IN THE EMPLOYMENT TRIBUNAL

Claim Number: 13/2017

BETWEEN:

COLIN O'DONNELL

Claimant

-AND-

GREENARC LIMITED

Respondent

AWARDS DECISION

Chairperson: Gabrielle O'Hagan

The Claimant in person

Mr Joseph Nunez of Counsel instructed by Nunez & Co for the Respondent

1. The Respondent is a company which provides gardening, horticultural, landscaping and tree surgery services. The Claimant was employed by the Respondent as an Arborist/Tree Surgeon from 27 May 2014 until 16 February 2017 when he was dismissed summarily for gross misconduct, namely, frequent unauthorised latenesses and absenteeism.

2. The Claimant filed a Claim Form on 5 May 2017 claiming unfair dismissal, arrears of pay and arrears of holiday pay. The Claimant's Details of Claim stated that he had been given verbal warnings and a written warning (which had been withdrawn) for absenteeism, but that prior to the termination of his employment he was not subject to a written warning and had not been given an opportunity to explain the circumstances of his latenesses and absences.

3. The Respondent filed a Response Form on 25 May 2017 giving the facts it would rely on to defend the Claim as the Claimant being continuously late for work, leaving his place of work without authorisation and taking prolonged tea breaks of up to 3 hours, continuous absenteeism and "*sick leave claims without cert*". It stated that innumerable verbal warnings

had been given and denied that the written warning had been withdrawn. The Respondent also stated that the Claimant was given *"a lengthy explanation as to why his employment was being terminated by both directors in private"* in the Respondent's directors' office. This was also the case in respect of verbal and written warnings it had given the Claimant.

4. The Claim was heard on 26, 27 and 28 February 2019 and I gave a Judgment dated 23 May 2019 in which I found that the Respondent had dismissed the Claimant because it genuinely believed him to be guilty of gross misconduct, namely persistent and serious unauthorised absenteeism and lateness; and had reasonable grounds for its belief on reasonable investigation. However, I found that the Respondent's decision to treat the Claimant's persistent absences and latenesses as a sufficient misconduct reason for dismissal did not fall within the band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted, as the Claimant had not been on notice that he was at risk of dismissal. Further, I found that the failure by the Respondent to undertake a reasonable dismissal procedure also rendered the dismissal of the Claimant by the Respondent unfair.

5. Further to a Preliminary Hearing and a directions Order being made on 24 July 2019, and further evidence and submissions being filed by the parties thereafter, a Hearing on the issue of Awards took place on 14 October 2019.

Factual background

6. A full background to the substantive Claims is set out in my Judgment dated 23 May 2019.

7. In respect of the Awards Hearing, as well as a spreadsheet of losses and a Witness Statement, which was not really focused on the issue of the Claimant's losses, the Claimant also separately provided substantive documentary evidence (which I admitted into evidence at the Awards Hearing with the Witness Statement) of his income since dismissal by the Respondent, and also of his attempts to secure employment. This included payslips, unemployment benefit documentation, ETB documentation and job seeking communications.

8. The Respondent filed a Counter Schedule of Loss and a (Second) Witness Statement by Mr Alan Brownbridge Snr, one of the Respondent's 2 directors, which exhibited, inter alia, a schedule analysing the Claimant's income received at the relevant times. The schedule, which was not disputed by the Claimant, showed that the Claimant's average weekly net income with the Respondent (based on the last 2 months of his employment) was £315.97.

9. Mr Brownbridge Snr did not give oral evidence at the Awards Hearing due to ill health. The Claimant did not object to Mr Brownbridge Snr's Second Witness Statement standing as his evidence in chief or to Mr Tyrone Serra, the other Respondent director, who had not given

a Witness Statement for the Awards Hearing, giving oral evidence and being cross-examined by the Claimant in place of Mr Brownbridge Snr.

10. In his oral evidence, the Claimant explained, and there was no reason to doubt him, that after the unfair dismissal by the Respondent, he applied for Gibraltar unemployment benefit, but was told that he would have to apply in Spain as he was resident there. When the Claimant applied in Spain, he said that there were various bureaucratic hurdles which he had not managed to leap in the allotted time. Counsel for the Respondent put it to the Claimant that he had not made sufficient effort in this regard and the Claimant could only respond that he had tried and had given up in the end.

