IN THE EMPLOYMENT TRIBUNAL

Claim Number: 62/2021

BETWEEN:

KEVIN ANTHONY WILLIAMS

Claimant

-AND-

OCS LOGISTICS LIMITED

Respondent

AWARDS DECISION

Chairperson: Ms Gabrielle O'Hagan
For the Claimant: In person
For the Respondent: Mr Paul Rose, Financial and Managing Director of the Respondent

Procedural background

1. The Claimant was employed by the Respondent from 13 December 2019 as a Delivery Operative /Warehouse Assistant until his dismissal on 25 August 2021.

2. The Claimant filed a Claim Form on 1 October 2021 making a claim for unfair dismissal, arrears of pay and arrears of holiday pay and seeking reinstatement and an apology or, if reinstatement was not possible, compensation, with attached copy correspondence and documentation. The Respondent filed a Response Form on 4 October 2021 denying the Claim in its entirety with attached copy correspondence, documentation and a video recording.

3. A Preliminary Hearing took place on 4 October 2023 and a Case Management Order was made.

4. The Main Hearing took place on 27 February 2024 and I gave a Judgment dated 21 May 2024 in which I found that that the Respondent's decision to dismiss the Claimant for gross misconduct fell outside the range of reasonable responses that a reasonable employer in those circumstances and in the Respondent's business might have adopted, due to the failings in the disciplinary procedure the Respondent followed on 23 to 25 August 2021, and therefore that the Claimant's Claim for unfair dismissal was well-founded and succeeded.

5. At the end of the Judgment, I held:

> *"1. In his Claim Form, the Claimant stated that, if successful, he was seeking reinstatement and an apology or, if reinstatement was not possible, compensation. In this respect, Mr Rose for the Respondent gave compelling and consistent evidence that, despite the previous high regard in which it had held the Claimant, the Respondent had lost trust*

in the Claimant as a result of his conduct on 13 August 2021 and his subsequent unwillingness to recognise the impropriety of his actions. I did not doubt this evidence and I find that the Respondent does genuinely believe that the trust and confidence between the Respondent and the Claimant has irretrievably broken down, and I also find that this belief is not irrational, given that the Claimant did not dispute that he did not believe he had done anything wrong on 13 August 2021. This finding means that it is impracticable, and not in accordance with equity, for a recommendation of re-engagement to be made under Section 70 of the Act. Recommendations (including that an apology be made) are not an available remedy for a finding of unfair dismissal.

2. *I shall therefore make an Award of compensation, further to an Awards case management directions order (which shall accompany this Judgment) and Hearing.*

3. *Given this Judgment - that the Claimant's dismissal was unfair because of the failings in the disciplinary procedure adopted by the Respondent - the parties are alerted to the application of Polkey v AE Dayton Services Ltd [1988] ICR 142 HL….*

4. *The parties are also alerted to Sections 2(5), 3(4) and 3(6) of the Employment Tribunal (Calculation of Compensation) Regulations 2016…*".

6. Further to the case management directions Order made on 21 May 2024, the Claimant filed a Schedule of Loss on 27 June 2024 (without supporting evidence) and the Respondent filed a Counter Schedule of Loss on 16 July 2024 with a submissions letter, and copy payslips for the Claimant for the months of May 2021 through to August 2021. Neither the Claimant nor the Respondent filed Witness Statements or Skeleton Arguments as provided for by the directions Order.

7. The Awards Hearing took place on 9 October 2024 and both the Claimant and Mr Rose of the Respondent gave live evidence. As at the Main Hearing, neither party was legally represented: the Claimant represented himself and Mr Rose represented the Respondent.

The Facts

1. A full background to the substantive Claims is set out in my Judgment dated 21 May 2024. In brief: on the afternoon of Friday, 13 August 2021, following problems with a delivery to a client of the Respondent (Trends clothing shop), the Claimant went to Trends and raised his voice at a shop assistant in front of a customer; the Respondent initiated a disciplinary procedure; and issued a Final Written Warning dated 19 August 2021 in which it stated that the Respondent was however: "*willing to allow the matter to be considered as settled, if [the Claimant] agree to giving an unreserved apology to both the floor manager and the member of staff involved*", and without trying to justify his behaviour. The letter continued that, should the Claimant make the apology, then the letter would constitute a final warning with respect to any future behaviour of a similar nature and would remain "*a permanent part*" of the Claimant's employment record. Any further incidents or complaints from clients of a similar nature would result in the Claimant's employment being terminated. If the Claimant refused

to make the apology, or make it not in the manner requested, the Respondent would "*be left with no choice but to institute a dismissal process*" and terminate the Claimant's employment for serious misconduct. The Respondent subsequently dismissed the Claimant on 25 August 2021.

