EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104303/2020

Held on 14 and 15 December 2020 (CVP)

Employment Judge: J D Young

Mr Andrew Kennedy	**Claimant**
Messrs. J & T Bell	**First Respondent**
Thomas Bell	**Second Respondent**
Graham Bell	**Third Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the claimant was unfairly dismissed by the respondent in terms of section 98 of the Employment Rights Act 1996; and

(2) the respondent is ordered to pay to the claimant a monetary award in the sum of **Five thousand seven hundred and forty two pounds and forty five pence (£5,742.45)** as compensation.

(3) the respondent is ordered to pay to the claimant the sum of **Four hundred and twenty pounds (£420**) under section 38 of the Employment Act 2002

in respect of failure to provide the claimant with a statement of employment particulars.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal on 15 August 2020. He complained of unfair dismissal; breach of contract (failure to pay notice pay) and failure to provide a statement of employment particulars. The claims are resisted. The respondent admits dismissal but denies it was unfair and gives the reason for dismissal as gross misconduct and thus no notice or payment in lieu thereof was necessary.

Issues

2. The issues for the Tribunal were:-

   (a) What was the reason for dismissal. Was it reasonable for the respondent to believe that the claimant was guilty of gross misconduct against the claimant's contention that no such reason could be ascertained. Did the respondent have a potentially fair reason under s98 of the Employment Rights Act 1996 (ERA)

   (b) If so, having regard to the tests set out in *Burchell v British Home Stores,* had the respondents carried out sufficient investigation so that at time of dismissal they had a genuine belief based on reasonable grounds of the claimant's misconduct.

   (c) Was a fair procedure followed with particular reference to any disciplinary procedures. Did the respondents fail to follow the ACAS Code of practice on Disciplinary procedures

   (d) Was dismissal within the band of reasonable responses.

   (e) Did the claimant contribute to his own dismissal and if so to what extent.

(f) If the dismissal was unfair would any compensation be limited under *Polkey* principles and if so to what extent.

(g) Was there an entitlement to payment of 4 weeks' pay in lieu of notice.

(h) Was there a failure to provide a written statement of employment particulars and if so what compensation should be awarded.

(i) If the dismissal was substantively and/or procedurally unfair what compensation should be awarded and should any uplift apply for failure to follow the ACAS Code; and if so to what extent and to which elements of claim.

The hearing

3. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1 – 104 (J1- 104).

4. At the hearing I heard evidence from the claimant and Graham Bell the third respondent. There was no dispute that the claimant was employed by the First Respondent and that the Second and Third Respondent were partners thereof. For ease of reference the third respondent is referred to as "Graham Bell" and all the respondents cumulatively as "the respondents".

5. From the documents produced, relevant evidence led and admissions made I was able to make findings in fact. However given the matters of fact in dispute between the parties I have considered it necessary to rehearse the evidence on certain events before coming to a conclusion on those events.

Findings in Fact

6. The respondents operate a mixed farm in Dumfriesshire. They have approximately 700/800 head of cattle and grow crops such as winter barley, wheat and oilseed rape. They also grow silage to feed the herd. Certain fields are let out in the winter for grazing of sheep.

7. The claimant had continuous employment with the respondents in the period from 16 February 2016 until that employment was terminated with effect from 24 July 2020.

Contractual matters

8. The claimant received no written particulars of employment at commencement of or during his period of employment.

9. The claimant was a part-time worker called upon when necessary for general tractor and other work. On average he would work for around 4 months each year generally in Spring and Autumn. At those times he would be called upon by the respondents to carry out certain tasks being commonly ploughing, hedge cutting, spreading of dung or fertiliser, hauling silage by a trailer, drilling and sowing. There were no set hours for these tasks. It was maintained by the claimant that at the start of each year he would discuss with Graham Bell work for the coming year. Graham Bell denied such specific discussion but agreed that there was regularity in the claimant being required to perform certain tasks at certain times of the year. I found that the claimant was not guaranteed any hours of work with the respondents or that he would perform any particular tasks and effectively he worked “as and when required”. From time to time tasks, such as those noted, may be carried out by Graham Bell or one of the other two employees on the farm. However he had an expectation of work and was generally available to the respondents. In the course of his period of employment was tasked with work usually appropriate to the seasons of Spring and Autumn.