11. It was established from the Claimant's payslips, ETB and DSS social insurance documentation that the Claimant worked for differing periods of time for 3 companies in Gibraltar after the unfair dismissal by the Respondent on 16 February 2017:

    - XL Scaffolding Limited: the Claimant was paid a total of £970.82 net from 10 March 2017 to 13 April 2017 and the ETB Termination Form reason for termination was "*Insufficient Work*";

    - ProSeal Construction Limited: the Claimant was paid a total of £6,191.88 net (standard £250.63 net per week) for the 23 weeks from 2 July 2017 to 1 December 2017 and the ETB Termination Form reason for termination was "*End of Contract*"; this employment had been extended from its original termination date of 25 August 2017; and

    - Eden Botanics Limited: the Claimant was paid a total of £1,849 net from 19 January 2018 until 6 April 2018 and the ETB Termination Form reason for termination was "*Mutual Agreement*".

12. The longest of these employments was with ProSeal. This ended, according to the Claimant in oral evidence, mainly due to a falling out with another employee. According to an email from Mr Richard Bell, director of ProSeal, dated 20 November 2018 put into evidence with Mr Brownbridge Snr's Second Witness Statement, the reason for the Claimant's termination by ProSeal was conduct issues very similar to those complained about by the Respondent as the reason for its dismissal of the Claimant. On the other hand, at the Hearing, the Claimant handed up a copy of his CV, which included 2 ProSeal managers as referees and he said that they had agreed to act as such. However, given that neither of these individuals nor Mr Bell gave a witness statement or oral evidence, in the end I give little weight either to the CV or to Mr Bell's email.

13. In respect of his employment with Eden Botanics and its termination, the Claimant put into evidence a glowing reference letter from the Managing Director of Eden Botanics dated 7 February 2019, which Counsel for the Respondent tried to undermine in his submissions by pointing out how few hours the Claimant had worked for the company. Although I do not accept that this means that the reference was untrue, given that the Eden Botanics

...(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.

(2) The loss referred to in subregulation (1) shall be taken to include–

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subregulation (3), loss of any benefit which the complainant might reasonably be expected to have had but for the dismissal.

... (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."

Contributory fault

18. Regulation 2(5) of the Regulations provides that a contributory fault reduction to the basic award is applicable where the employee's conduct was such that it would be just and equitable to make such a reduction; and Regulation 3(6) provides that a contributory fault reduction to the compensatory award is applicable where the dismissal was to any extent caused or contributed to by any action of the employee, by such proportion as the Tribunal considers just and equitable.

19. 3 factors must be present for a finding of contributory fault under both Regulations:

(i) the claimant's conduct must carry the necessary "culpable or blameworthy" characteristic, as per Nelson-v-BBC (No. 2) [1979] IRLR 346 (CA): "perverse or foolish or ... bloody-minded" or sufficiently unreasonable;

(ii) it must have actually caused or contributed to the dismissal; and

(iii) the reduction must be just and equitable.

Only the claimant's conduct is relevant to the issue of contributory fault, not the respondent's.

Causation

20. Regulation 3(1) provides that 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.

21. Whelan and Anor-v-Richardson [1998] ICR 318 sets out helpful guidelines based on the authorities at that time:

"... (1) The assessment of loss must be judged on the basis of the facts as they appear at the date of the assessment hearing ("the assessment date").

(2) Where the applicant has been unemployed between dismissal and the assessment date then, subject to his duty to mitigate and the operation of the recoupment rules, he will recover his net loss of earnings based on the pre-dismissal rate. Further, the industrial tribunal will consider for how long the loss is likely to continue so as to assess future loss.

(3) The same principle applies where the applicant has secured permanent alternative employment at a lower level of earnings than he received before his unfair dismissal. He will be compensated on the basis of full loss until the date on which he obtained the new employment, and thereafter for partial loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.

(4) Where the applicant takes alternative employment on the basis that it will be for a limited duration, he will not then be precluded from claiming a loss down to the assessment date, or the date on which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.

(5) As soon as the applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings, his loss attributable to the action taken by the respondent employer ceases. It cannot be revived if he then loses that employment either through his own action or that of his new employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken."