2. In the Claimant's Schedule of Loss, he stated that his gross and net monthly pay at termination were approximately £1,200. The Respondent attached to its Counter-Schedule of Loss the Claimant's payslips for the months of May to August 2021. The Respondent stated that at termination the Claimant's average gross monthly pay was £1,023.75 and average net monthly pay was £919.20; and his average gross weekly pay was £236.25 and his average net weekly pay was £212.12.

3. The Claimant stated in his Schedule of Loss that the Respondent paid him £1,800 net pay in lieu of notice. However, the Claimant's Termination of Employment Form dated 25 August 2021 stated the pay in lieu of notice to be £810 (and that the Claimant was also paid £725 accrued holiday pay). I confirmed with the parties at the Awards Hearing that this was correct.

4. In the Claimant's Schedule of Loss, in answer to the question as to Government benefits payments made between termination and the date of the Awards Hearing, he entered £13,480 and also stated that he was struggling to survive on £162 monthly payments. At the Awards Hearing, I asked the Claimant to explain the nature and periods of time of the £13,480 benefits payments and the £162 monthly payments. The Claimant said that the latter were unemployment benefit payments.

5. The Claimant stated in his Schedule of Loss that he was "*now coping better with*" Minimum Income Guarantee and Community Officer Scheme payments of £1,060 per month.

6. The Claimant stated in his Schedule of Loss that he received zero earnings from any paid work since his dismissal.

7. In the Counter Schedule of Loss, and in correspondence to the Tribunal, the Respondent alleged that the Claimant had omitted to account for earnings from his employment as a delivery person for the food company "Mr Noodles", from the end of 2021 until, according to Mr Rose at the Awards Hearing, the end of 2023. However, the Respondent was not able to proffer any supporting evidence for this belief, and Mr Rose stated in the Counter Schedule of Loss that, although there was a witness who could support this allegation, she would not wish to give live evidence in the presence of the Claimant. Subsequently, Mr Rose also raised this in correspondence with the Tribunal. When I advised Mr Rose at the Awards Hearing that it would support this allegation if the witness attended to give evidence, the Hearing was adjourned at Mr Rose's request for him to contact her. However, Mr Rose said that the witness maintained that she did not want to attend the Hearing as she was scared of the Claimant.

8. Mr Rose also alleged (for the first time) at the Awards Hearing that the Claimant also worked for Beacon Press for a short time after his dismissal by the Respondent. However, he did not develop this any further.

9. In cross-examination and in response to an express question from me, the Claimant denied that he had worked at any time post-dismissal, for Mr Noodles or anyone else. He repeatedly stressed that the Respondent had no evidence for this allegation. When the Claimant was asked in cross-examination how he had managed to survive on unemployment benefit, he said his parents and friends had helped him survive by contributing to pay his bills and whenever he "*was short*". He said, "*how else could I survive?*" and when Mr Rose responded, "*presumably, from employment*", the Claimant retorted "*he can't produce any other evidence*". When the Claimant cross-examined Mr Rose, he said, "*you are accusing me of working illegally*" and when Mr Rose said that he was indeed, the Claimant repeated this over and over again until I pointed out that Mr Rose had answered the question.

10. Under the directions Order dated 21 May 2024, the Claimant was required to file and serve all evidence to prove the sums detailed in his Schedule of Loss, including evidence proving the steps the Claimant had taken to mitigate his loss by finding alternative employment, such as job applications made and offers of alternative employment received, confirming whether or not the Claimant accepted the new position(s) and if not, why not. However, the Claimant did not file or serve any evidence in this regard.

11. The Respondent submitted in its Counter Schedule of Loss that the Claimant was a fit man and should have been able to secure employment as a deliveryman fairly quickly. He added at the Awards Hearing that the Claimant also has experience of Gibraltar and that unemployment levels are low. Under cross-examination, the Claimant said that he did make efforts to find a new job. He named a number of companies where he said he had gone to ask about work and that his daughter had emails proving he was making job-seeking efforts (but he had not provided these with his Schedule of Loss). When asked in cross-examination how often he had looked for work, he said once a week.