10. The claimant held a “Certificate of Acquired Experience” from T & G Scotland dated 14 April 1997 (J55). He maintained he had shown this to Graham Bell at commencement of employment but Graham Bell denied he had seen this certificate. I did not think it necessary to resolve this particular matter as it did not feature as being relevant to dismissal or other claims. There was no doubt that Graham Bell was aware that the claimant had experience of farming matters prior to his engagement in February 2016.

11. The claimant was paid at the flat rate of £10 per hour gross. There was some dispute as to how that rate had been struck but payment at that rate was satisfactory for the claimant as he would then have "in his hand" net pay of around £8 per hour. The payslips produced (J78 - 87) showed consistent payment of net of £10 gross per month paying out an average net pay of just over £8 per hour after deduction of tax. Given the claimant's date of birth (25 October 1949) there was no deduction for National Insurance contribution. The P60 End of Year Certificate in respect of the tax year 5 April 2018 showed earnings for the claimant in the gross amount of £7,340.80 with deduction of tax of £1,410.20 (J94). The P60 End of Year Certificate for the tax year to 5 April 2020 showed gross earnings of £8,180.00 and deduction for tax of £1,437.51 (J93). No P60 for the tax year to April 2019 was produced but the payslip for 2 February 2019 showed gross payment to that date of £7140. Accordingly in the tax years 2018 and 2020 the claimant carried out 734 and 818 hours of work respectively; and for the period 5 April 2018 – 2 February 2019 the claimant carried out 714 hours of work for the respondents..

12. During the period of employment with the respondents the claimant earned income elsewhere from gardening work but was not engaged in another farm.

Other employees

13. At commencement of the claimant's employment the respondents had two other employees namely James Copeland and James Grainger. They were each full time employees. Mr Copeland was employed principally as a stockman in looking after the herd and calving. He would also be utilised from time to time in grain carting or bringing hay in from the fields. Mr Grainger carried out general farming tasks such as tractor work, baling, grain carting, silage carting or digger work with the JCB. He also had workshop fabrication skills as a qualified mechanic. He also assisted with calving as a holiday relief and on the occasions when calving took place at night.

14. In early 2020 James Copeland retired. Scott Nicholson was employed to carry out the duties previously undertaken by James Grainger who then assumed the role vacated by James Copeland. Scott Nicholson would assist

with calving work from time to time. Scott Nicholson would require to work approximately 100 hours of overtime per annum being the arrangement that had been in place with James Grainger.

15. While the claimant asserted that he had been told by Mr Nicholson that he was to be given 50 hours per month of overtime working I could not make that as a finding. There was no evidence from Mr Nicholson or other requests for documents which might have shown that he worked that level of overtime per month. On this point I accepted the evidence of Graham Bell that the overtime working arrangement for Scott Nicholson followed that in place with James Grainger.

16. Subsequent to Scott Nicholson being engaged the claimant noted that Scott Nicholson was engaged in work that normally he might have been asked to undertake. In particular he noted that Mr Nicholson had been involved in some silage work; in May 2020 was spreading manure; certain ploughing and seeding work had been carried out; and in July 2020 that a hedge was being cut by Mr Nicholson which the claimant would normally cut in August.

Discussion of 24 July 2020 and dismissal of claimant.

17. He came to the view work was being taken away from him. He decided to speak to Graham Bell about that. He went to the farm on 24 July 2020. He had not been working on the farm that day but involved in gardening work nearby which meant he would travel past the “road end”.