22. In Dench-v-Flynn and Partners [1998] IRLR 653, CA, the Court of Appeal referred to Whelan and held:

"No doubt in many cases a loss consequent upon unfair dismissal will cease when an applicant gets employment of a permanent nature at an equivalent or higher level of salary or wage than the employee enjoyed when dismissed. But to regard such an event as always and in all cases putting an end to the attribution of the loss to the termination of employment, cannot lead in some cases to an award which is just and equitable.

Although causation is primarily a question of fact, the principle to be applied in deciding whether the connection between a cause, such as unfair dismissal, and its consequences is sufficient to found a legal claim to loss or damage, is a question of law. The question for the Industrial Tribunal was whether the unfair dismissal, could be regarded as a continuing cause of loss [as] she was subsequently dismissed by her new employer with no right to compensation after a month or two in her new employment. To treat the consequences of unfair dismissal as ceasing automatically when other employment supervenes, is to treat as the effective cause that which is simply closest in time.

Causes, in my view are not simply beads on a string or links in a chain, but, as was said many years ago, they are influences or forces which may combine to bring about a result. A tribunal of fact has to consider the appropriate effect of the wrongful or unfair dismissal and the effect of the termination of any employment which is subsequently obtained. That is a function which an Industrial Tribunal is called upon frequently to perform and, provided it does not regard itself as rigidly bound in every case to take the view that a subsequent employment will terminate the period of loss, it seems to me that it will be able, fairly and equitably, to attribute to the unfair dismissal the loss which has been sustained."

23. in Morris-v-Richards [2004] PIQR Q3 [2003] EWCA Civ 232, Schiemann LJ stated:

"... by reason of the defendant's wrongful action [the Claimant] lost the job which she liked and for which she was trained. The fact that she obtained another job and then lost it will not automatically disqualify her from recovering from the tortfeasor damages in respect of the period after the loss of her new job ("the period in issue"). The crucial question is whether, in respect of the period in issue, it is just that she should recover damages from the tortfeasor. If she was at fault in losing her new job then she will have difficulty in recovering for the period in issue. If she was not at fault then in general she will recover. The question whether she was at fault is one which in principle the trial judge should resolve bearing in mind that it was the wrongful act of the defendant which put the claimant in the position of having to find a new job and that therefore she should not be judged too harshly."

24. So, as per Cowen-v-Rentokil Initial Facility Services UKEAT/0473/07, tribunals cannot always assume that permanent employment breaks the chain of causation. Such a break may well arise, but the circumstances in each case need to be looked at, including why the claimant lost the new job. In Cowen, the employee had taken on a very different role in a new job and accordingly there was found to be a strong possibility from the outset that this new employment might not continue beyond the probationary period. In these circumstances, taking a job for a limited period did not break the chain of causation. The claimant's ongoing loss remained causally linked to his unfair dismissal by the respondent. Similarly, In McGarry-

v-ARKeX Ltd ET/3400903/14, an employment tribunal held that the chain of causation was not broken by new employment for three months despite the fact that the employee resigned from the position considering it to be unsuitable.

Mitigation

25. In assessing the compensatory award, Regulation 3(4) requires a claimant to mitigate their loss. This includes looking for another job and applying for available state benefits. What steps it is reasonable for the claimant to take will then be a question of fact. 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 that the claimant 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).

26. 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 (*Waterlow & Sons Ltd-v-Banco de Portugal* [1932] UKHL 1); there is a difference between acting reasonably and not acting unreasonably (*Wilding*); and what is reasonable or unreasonable is a matter of fact;

- 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; however, it is the tribunal's assessment of reasonableness, not the claimant's, that counts;

- 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

27. The compensatory award must be "just and equitable". *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 and that the employer's procedural errors accordingly made no difference to the outcome. 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.

28. It is possible although more difficult to make a Polkey deduction where there has also been a substantive failure by the employer making the dismissal unfair, as in this case. As per *Gover and Others-v-Propertycare Ltd* [2006] EWCA Civ 286):

"The correct approach is not for a Tribunal to adopt a taxonomy which separates procedural from substantive issues but to ask itself the question: was there an unfair departure from what would or should have happened?... What is necessary is that the Tribunal should have confidence in deciding whether or not it could sensibly reconstruct what would have happened had there been no such failing."