12. The Respondent further submitted in the Counter Schedule of Loss that a Polkey deduction should be made as it was "*a certainty*" that the Claimant would have been dismissed "*even if all our processes had been entirely correct*" due to the nature of the offences "*on the day in question*" i.e. 13 August 2021, including the fact that the Claimant abandoned high value goods on the side of a public street, as well as the Claimant's lack of accountability for his actions. "*The trust that we placed in the claimant was completely eroded by this incident and his lack of accountability for his own actions sealed this. The only person responsible for the claimant's dismissal is the claimant himself.*"

13. I put it to Mr Rose at the Awards Hearing that this new allegation about the Claimant leaving high value goods in the street had also not been put to the Claimant at any disciplinary meeting nor in any disciplinary communication prior to the dismissal and so appeared to be an additional failure by the Respondent to follow a fair disciplinary procedure. Mr Rose conceded this.

14. Previously, at the Main Hearing, I had asked Mr Rose what he thought would have happened if the Claimant had gone to Trends to make the apology, as per the Final Written Warning. Mr Rose replied that the Claimant would still have been dismissed soon afterwards, as he had by then lost all trust that the Claimant would not act in the same way again.

15. In addition, I asked both the Claimant and Mr Rose at the Awards Hearing whether they thought that there was a possibility, however small, that if the Claimant had been made aware (by way of a correct disciplinary/dismissal meeting or otherwise) of the likelihood of dismissal on 25 August 2021 or of the complaints made in the 25 August 2021 dismissal letter, and been given the opportunity to take steps to try to ameliorate the situation, for example, by trying to persuade Mr Rose that the Claimant could be trusted and to reach an alternative decision, the Claimant might have succeeded. Mr Rose said categorically that there was no such possibility. The Claimant did not understand this question, despite me re-phrasing it several times.

16. At the Awards Hearing, I put it to the Claimant that we had heard at the Main Hearing that after the incident at Trends on 13 August 2021, the Claimant refused to recognise that this behaviour was wrong in the days which followed. I asked him whether with hindsight he still believed that he did not do anything wrong. The Claimant answered with a firm "*yes*".

17. At the Awards Hearing, Mr Rose stressed that the Claimant was dismissed because he could not be trusted to behave properly and because he did not realise he had done anything wrong.

The Law

1. Section 70(3) of the Employment Act provides that where the Tribunal finds that the grounds of a claim for unfair dismissal are well-founded and does not make a recommendation, the Tribunal shall make an award of compensation, to be paid by the employer to the claimant, in respect of the dismissal. Section 71 provides that the award of compensation shall consist of a Basic Award and a Compensatory Award.

2. The Employment Tribunal (Calculation Of Compensation) Regulations 2016 (**the Regulations**) provide:-

"1.(2) For the purposes of these Regulations–

"the appropriate amount" means–

(a) one and a half weeks' pay or three times the weekly minimum wage, whichever is the greater, for a year of employment in which the employee was not below the age of forty-one…

"weekly minimum wage" means the amount prescribed as the minimum weekly remuneration payable under the Conditions of Employment (Standard Minimum Wage) Order 2001 as amended from time to time…

Basic award.

2.(1) The amount of the basic award provided in section 71(a) of the Employment Act, shall be £2,200 or such higher amount as calculated by–

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

…(5) Where the Employment Tribunal considers that any conduct of the employee 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 Employment Tribunal shall reduce or further reduce that amount accordingly.

Compensatory awards*.*

3.(1) … the amount of the compensatory award shall be such amount as the Employment Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

… (4) In ascertaining the loss referred to in subregulation (1) the Employment Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Gibraltar.

… (6) Where the Employment 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.

… (8) The amount of a compensatory award to a person calculated for the purposes of section 72 of the Employment Act, shall not exceed the lesser of–

(a) the amount which, in the case of the person who has presented a complaint under section 70 of the Employment Act, represents 104 weeks' pay; or

(b) the amount calculated as follows– 104 x (2 x the weekly minimum wage), whichever is the less."

Mitigation

1. In assessing the Compensatory Award, Regulation 3(4) imposes a duty on a claimant to mitigate their loss suffered as a result of the unfair dismissal. This includes making diligent searches for alternative employment and applying for available state benefits. A claimant will not recover losses beyond a date by which the Tribunal concludes they ought reasonably to

have been able to find new employment at a similar rate of pay. What steps it is reasonable for the claimant to take will be a question of fact.