18. There was dispute over the circumstances of the conversation between the claimant and Graham Bell that day in the workshop area. There was no dispute that the claimant required to wait until Graham Bell had attended to some other business before he could speak to him. Graham Bell’s position was that the claimant was very agitated and “pacing up and down around the steading, opening doors to the workshop and to a number of sheds” to the extent that his parents who were in the farmhouse called his attention to this. The claimant’s position was that he was not agitated but he was looking around the farmyard area. Graham Bell asked the claimant what he wanted

to speak about and said that the claimant became "immediately aggressive and confrontational" and "I had to tell him to stand back from me and not be so aggressive". However he continued to be confrontational and "demanded to know what work he would be getting from me" to the extent that he became concerned about his own safety and that of his parents.

19. The claimant's position was that he was anxious and nervous about speaking with Graham Bell but calm and certainly not acting in a manner which would suggest he was in any way a danger to Graham Bell or his parents who were in any event only a few years older than him. He never saw Graham Bell's parents at that point.

20. Graham Bell agreed that the claimant's concern was about work being given to others that he normally performed. He said that he advised the claimant that he was only a "casual worker" but that the claimant demanded to know "what his job was and the hours".

21. Both parties agreed that mention was made of damage to a neighbouring farmer's wall which had occurred in April 2020 and involved the claimant; and in March 2020 of barley seed which had been drilled by the claimant at an allegedly incorrect seed rate.

22. The conversation ended with Mr Bell "looking round the area" and asking the claimant if he "owned anything here" and then telling him to "get off my farm". The claimant left slamming the workshop door.

23. I return to the circumstances of this incident in the "conclusions".

Subsequent communication

24. On his return home the claimant sent Mr Bell a text message (J63) which set out his complaint that work had been taken from him and "given to a new employee". He raised an issue of holidays and overtime. He mentioned the damage to the wall and the drilling of the barley field and stated that if these matters bothered Graham Bell he should have "received a verbal warning

then perhaps a written warning" but instead, as regards the wall, Graham Bell said "it's not the end of the world". He awaited a reply from Mr Bell.

25. On 28 July 2020 the claimant sent an email to Mr Bell (J64/65) stating that he had been advised by ACAS to contact him in order to raise a formal grievance. He then outlined that grievance. Various matters were raised including that "duties that I was employed to undertake" had been allocated to a "new member of staff". The claimant concluded his email by asking whether he had been dismissed or made redundant or "is this a case of "constructive dismissal?".

26. The respondent replied by letter of 30 July 2020 (J66) in which he stated:-

> "I refer to our discussion on 24 July and write to confirm that we will no longer be using you on a casual basis with effect from that date on the grounds of gross misconduct".

The letter went on to explain that respondents had concerns over the "diminishing quality" of the claimant's work on the farm which "came to a head around the incident of 14 April 2020" regarding damage to a neighbour's wall in the delivery of dung. It was maintained that the claimant had commenced a job with a tractor and trailer only then to return with a "telehandler" which he did not have permission to take and in the course of the operation caused damage to the wall which required to be repaired at a cost of £2,500 to the respondent.

27. Additionally it was stated that the claimant had been acting in an aggressive manner to other employees on the farm and that he had displayed a confrontational attitude to Graham Bell in the discussion on 24 July 2020. It was stated that Graham Bell had "no alternative but to dismiss" with immediate effect on 24 July 2020.

28. The claimant was offered the right "to appeal against that dismissal decision. If you want to do so please send a written note of your grounds of appeal to my solicitor… within the next five working days. An appeal hearing will then be arranged and you have the right to be accompanied in that meeting."

29. So far as the grievance was concerned it was confirmed that the respondent was receipt of that grievance and albeit it had been made "after termination of your employment on the farm I will however investigate the matters you have raised and will reply to you shortly about those". (J66).

Appeal

30. The claimant did appeal the decision to dismiss by email of 3 August 2020 (J67/68). In that email the claimant gave his version of events of 24 July 2020 stating that he had asked Graham Bell why he had given his duties to another employee and that Graham Bell had become hostile and speaking to him in a raised voice. He stated that at the time he was told the respondents needed a full time employee and that the claimant had "done nothing wrong". The claimant indicated that he did not understand why any "damage to the wall" was a concern given the delay between that happening on 14 April 2020 and 24 July 2020 when he was dismissed. He denied any aggressive attitude to Graham Bell or other employees on the farm and on that matter requested that "you provide proof in the form of witnesses, times, dates and details".