29. The chances of the actual employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed. This requires consideration of the employer's likely thought processes and the evidence that would have been available to it.

30. Polkey deductions can be assessed in a variety of ways, including 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 reduction. The assessment is predictive - it requires an assessment of chance (rather than of probability), which depends upon all the facts. The burden is on the employer to satisfy the Tribunal that that future chance would have happened.

31. Although the Tribunal is not under a general duty to investigate whether a fair dismissal might have occurred had proper procedures been followed, it must do so if there is some concrete evidence to this effect: "*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).

32. The evidence need not emanate solely from the employer's evidence or cross-examination of the claimant's witnesses. Rather, 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)).

Findings

Contributory fault

33. I found in my Judgment dated 23 May 2019 that the Respondent's principal reason for its dismissal of the Claimant was gross misconduct, namely, persistent and serious unauthorised absenteeism and lateness, which by February 2017 had "been exceptionally poor for more than a year and was further deteriorating, with it appearing unlikely to the Respondent that matters might improve (and the consequent ongoing damage to the Respondent's business)". In respect of the Claimant's last day of work before he was dismissed, I also found that when he decided to leave early for sickness on that day, he did not report this and I "concluded that he may not have tried very hard" to do so.

34. These passages of my Judgment were relied upon in support of the Respondent's Submissions that the basic and the compensatory awards should be reduced by reason of the Claimant's contributory fault. In his Second Witness Statement, Mr Brownbridge Snr said: "*... the Claimant had always sought to push the boundaries further and further so that in the end the Respondent felt it had no choice but to dismiss the Claimant as the whole situation had become a nightmare*"; and "*the Claimant's days in employment with the Respondent were numbered since no matter how often he was spoken to not only did he disregard what was said to him but his behaviour / conduct was increasingly getting worse and worse. The situation was intolerable and it was one that was not possible of resolution since the Claimant showed no wish or intention of turning things round, and his actions were causing the Respondent to lose business, were raising tensions with co-workers and detrimentally affecting the smooth running of the business.*"

35. I accept this evidence in its entirety and I take the view that the Claimant's conduct, his persistent and worsening latenesses and absences, clearly caused his dismissal. However, by reference to the authorities, in particular that only a claimant's conduct is relevant to the issue of contributory fault (not the respondent's), I do not view the Claimant's persistent latenesses and absences as carrying the sufficiently culpable, blameworthy, perverse, foolish, bloody-minded or unreasonable nature for it to be just and equitable for me to make a significant reduction to either the basic or contributory awards.

36. I therefore find that the dismissal in this case was caused by the Claimant's conduct, but that it would be just and equitable to apply only a 5% reduction to both the basic and the compensatory awards with regard to the same.

Causation

37. Following the Claimant's unfair dismissal by the Respondent, his first job was a short term contract (less than a month) for XL Scaffolding Limited, the ETB Termination Form reason for termination being "*insufficient work*". Following the authorities, I do not consider that this apparently no fault termination of a very temporary job broke the chain of causation under Regulation 3(1); and I find that the Claimant's ongoing losses remained causally linked to his unfair dismissal by the Respondent following this termination.

38. The Claimant's next job was with ProSeal Construction Limited. Whilst this was originally stated to be a short term contract, the contract was extended and in the end lasted almost 6 months. The employment with ProSeal ended (on 1 December 2017), according to the Claimant in oral evidence, mainly due to him falling out with another employee. (I do not give much weight to the other material on this issue put into evidence by both the Claimant and the Respondent because it was not supported by any witness evidence.)

39. On the basis of this oral evidence by the Claimant as to the reason for the termination of what was in the end not a temporary or brief contract of employment with ProSeal, I consider that this broke the chain of causation so that the Claimant's losses thereafter should therefore not be attributable to the Respondent, with the result, following *Whelan* referenced above, that the Respondent's liability to the Claimant for losses in consequence of its dismissal of the Claimant crystallised to the £65.34 net weekly shortfall in the Claimant's remuneration with ProSeal.