2. The standard to be imposed on a claimant who has suffered unfair dismissal should not be overly stringent. The burden of proof is on the respondent, and it is not enough for the respondent to show that there were other reasonable steps that the claimant could have taken but did not take. It must show affirmatively that the employee acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to the claimant (*Wilding-v-British Telecommunications Plc* [2002] IRLR 524).

3. The burden is on the Respondent to prove a failure to mitigate (*Fyfe-v-Scientific Furnishing Ltd* [1989] IRLR 331). If the Claimant has failed to take a reasonable step, the Respondent must show that any such failure was unreasonable (*Wright-v-Silverline Car Caledonia Ltd* UKEATS/0008/16). The question of reasonableness is to be determined by the Tribunal itself; the Claimant's perception is only one of the factors to be taken into account.

4. *"A claimant who has suffered by the wrongful act of another party is entitled to recover loss that flows from the wrongful act. The duty on the claimant is to take such steps as are reasonable in all the circumstances to reduce the loss he suffers from the wrongful act. … the relevant question for the tribunal to ask was whether in all the circumstances, it was reasonable for the appellant to do what he did… In order to show a failure to mitigate, what has to be shown is that if a particular step had been taken, the dismissed employee, after a particular time, on a balance of probabilities, would have gained employment. From then onwards, the loss flowing from the unfair dismissal would have been extinguished or reduced by his income from that other source. In fixing the amount to be deducted for a failure to mitigate, therefore, it is necessary for the tribunal to identify what steps should have been taken, the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the alternative income which would have been earned*" (*Gardiner-Hill v Roland Berger Technics Ltd* 1982 IRLR 498).

5. In *Cooper Contracting Ltd-v-Lindsey* UKEAT/0184/15, Mr Justice Langstaff, President of the UK EAT, set out the following key principles derived from case law that Tribunals should take into account when considering the issue of mitigation of loss:

- the burden of proof is on the respondent, as the wrongdoer, to show that the claimant acted unreasonably in failing to mitigate their loss (the claimant does not have to prove that they have mitigated their loss) and if the respondent does not put forward evidence that the claimant has failed to mitigate, the tribunal has no obligation to make that finding (*Tandem Bars Ltd- v-Pilloni* UKEAT/0050/12);

- the respondent must prove that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable; and what is reasonable or unreasonable is a matter of fact to be determined (*Waterlow & Sons Ltd-v-Banco de Portugal* [1932] UKHL 1);

- the claimant's views and wishes are one of the circumstances that the Tribunal should take into account when determining whether the claimant's actions have been reasonable;

- the Tribunal should not apply too demanding a standard on the claimant who is, after all, a victim of a wrong; the claimant is not to be put on trial as if the losses were their fault, when the central cause is the act of the respondent as wrongdoer (*Waterlow*, and *Fyfe-v-Scientific Furnishings Ltd* [1989] ICR 648).

The Polkey deduction principle

1. Under Regulation 3(1), the Compensatory Award must be "*just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

2. *Polkey-v-A E Dayton Services Ltd* [1988] ICR 142 HL established that if a dismissal is found unfair by reason of procedural defects, then the Compensatory Award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event even if the procedure followed had been fair. This is commonly referred to as a "Polkey deduction" (or reduction). This does not mean that the unfair dismissal is rendered fair, but allows the Tribunal to make a realistic assessment of loss according to what might have occurred in the future.

3. Polkey deductions can be assessed in a variety of ways, often by an assessment of the percentage chance of the dismissal of that employee by that employer having happened anyway if a fair disciplinary/dismissal procedure had been followed, and to apply that as the deduction. The assessment is predictive - it requires an assessment of chances (rather than of probability), which depends upon all the facts. "*The chances may be at the extreme (certainty that [the employer] would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. … A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand*" (*Hill-v-Governing Body of Great Tey Primary School* [2013] IRLR 274). This requires consideration of the employer's likely thought processes and the evidence that would have been available to it.

4. "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice*" (*Software 2000 Ltd-v-Andrews and Others* (UKEAT/0533/06/DM).

5. The burden is on the employer to satisfy the Tribunal that that future chance would have happened. The Tribunal must have regard to all the evidence when making its assessment,

including any evidence from the claimant (*Ventrac Sheet Metals Ltd-v-Fairly* (UKEAT/0064/10)).

