows:

(2) 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.

Section 123(6) then provides that:

(6) 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.

53. The ACAS Code of Practice on Disciplinary and Grievance confirms that

*(a) "Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made"* (at paragraph 4);
*(b)* Employers should notify employees if it is decided after investigation that there is a case to answer and when they do so *"It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification"* (at paragraph 9); and
*(c)* Employers should hold a disciplinary meeting where *"the employer should explain the complaint against the employee and go through the evidence that has been gathered"* and the employee should *"be given an opportunity to raise points about any information provided by witnesses"* (at paragraph 12).

54. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides where it appears to the Employment Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer had failed to comply with the Code in relation to that matter, and the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award it makes by no more than 25%.

**Conclusions**

55. The Claimant's dismissal was procedurally unfair. The Respondent did not follow its own disciplinary procedure because it did not take statements from the witnesses. Statements could and should have been taken even if those witnesses wanted to remain anonymous. Statements do not need to include the author's name. That is clear from the one statement that the Respondent did take.

56. The Respondent further unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance. The disciplinary invite did not contain a copy of the one statement that was available. This was instead read out to the Claimant in the disciplinary hearing itself. The Claimant was not given opportunity to comment on what the witnesses said because he was not given full information about what they had in fact said.

57. The Respondent did not go through all the evidence that had been gathered. The tracker records suggesting that it was switched offline over the weekend were not put to the Claimant. Mr Rees' belief that Mr Hargreaves would need a driver to assist in the removal of company stock was not put to him.

58. Further, there was no note of the conversation with the customer. The Claimant was told that the customer did not deny that the Claimant had carried out private work but he was not given any detail about what was said. Despite asking, the Claimant was not given an approximate date of when this work was said to have taken place. This deprived him of the opportunity to provide an alibi in the form of his smartphone tracker.

59. I find that Mr Rees held a genuine belief that the Claimant had dishonestly taken stock from the Respondent and used that stock to compete with the company by carrying out work for its customers at the weekend. His evidence on that was clear and his dismissal letter was unequivocal. However, that belief was not a reasonable belief because it was not formed after a reasonable investigation.

60. In making this finding, I have taken account of the fact that the Respondent is a small employer that might not have the administrative resources to carry out as much investigation as one might expect of a larger enterprise. However, it did have the benefit of assistance from Mr Evans, who is said to have HR experience.

61. Even the smallest employer is capable of taking notes of conversations with witnesses in order that these notes may be put to an employee under investigation. The Respondent did not do so.

62. The Respondent did not take the steps set out in **Linfood Cash and Carry**: it did not reduce the information given by the anonymous informants to writing; it did not take any dates, times or places of the alleged thefts or private work; only one statement was provided to the Claimant; the disciplinary hearing notes were not full or careful (and it is notable that the Respondent was able to take full and careful notes of the investigation meeting).

63. The Claimant admitted that he damaged two company vehicles and did not report that he had. Mr Rees held that to be a breach of company procedures without establishing whether or not the Claimant was aware of that procedure. Mr Stanley suggested in closing submissions that "everyone knows" that someone who causes an accident is obliged to report it. That alleged fact was not put in evidence.

64. The damage to the two vehicles was minor and cosmetic. There is no evidence to suggest that the Claimant was "incompetent" or grossly negligent in causing the damage. Accidents happen. The Claimant was at fault for the accident, but that is not the same level of culpability as "incompetence" or gross negligence.

65. Mr Rees did not therefore hold a reasonable belief that the Claimant was guilty of misconduct in either causing the accident or in failing to report the damage to the office.

66. The Claimant's dismissal was therefore unfair.

67. Mr Stanley invites me to find that had a fair process been followed then the outcome would still have been dismissal. In the alternative, he submits that there is a very high probability of the Claimant being dismissed as a direct consequence of the matters dealt with in the disciplinary process. He further invited me to find that even if the Claimant had not been dismissed on 26 September 2023, he would likely have been dismissed shortly thereafter because he was likely to have committed further misconduct. There was no evidence to support this assertion save that the Claimant had a recent warning regarding the customer incident and had been spoken to regarding the WhatsApp incident.

68. There is insufficient evidence to support a finding that the Claimant would have committed further misconduct such that he would have been dismissed later.

69. However, there is evidence to support a conclusion that there was a chance that the Claimant would have been dismissed if a fair procedure had been carried out. If the Respondent had taken detailed statements from the witnesses and put those statements to the Claimant, he may have been able to provide an explanation. He says that there was a witch hunt. He may have been able to identify evidence of collusion. Had he been given the approximate date of the alleged work for the customer, he may have been able to provide an alibi. However, there is a significant chance that he would not have been able to do so and that the Respondent could have formed a reasonable belief that he had committed the theft and private work on the sheer weight of the number of staff who

said he had done so. I find that there was a 50% chance that this would have happened.

70. I have not found that the Claimant committed any conduct that would make it appropriate to reduce either the basic or compensatory awards. The Claimant did cause minor damage to the company vehicle, which had a "but for" consequence in that this led to the investigation that uncovered the theft and private work allegations, but I do not consider that this conduct was blameworthy such that it is appropriate to make any adjustments to either the basic or compensatory awards.

71. As will be apparent from my findings on the procedure adopted by the Respondent, I find that it unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance. It did however make some attempt to follow the Code: it carried out an investigation and invited the Claimant to a disciplinary meeting at which he could put his case. It offered him an appeal. The Claimant conceded that he had also failed to follow the Code of Practice because he failed to appeal, and that this failure was also unreasonable. I find however that it was less culpable than that of the Respondent. In other words, the Respondent's failures were more serious. Taking all of that into account, I consider that it is just and equitable to increase the Claimant's compensation by 5%.

72. The claim will now be listed for a remedy hearing in respect of the claim of unfair dismissal, when the amount awarded will take account of these conclusions.

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Employment Judge Taft

Date: 3 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17/12/2024

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FOR EMPLOYMENT TRIBUNALS

recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/