40. In respect of the length of the period of loss which should be accounted for, although I appreciate the arguments by Counsel for the Respondent that where there has been a lengthy delay in a case coming to an assessment Hearing, a respondent should not suffer the consequences of the longer period of accountable loss, these were unsupported by authority. Without this, I see no reason to depart from the normal rules on assessment of loss to the date of the Hearing, particularly bearing in mind that the delay was the fault of neither party.

Mitigation

41. The Claimant managed to find work in Gibraltar less than a month after his dismissal and he was employed for much of his time before leaving Gibraltar. The Respondent did not make any submissions in relation to the Claimant's job seeking efforts in this period, only that he did not put in sufficient effort to securing unemployment benefit. There is some merit in this line of argument, given that the Claimant admitted in evidence more than once that he had given up on pursuing unemployment benefit from the Spanish social insurance system following his initial difficulties. But without some evidence from the Respondent of the ease with which unemployment benefit in Spain can be obtained, I am not minded to impose upon the Claimant too stringent a standard in this regard, as it was not disputed that he had made some efforts to obtain the benefit. I do not find that the Claimant acted unreasonably in the circumstances.

42. The Respondent also submitted that the Claimant's decision to move home to the UK after he lost his job with Eden Botanics, rather than continue to try to find work in Gibraltar where the Respondent submitted the Claimant had less difficulty in finding employment, was a failure to mitigate his loss. The Claimant stated in oral evidence that since leaving the Respondent's employment, he had not been making sufficient money in Gibraltar to survive and the employment opportunities were limited. He could not see the possibility of sufficiently well-paid full time employment in Gibraltar (if he could, he would have stayed) and had no choice but to return home.

43. The Respondent did not submit any evidence to prove that the Claimant's chances of finding long-term employment with reasonable pay would be better in Gibraltar than in the UK. There seems no reason to disbelieve the Claimant's reasons for moving home to the UK . His jobs since leaving the Respondent had been lower paid and less secure. Combined with the smaller job market in Gibraltar and the Claimant's family being in the UK (from whom he said he received loans to survive on his initial return to the UK), I do not consider it unreasonable on the part of the Claimant to decide to return home. I do not agree with the Respondent that this decision constituted a failure to mitigate.

44. The Respondent did not discharge the burden of proving that the Claimant failed to mitigate his loss or acted unreasonably in failing to mitigate his loss.

Polkey deduction

45. In my Judgment dated 23 May 2019, I found that: "... the Respondent approached the dismissal in total ignorance of the applicable procedural requirements and did not follow a reasonable dismissal procedure". I held that the Respondent did not undertake a reasonable dismissal procedure rendering the dismissal of the Claimant by the Respondent unfair procedurally. However, I also held that the dismissal was substantively unfair because no reasonable employer would have moved to dismiss the Claimant for absenteeism as the Claimant was not on notice that he was at risk of dismissal (and had not been given the opportunity to improve and avoid dismissal). The dismissal was thus not within the band of reasonable responses available to a reasonable employer.

46. In my view, this is a case where what would have happened if the Claimant had been on a formal dismissal warning and if a reasonable disciplinary/dismissal procedure had been otherwise followed can be reconstructed so that there should be an assessment of whether a Polkey deduction should be made to the compensatory award to reflect the chance of the dismissal of the Claimant by the Respondent having happened anyway if a fair disciplinary/dismissal procedure had been followed.

47. At the substantive Hearing, when asked by Counsel for the Respondent what he thought the consequences of the Claimant continuing in his pattern of latenesses and unauthorised absences would have been, Mr Serra initially said that the Respondent would have carried on giving the Claimant warnings, and when pressed by his Counsel said that they would have told the Claimant that they would not be able to keep him in employment if he kept on. Mr Brownbridge Snr said in oral evidence at the substantive Hearing that an employee's repeated lateness would normally be dealt with first by an informal chat, then a verbal warning and then a written warning.

48. In my Judgment dated 23 May 2019, I found that:

"When balanced, the evidence supported the conclusion that Mr Brownbridge Snr and Mr Serra had come to the decision to dismiss before the [16 February 2017 dismissal] meeting. ... On the other hand, I find that the Claimant was not actively denied the opportunity to

speak or make representations at the 16 February 2017 dismissal meeting. But I find, as per the above, that he was not given this opportunity before the Respondent made its decision to dismiss. This would in my view be the most natural explanation for why the Claimant is described by all of the participants (including himself) as not speaking, or speaking very little, in the course of the meeting. As Counsel for the Respondent put it in his Closing Arguments, *"[The Claimant] stated that what was there to say when he was told he was being dismissed there and then"*.