Contributory fault

1. Regulation 2(5) of the Regulations provides that a contributory fault reduction to the Basic Award shall be made where the Tribunal considers that any conduct of the employee before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the Basic Award to any extent.

2. Regulation 3(6) provides that a contributory fault reduction to the Compensatory Award shall be made where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, by such proportion as the Tribunal considers just and equitable.

3. Reductions to both Awards for contributory fault can be of up to 100%, meaning an unfair dismissal can be found but no compensation awarded. However, such outcomes are rare and require reasoned justification (*Moreland v Newton* [UKEAT/435/92]).

4. Although the criteria for reducing the Basic and Compensatory Awards differ, Tribunals usually apply similar reductions to both Awards unless there are exceptional circumstances. (When differing reductions are applied, the Tribunals must provide justification (*RSPCA v Cruden* [1986] ICR 205 (EAT)).

5. In *Nelson v BBC* (No.2) [1979] IRLR 346 (CA), the Court of Appeal outlined 3 factors which must be met for a Compensatory Award to be reduced for contributory fault:

   i. the claimant's conduct must carry the necessary culpable or blameworthy characteristic: "*perverse or foolish or ... bloody-minded*" or sufficiently unreasonable;

   ii. the conduct must have caused or contributed to the dismissal (although the conduct need only be one of the reasons for dismissal, not the main cause); and

   iii. the reduction must be just and equitable.

6. The EAT case of *Steen v ASP Packaging Ltd* [UKEAT/23/13] more recently established 4 key questions for assessing contributory fault:

   (i) what conduct gave rise to possible contributory fault?
   (ii) was the conduct blameworthy, irrespective of the employer's view?
   (iii) did the blameworthy conduct cause or contribute to the dismissal?
   (iv) to what extent would it be just and equitable to reduce the Award?

And held:

"12. It should be noted in answering this second question that … The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.

13. … The Tribunal must ask for the purposes of [Regulation 3(6)] if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction …, no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the Tribunal moves to the next question, (4).

14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of [Regulation 2(5)] where the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."

7. In relation to cases where there is a finding about the real reason for a dismissal, this does not affect consideration of whether employee conduct caused or contributed to the dismissal. Put another way, the real reason for a dismissal "*is not exclusive of all other matters and a bogus reason does not necessarily shut out the employer completely [from a contributory fault deduction] if there was material to support the reason relied upon*" (*Robert Whiting Designs Limited v Lamb* [1977] ICR 89).

Findings

1. The Claimant was unhelpful both when cross-examined by the Respondent and in answer to questions which I put to him, which was surprising given that the Hearing was to determine the amount of the Award to be made to him. He gave responses which were irrelevant to the questions asked and fixated upon off the point issues such as his complaints about the Respondent having paid him at the incorrect rate of minimum wage during some or all of the relevant period (which had been admitted by the Respondent in 2021 and an offer of redress made to, but not accepted by, the Claimant). When cross-examining Mr Rose, the Claimant tended to make accusations, submissions and allegations, instead of asking questions, and also asked the same questions over and over, despite the questions having already been answered by Mr Rose. Although cross-examination is an adversarial process, the Claimant's cross-examination of Mr Rose, which he did not appear to have prepared for, at times lacked

common courtesy, which I expect in the Tribunal. The Claimant's approach did not elicit any evidence which supported his case.

2. On the other hand, I found Mr Rose and his oral evidence to be clear, frank and credible. He also did his best to remain professional and composed when cross-examining the Claimant.

Basic Award

1. It had already been admitted by the Respondent during the Main Hearing that the Claimant had been paid at the incorrect rate of minimum wage during some or all of the relevant period (and an offer of redress was made to, but not accepted by, the Claimant). The payslips attached to the Counter Schedule of Loss establish that this had been corrected as of July 2021. They also establish that generally no income tax was deducted from the Claimant's wages, presumably because the Claimant benefitted from the Low Earnings Allowance. Social insurance contributions of 10% of gross earnings were routinely deducted.

2. The hourly minimum wage in May to 31 July 2021 was £7.25 and from 1 August 2021, £7.50.

3. Based on the May-July 2021 payslips attached to the Counter Schedule of Loss, the Claimant worked an average of 137 hours per month (32 hours per week). (This means that the Claimant would not have benefitted from the weekly and by extension, the monthly (as opposed to hourly) minimum wage provisions of the Conditions of Employment (Standard Minimum Wage) Order, 2001 because this only applies where at least 34 hours per week are worked (and the Claimant was on an "as required" (i.e. zero hours) contract).