31. Graham Bell responded to the claimant's appeal by letter of 11 August 2020 (J74/75) in which he indicated that he had day to day control of the business of the farm and that his father had stepped back and did not keep good health. Also his solicitor had indicated that he could not assist and so the appeal was being dealt with by him. In that letter Mr Bell dealt with the various matters raised by the claimant including that he had "mentioned to you on various occasions about your diminishing work standards over the period and this culminated in the wall incident" and reiterated that he had been dismissed for gross misconduct on 24 July 2020. He indicated:-

> "You are well aware that the farming industry like everyone else has been seriously affected by the current worldwide health pandemic. It has been extremely difficult to deal with anything other than essential day to day tasks during the public health crisis. Accordingly I have not been able to discuss in detail my concerns with you arising from your conduct towards other staff and your behaviour in relation to the damage caused to

property in the incident of 14 April. I note you do not dispute that incident occurred and that damage was caused to the wall at the cost to the business of some £2,500. Any delay between that incident occurring and the communication of your dismissal is simply a reflection of the fact that the business had to focus on other priorities during the emergency situation created by the pandemic."

He indicated that he had no alternative but to terminate the employment on 24 July 2020 and that the appeal was rejected and the decision to dismiss stood.

Events after appeal

32. On 24 August 2020 the solicitor for the respondent wrote to the claimant enclosing various documents which it was stated led to the decision to terminate the claimant's employment on 24 July 2020 (J76). The documents sent comprised:-

(a) Motor accident report form in respect of damage to wall at Low Kilroy Farm on 14 April 2020 (J58/61).

(b) Letter from Mr J R McQueen of Low Kilroy Farm dated 4 August 2020. (J69).

(c) Statement of James Grainger dated 6 August 2020 (J70).

(d) List of incidents between 17 August 2018 and 27 July 2020 prepared by Graham Bell after dismissal (J72).

(e) Invoice from M T Bowran & Sons dated 30 July 2020 in respect of cleaning and repair to trailer carried out on 11 February 2020 (J73).

Damage to Wall

33. The claimant was asked to deliver a load of manure to a neighbouring farm property on 14 April 2020. Initially the load was taken by the claimant by tractor/trailer and the load was tipped close to a wall. The neighbouring

farmer asked if the load could be placed closer to the wall and the claimant was unsure as he did not consider the wall was load bearing. However the neighbouring farmer insisted and the claimant returned with the "telehandler" and in the course of that work the wall was damaged.

34. The claimant's position was that he contacted Graham Bell to advise him of the problem and they both went to the site the following day. After examining the damage Graham Bell said that "it is not the end of the world". The claimant said that perhaps an insurance claim could be made and later Graham Bell called the claimant about a claim on a "motor policy".

35. Mr Bell denied that the claimant was with him when he went to inspect the damage as he had gone after hours that evening and spoke to him on the phone. He denied saying that it was "not the end of the world" but said "at least no one got hurt". He confirmed that the claimant had offered to rebuild the wall and that he had discussed the possibility of an insurance claim with the claimant.

36. A "motor accident report form" was completed but not followed through by way intimation to the insurance company (J58/61). This form contained details of the incident which had been obtained from the claimant. It indicated that there was no damage to the tractor but a "wall knocked down when load discharged" and "delivering load of dung to field. Tipped dung against a wall. The weight of the dung pushed on outbuilding wall. Possibly with the weight of hydraulic door opening."