49. In Mr Brownbridge Snr's Second Witness Statement, Mr Brownbridge Senior stated (and this was agreed by Mr Serra in his oral evidence at the Awards Hearing):

"Irrespective of the procedure that would have been followed in February 2017, the Claimant's days in employment with the Respondent were numbered since no matter how often he was spoken to not only did he disregard what was said to him but his behaviour/conduct was increasingly getting worse and worse. The situation was intolerable and it was one that was not possible of resolution since the Claimant showed no wish or intention of turning things round ... Even if the Claimant had not been dismissed on the 16th February 2017, it would have happened anyway at some point afterwards not because the Respondent wanted to do so but because it was left with no other alternative; I have no doubt of that."

50. As I noted at the substantive Hearing, the relationships between the Claimant, Mr Brownbridge Snr and Mr Serra were still at the time of the Hearing surprisingly congenial, probably due to the apparent likeability and charm of all three gentlemen. At the substantive Hearing, it was established that the Respondent as a company was also very supportive of its employees generally and did what it could to help whenever possible. It had a low employee turnover rate.

51. In his oral evidence at the Awards Hearing, Mr Serra said to the Claimant who was cross-examining him: *"We gave you warnings, talked to you. The end would have been the same. You would have been out of work."* The Claimant responded *"But I would have known ..."*. I consider that both gentlemen were correct, but Mr Serra and Mr Brownbridge Snr cannot say for certain that, had the Claimant previously been made aware of the seriousness of the situation by way of a full disciplinary procedure and / or final written warning, he would not have improved. Nor can they say that there was no chance that he would not have managed to persuade them to reach an alternative decision in April 2017 had a full procedure been followed in respect of the 16 April 2017 dismissal meeting.

52. Taking all of these factors into account, I take the view that, had the Claimant been on notice that he was at risk of dismissal and/or had the Respondent followed a disciplinary/dismissal procedure, which both of the Respondent's directors said would have involved formal warnings being given to the Claimant and which should have included meetings at which the Claimant would have been able to present a case, there is a likelihood, which I assess at 45%, that before matters came to a head in the week of 16 February 2017 the Claimant

would still not have turned things around and changed his approach to lateness and absenteeism and/or that he would not have been able to persuade the Respondent to make an alternative disciplinary decision at the 16 February 2017 dismissal meeting, and that the Respondent would still have dismissed him on 16 February 2017.

Awards

Pursuant to Regulation 2, I make a **basic award** to the Claimant of £2,200, reduced by 5% for contributory conduct to **£2,090**.

Pursuant to Regulation 3, I make a **compensatory award** to the Claimant of **£3,023.48** as follows:

- loss to the date of termination by ProSeal Construction Limited = £5,792.07 (the Claimant's average weekly net income with the Respondent was £315.97; the number of weeks from the dismissal by the Respondent until the Claimant's termination of employment by ProSeal Construction Limited is 41; 41 X £315.97 = £12,954.77 less net income received by the Claimant in the same period of £7,162.70); plus

- loss from the date of termination by ProSeal Construction Limited to the date of the Awards Hearing = nil (£65.34 net weekly shortfall in the Claimant's remuneration with ProSeal when compared with his remuneration with the Respondent X 97 weeks = £6,337.98 less net income received in the same period in Gibraltar and the UK = £7,724.98); plus

- future loss = nil (£65.34 net weekly shortfall in the Claimant's remuneration with ProSeal when compared with his remuneration with the Respondent is less than his UK weekly unemployment benefit payments of £73.10);

- plus (not disputed by the parties) award for loss of statutory rights in the sum of 1 week's net pay: £315.97

- totals £6,108.04;

- subject to a 45% Polkey deduction and 5% contributory conduct deduction; totals £3,191.45.

The Tribunal therefore awards and the Respondent is Ordered to pay to the Claimant the total sum of £5,281.45 in compensation for unfair dismissal.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson

28 November 2019