4. Using the above figures, the Claimant's average monthly gross pay (at correct applicable hourly minimum wage) at termination was £1,027.50 (137 X £7.50); and weekly, £237.12; and so his average monthly net pay at termination (after deduction of social insurance contributions at 10%) would have been £924.75; weekly, £213.40.

5. Pursuant to Regulation 2(1), the amount of the Basic Award shall be £2,200 or such higher amount as calculated by the number of years of the Claimant's continuous employment with the Respondent (in this case, one) and allowing the "appropriate amount" for each of those years of employment. The appropriate amount in this case is 3 X the weekly minimum wage (because the Claimant was paid at minimum wage). This means that the Basic Award in this case is £2,200, being a higher amount than 3 X the weekly minimum wage.

6. The Basic Award shall be reduced by 90% to **£220** for the Claimant's contributory conduct under Regulation 2(5), for the reasons set out below.

7. Regardless of the true principal reason for the Claimant's dismissal, for the purposes of Regulation 2(5), I need consider whether any of the Claimant's conduct before the dismissal was such that it would be just and equitable to reduce the Basic Award to any extent.

8. I consider that the Claimant's aggressive and confrontational behaviour at Trends on 13

August 2021, which during the Main Hearing we viewed on a CCTV recording, and additionally the Claimant's subsequent refusal to recognise that this behaviour was wrong (which was evidenced by all of the Respondent's witnesses at the Main Hearing, and which he maintained even at the Awards Hearing) was at best foolish and unreasonable, carrying sufficiently culpable and blameworthy characteristics such that it would be just and equitable to reduce the Basic Award by 90%. This reflects the fact that whilst the Claimant's conduct was culpable and blameworthy, in the interests of justice, the Respondent equally must bear some culpability, at the very least for the way it managed the dismissal on 25 August 2021. The Claimant was all but summarily dismissed without being given an opportunity to explain or defend himself.

Compensatory Award

The Claimant's losses

1. For the purposes of assessing the loss sustained by the Claimant, insofar as that loss is attributable to his dismissal by the Respondent, and therefore the amount of the Compensatory Award under Regulation 3(1), the Claimant is required to establish his losses.

2. At the Awards Hearing, it became clear that the Claimant's loss figures in his Statement of Loss were speculative at best. He said that he just "*put it*" and that he had had a lot of stress and funerals.

3. The Claimant expressly denied that he received any earnings from employment after his dismissal by the Respondent on 25 August 2021, and that he relied upon benefits, which he said were £162 per week After unsuccessfully attempting to clarify this issue with the Claimant, I find that as a matter of fact the Claimant would have been entitled to 78 days of unemployment benefit post-dismissal, totalling £738.74.

4. The Claimant admitted in his Schedule of Loss that he became entitled to Minimum Income Guarantee and Community Officer Scheme payments of £1,060 per month. These payments are made from a person's 60th birthday, which for the Claimant was on 28 April 2023 (87 weeks after his dismissal). These payments are more than the Claimant's average monthly pay by the Respondent and thus there is no assessable loss in the period from 28 April 2023.

5. The Claimant stated in his Schedule of Loss that he has received zero earnings from any paid work since his dismissal.

6. I have considered and weighed up the Respondent's allegation that the Claimant has omitted to account for earnings from his employment as a delivery person for the food company "Mr Noodles", taking into account the fact that this allegation was based solely on hearsay from, the Respondent said, a witness who did not wish to give live evidence, and the fact that the allegation was vehemently denied by the Claimant. I did not perceive any reason to disbelieve the Claimant on this issue, despite my concerns about the rather provocative and antagonistic manner in which he gave his evidence on the subject.

7. In this regard, there is no rule that oral testimony must take priority over opposing hearsay if the Tribunal finds the latter more reliable or compelling. However, on the balance of probabilities, without any supporting direct evidence of the Respondent's allegation, whether from the reluctant witness or otherwise, and without any such evidence being tested in cross-examination and assessed for the weight to be attached to it, I decline to make a finding of fact that the Claimant was employed by Mr Noodles or any other entity after his dismissal by the Respondent.