37. There was dispute over the signing of the insurance form which bore to be signed by both Graham Bell and the claimant. The claimant denied he had ever signed the form. He claimed that his signature had been forged on the form sent to him subsequent to the dismissal as a "scare tactic". The circumstances of the signature outlined by Graham Bell were straightforward. A text of 22 April 2020 to the claimant was produced (J62) indicating that Graham Bell would be "round in 10 minutes with the insurance forms". Graham Bell advised that Mr Kennedy had signed the form when he went round to see him. He was "filling the drill near the farm building" which was

consistent with the terms of the text and was consistent with the claimant's evidence that on that day he had been "calibrating the drill". I did not see the reason being proferred by the claimant as to why his signature would be forged as being likely and neither did I consider that Graham Bell had forged the signature on the form. It may be that the claimant had simply forgotten that he had signed.

38. In relation to this matter there was produced a letter from the neighbouring farmer dated 4 August 2020 (J69) which suggested that the claimant was angry when he returned with the telehandler to re- site the dung and caused the damage.

39. However there appeared to be no discussion between the claimant and Graham Bell about the claimant's conduct in relation to the damage to the wall at the time. The matter had not been the subject of any verbal or other warning or disciplinary hearing.

List of incidents involving the claimant

40. Subsequent to dismissal Mr Bell prepared a list of incidents involving the claimant stretching back to 17 September 2018 (J71/72). He explained that in the discussion with the claimant on 24 July 2020 he had been aware of diminishing work quality by the claimant and that along with the claimant's attitude on the day matters had "come to a head". His position was that he had had in mind the various matters listed in the document as well as the issue of the damage to the wall occurring on 14 April 2020 and all contributed to dismissal of the claimant.

41. He advised he had compiled this list from notes "in the farm diary". There was no note that he had spoken with the claimant about any of these incidents at the time although he claimed that he had taken issue with the claimant about these matters. This list had never been provided to the claimant prior to dismissal. Mr Bell advised in cross-examination that he would see some issues as "capability issues" rather than conduct issues and that he would always wish to seek to support an employee.

42. Of the list of issues it seemed common ground that in the discussion on 24 July 2020 mention was made of an incident of 30 March 2020 which was noted on the list of the issues as:-

> "New drill, got a mechanic out to show him how to set it up. 7 acre of barley drilled at a really low seed rate. Blamed everyone but himself."

43. The claimant had raised this matter in the text to Mr Bell just after dismissal where he indicated "as for the drilling 7 acres you don't know yet if you have lost any yield and it was the first time drilling barley with it. As for the wall and barley if it bothered you I should have received a verbal warning then perhaps a written one instead you said it's not the end of the world…"

44. In evidence Mr Bell advised that he had told the claimant he "needed to get help to calibrate – tried to help him – he had problems with setting the machine – had to learn to get set properly." In his evidence the claimant denied he had been responsible for incorrect calibration.

45. Incidents noted of 17 September 2018 and 11/12 February 2020 involved hire of machinery from M.T.Bowran & Son. In each of those matters the respondents claimed that machinery was hired and damaged whilst operated by the claimant. In support there was produced (J73) an invoice from M.T. Bowran dated 30 July 2020 being a charge for cleaning and repairing a trailer on 11 February 2020. The invoice made reference to "twice the trailer door has been damaged " and "we cannot take these losses". There was also reference to "back in 2017 damage to a muck spreader which I had to repair" and "all of the damage has been the result of the same operator. Can you please not put him on these again". The entry on the document (J71/720) case indicated "when questioned Mr Kennedy denied he had damaged the door" in respect of the hire in February 2020.

46. Entries for 14 July 2020 and two entries of May 2020 (J71) involved the poor condition of a "hedger" and lack of greasing of a tractor and Fertiliser Spreader. It was indicated the claimant was responsible for lack of attention to these pieces of machinery. Graham Bell advised that he had not spoken to

the claimant about these matters but had examined the pieces of machinery involved himself.

47. A further entry of 27 July 2020 regarding the inspection and faults in a plough which again were stated to be the fault of the claimant occurred subsequent to dismissal.