Mitigation

1. I bear in mind that, when assessing what steps a claimant has taken to mitigate their losses, the standard to be imposed on the claimant should not be overly stringent, the burden of proof is on the respondent to show that the claimant acted unreasonably, and the claimant does not have to prove that they acted reasonably. The Claimant's position at the Main Hearing in oral evidence was that he had regularly approached local employers for work, but had been unsuccessful.

2. Although I also accept the Respondent's submissions that the Claimant was (and I hope still is) a fit man with experience of working in Gibraltar and that Gibraltar has a low unemployment rate, and also that the Claimant presented no evidence except for his word in relation to his job-seeking efforts, I find the Claimant's oral evidence, although disordered, somewhat belligerent and unsubstantiated, credible on this issue and that the Respondent did not succeed in proving that the Claimant acted unreasonably with respect to the steps he took to seek alternative work. I therefore find that there was no breach by the Claimant of the duty to mitigate his losses.

Polkey deduction

1. In my Judgment dated 21 May 2024, I held that the Respondent's principal reason for the Claimant's dismissal was more likely than not because the Respondent had been informed by its customer (Trends clothing store) that the Trends shop assistant to whom the Claimant had allegedly raised his voice when trying to make a delivery on 13 August 2021 (which action started the chain of events leading up to the Claimant's dismissal) had refused to accept an apology from the Claimant (which the Respondent had already required the Claimant to make as a condition of the Final Written Warning dated 19 August 2021).

2. I went on to hold:

> *"17. Even if I am wrong on this finding, and the real reason for the dismissal was that the Claimant had not gone on 23 August 2021 to make the apology, as allegedly ordered to do by Mr Rose (if I had found this allegation to be made out, which I have not), this would mean that the principal reason for the dismissal was the Claimant choosing "not to make the apology or failing to make the apology in the manner stated" (as per the final written warning letter dated 19 August 2021) and therefore misconduct under Section 65(1) and (2) of the Act. However, neither this nor the refusal by the Trends shop assistant to accept*

any apology from the Claimant are the reasons for the dismissal expressly stated in the Respondent's dismissal letter dated 25 August 2021. Nor does the dismissal letter refer to the final warning (in the final written warning letter dated 19 August 2021) that: "Any further incidents or complaints from clients of a similar nature will result in your employment being terminated."

18. *In fact, the first stated reason for the dismissal in the 25 August 2021 dismissal letter is the Claimant's aggressive and confrontational behaviour at Trends on 13 August 2021. But the Claimant had already been investigated and sanctioned in this regard, as notified by the Respondent's final written warning letter of 19 August 2021. I therefore find (following Christou & Ward v L.B. Harringey UK EAT/0298/11/DIV) that, given no evidence was presented of there being a serious and real reason for the Respondent imposing a second sanction for the same offence, the Claimant was entitled not to be sanctioned again in this way.*

19. *The other stated reasons for the dismissal in the dismissal letter were: the Claimant's "failure to recognise that [his] behaviour was highly inappropriate and contrary to the terms and conditions of [his] employment for a member of staff representing this company and our UPS brand"; and the Respondent's lack of trust in the Claimant to conduct himself "in a manner that is befitting a representative of this company". I find that both these complaints might well amount to misconduct, and a fair reason for dismissal, under Sections 65(1) and (2) of the Act. However, these new complaints - the Claimant's lack of accountability for his actions and the Respondent's consequent lack of trust in the Claimant - had not been formally raised by the Respondent with the Claimant previously and there was no evidence that the Claimant had been made aware of their substance or detail. No disciplinary investigation had been undertaken nor a disciplinary meeting arranged at which the Claimant would have had the opportunity to address these new complaints, state his case in response, ask questions or present evidence. Again, ipso facto given that there was no meeting, the Claimant had not been given the right to be accompanied or been previously warned that a possible outcome of such a meeting was dismissal. To compound matters, the 25 August 2021 dismissal letter did not give the Claimant the right to appeal the dismissal.*

20. *I therefore find that the Respondent's decision to dismiss the Claimant for gross misconduct falls outside the range of reasonable responses that a reasonable employer in those circumstances and in the Respondent's business might have adopted, due to the failings in the disciplinary procedure it followed on 23 to 25 August 2021, and therefore that the Claimant's Claim of unfair dismissal is well-founded and succeeds.*"

3. I subsequently held:

"*Given this Judgment - that the Claimant's dismissal was unfair because of the failings in the disciplinary procedure adopted by the Respondent - the parties are alerted to the application of Polkey v AE Dayton Services Ltd [1988] ICR 142 HL, which case establishes that the compensation payable to a claimant may be reduced to reflect the chance that the claimant would still have been dismissed even if a fair procedure had been followed (the Tribunal must*

assess the percentage likelihood of dismissal occurring in any event, even if that would have taken longer)."