48. On the remaining entries Mr Bell stated he had raised these issues with the claimant over the period concerned.

49. The claimant denied that he had been spoken to on numerous occasions about his workmanship.

Statement from James Grainer

50. Mr Grainger provided a statement (J70) regarding alleged incidents with the claimant. It is not clear when these matters came to the attention of Graham Bell.

51. In relation to an incident of 21 May 2018 Mr Grainger states that he did not report this to the respondents until after the claimant's termination of employment. Accordingly it could not have been in mind on 24 July 2020 when the claimant was dismissed.

52. A further incident was stated to have taken place on 17 July 2020 but there is no particular record from Graham Bell about this matter. He mentions the claimant's conduct toward other employees in his letter of 30 July 2020 but in terms that this came to his attention "subsequently". In the appeal outcome letter of 13 August 2020 he states that "it has come to my attention that you have been acting in a hostile manner to one of my other employees. If this behaviour continues towards them I will have no choice but to report it to the relevant authorities." It would not appear that any issues raised by Mr Grainger played any part in the dismissal or appeal against that dismissal.

Events subsequent to termination

53. The claimant advised he had sought alternative employment but had not been successful. His age was against him as well as the present pandemic. He had messaged and called a number of different employers without success (J98/103). His enquiries related to any vacancies "for a tractor driver".

54. He advised that he would perform gardening if fit but the present season was against him and he had also been signed off as unfit for work due to the stress caused by his dismissal under reference to a "Fit note" of 18 November 2020. He had performed no gardening work since dismissal

55. He had not "signed on at the Jobcentre". He hoped to be able to perform some gardening and other duties in the Spring. He claimed the losses outlined in the schedule of loss (J95/97).

56. The respondents did not accept that the claimant had taken all reasonable steps to find other work. They did not consider that the messages (J98/103) were supportive of him doing all that he could to find work. He seemed to be limiting himself to farming work with people he may already have worked for and did not seem to have contacted anyone within a 7 mile radius of his house.

Submissions

57. I was grateful for submissions from the parties.

For the Respondent

58. It was submitted for the respondent that the reason for dismissal was the potentially fair reason of misconduct.

59. The respondents had been concerned with issues regarding the performance of the claimant and had sought to encourage him to do better. However the events on 24 July 2020 with the aggressive attitude displayed by the claimant had tipped the balance to gross misconduct.

60. It was submitted that where there was conflict the evidence of Mr Bell should be preferred. The claimant had been less consistent. The claimant made

various complaints in his grievance (J64/65) and there was no immediate reference to work being taken off him and given to someone else. Only almost as an afterthought was this mentioned. The same was true of the appeal letter (J66/68).

61. It had been suggested by the claimant that work was taken off him but the only matters he could point to were some ploughing work and hedge cutting for a few hours. Conduct was essentially the issue. Mr Bell did not know that the claimant was to arrive on 24 July and the claimant had understated his own aggression and hostility. That was consistent with him taking no blame for any of the matters raised with him such as the damage to the wall and the miscalibration on seed drilling. So far as the damaged wall was concerned it was accepted by the claimant that he had knocked the wall over and he had offered to rebuild it. He had talked of insurance and then said his signature had been forged. That made no sense.

62. It was accepted that there was lack of procedure in this case. However Graham Bell had dealt with the matter as best he could. It was emphasised in *Taylor v OCS Group 2006 ICR 1602* that the more serious the issue then the less procedure might be required. It was submitted s98(4) of ERA required a Tribunal to consider the issue as a whole and here there was sufficient to make the dismissal fair. Mr Bell had been tolerant with the claimant and perhaps indulgent. The final straw was the attitude of the claimant on 24 July 2020.

63. If the dismissal was unfair then there should be a "*Polkey deduction*". Procedural conformity would not have produced a different result and so that had an impact on any compensation to be awarded. If it was accepted that there had been unnecessary aggressive behaviour then dismissal would have been effected in any event.

64. So far as the schedule of loss was concerned no issue was raised regarding the basic award and figure inserted for loss of employment rights.