4. The Respondent submitted in the Counter Schedule of Loss that a Polkey deduction should be made as it is "*a certainty*" that the Claimant would have been dismissed "*even if all our processes had been entirely correct*" due to the nature of the offences on the day in question, including the fact that the Claimant had abandoned high value goods on the side of a public street, as well as the Claimant's lack of accountability for his actions. "*The trust that we placed in the claimant was completely eroded by this incident and his lack of accountability for his own actions sealed this. The only person responsible for claimant's dismissal is the claimant himself.*"

5. Previously, at the Main Hearing, I had asked Mr Rose what he thought would have happened if the Claimant had gone to Trends to make the apology, as per the Final Written Warning. Mr Rose replied that the Claimant would still have been dismissed soon afterwards, as he had by then lost all trust that the Claimant would not act in the same way again.

6. Taking into account all of the evidence, including Mr Rose's evidence, which I believed, that eventually in the days which followed the 13 August 2021 incident Mr Rose felt (whatever may have been the true reason) that there was no way he could keep the Claimant in employment, in particular because of his loss of trust in the Claimant, and, on the other hand, the relatively small possibility (albeit the total exclusion of which Mr Rose failed to convince me) that had the Respondent followed a fair disciplinary/dismissal procedure, including making the Claimant aware of the likelihood of dismissal on 25 August 2021, giving the Claimant the opportunity to present his case in respect of the Respondent's complaints as stated in the 25 August 2021 dismissal letter and /or giving the Claimant a fair opportunity to discuss the apology to be made to the Trends shop assistant, the Claimant might have persuaded Mr Rose to give him a last chance and to impose a lesser sanction than dismissal, I find that there is a 80% chance that, even had a reasonable and fair disciplinary/dismissal process been adopted, the Respondent would have dismissed the Claimant fairly in any event.

7. Accordingly, the Compensatory Award shall be subject to a Polkey deduction of 80%.

<u>Contributory fault</u>

1. As I held in my Judgment dated 21 May 2024, I do not believe that the Claimant's aggressive and confrontational behaviour at Trends on 13 August 2021 and/or the Claimant's subsequent refusal to recognise that this behaviour was wrong in the days which followed were the cause of the Claimant's dismissal.

2. However, I consider that the Claimant's aggressive and confrontational behaviour at Trends on 13 August 2021, which during the Main Hearing we viewed on a CCTV recording, and additionally the Claimant's subsequent refusal to recognise that this behaviour was wrong (which was evidenced by all of the Respondent's witnesses at the Main Hearing and was maintained by the Claimant himself at the Awards Hearing) was at best foolish and

unreasonable and carried culpable or blameworthy characteristics. I also find that both certainly contributed to the Claimant's dismissal: the Claimant's behaviour on 13 August 2021 started the chain of events which led to his dismissal.

3. I therefore find that it is just and equitable to reduce the Compensatory Award under Regulation 3(6) by 90% to reflect this.

Awards

The **Basic Award** under Regulation 2 is £2,200 reduced by 90% under Regulation 2(5) for the Claimant's contributory conduct as set out above, to **£220**.

Pursuant to Regulation 3, I make a **Compensatory Award** to the Claimant as follows:

- weekly net loss of earnings from 25 August 2021 to 28 April 2023 (87 weeks X £213.40) =£18,565.80
- LESS £810 pay in lieu of notice made by the Respondent = £17,755.80
- LESS £738.74 unemployment benefit = £17,017.06 TOTAL LOSS
- SUBJECT TO 80% Polkey deduction = £3,403.41
- SUBJECT TO 90% contributory conduct reduction under Regulation 3(6) = £340.34
- PLUS £519.83, being the sum offered by the Respondent to the Claimant as a result of being paid at the incorrect rate of minimum wage during some of the relevant period = £860.17
- PLUS £350.00 award for loss of statutory rights = **£1,210.17**

THE TRIBUNAL THEREFORE AWARDS AND THE RESPONDENT IS ORDERED TO PAY to the Claimant the total sum of £1,430.17 in compensation for unfair dismissal.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson
21 November 2024