65. However compensation for past and future loss had been based on 16 weeks pay to date of Tribunal and 52 weeks thereafter. The cap of 12 months' pay should be applied and here there was an attempt to recoup 16 months of loss.

66. In any event it was just and equitable to reduce the compensation by the contributory fault of the claimant under s123(6) of ERA.

67. It was further submitted that there had been insufficient effort to mitigate loss. The claimant had made no search for employment outside farming. He suggested that he was unwell but the "Fit note" was dated 18 November 2020 and there was insufficient evidence to indicate that he could not continue his search for employment.

68. In any event he had worked irregular hours and been involved in various seasonal work only in Spring and Autumn.

69. The duty was on the claimant to mitigate his loss as if he had no hope of getting compensation and that set the bar high (*Archibald Freightage Ltd [1974] IRLR 10).* Under reference to *Savage 1998 ICR 357* it was submitted that it was necessary to identify (1) what should have been done; (2) what the result was; and (3) reduce loss claimed if there was no genuine attempt at mitigation.

70. So far as any uplift for failure to follow the ACAS Code was concerned then the relevant provision indicated that there "may" be an uplift and it was not mandatory. Any uplift was what was "just and equitable" which was a matter for the Tribunal. It was submitted it would not be just and equitable to allow the maximum amount as claimed.

71. The claim for wrongful dismissal effectively covered notice pay and if the dismissal was found to be conduct based then that claim would fall.

For the Claimant

72. It was submitted that this was a dismissal with no warning or process and that the claimant only knew of dismissal when he received the letter of 30 July 2020 (J66). The burden was on the respondent to provide a fair reason. In

this case they stated it was conduct but it was disputed that the circumstances provided a fair reason.

73. The events of 24 July 2020 were disputed ending with Mr Bell telling the claimant to "get off his property". Mr Bell had changed his position in the evidence given. His witness statement stated he had spoken to his parents about the attitude of the claimant but in his evidence to the Tribunal he stated he had not spoken to his parents. On the issue of credibility it was submitted that the evidence of the claimant should be preferred to that of Mr Bell whose evidence had varied in the course of the hearing.

74. While there was reference to the damage to the wall fourteen weeks had passed since that incident. It was not possible to convert this issue into one of gross negligence or gross misconduct. The claimant's position was that he had warned the neighbouring farmer what might happen were he to load more dung in the area. Mr Bell had inspected the damage and had not taken any action at the time. Matters had continued as normal.

75. It was stated that Mr Bell might have raised the issue with the claimant had it not been for Covid and how that affected business matters but he could easily have taken issue with the claimant had had he had real concerns about this issue. It was more probable that when the claimant arrived on 24 July 2020 asking questions about his workload he took umbrage with the claimant questioning his decisions.

76. It was submitted that the respondent realised they had conducted no fair procedure in this case and backtracked with the letter of 30 July 2020 and subsequent evidence.

77. Reference was made to *Ashworth 2006 IRLR 576* which was a case which involved the reason given being a "ruse". Reference was also made *to East Lancs UKEAT 0054-06* where it was indicated that an incident cloaked the real reason for dismissal.

78. There was no explanation given to the claimant as to why he was being told to "get off the farm". Different explanations had been given. In the letter of 30

July 2020 it was stated that gross misconduct arose out of the damage to the wall on 14 April 2020 but that could not be the real reason. It was then stated in the appeal letter that the claimant was dismissed for varying work standards. On 25 August the solicitor's letter sought to further bolster the reasons for dismissal.

79. The real reason was that Mr Bell did not want the claimant any longer. He had somebody who could do overtime and that the respondents did not need him. He did not like being challenged about that. It was submitted the evidence was that as the employee J Grainger kept some of his old tasks Mr Nicholson would have required some of the claimant's work to keep him fully occupied and to provide the overtime which had been promised.

80. Prior to the discussion on 24 July 2020 Mr Nicholson had done some hedging and ploughing work which the claimant normally did. The respondents had nothing to reassure the claimant that work was available for him and he would continue to be employed. The burden was on the respondent to identify the reason for dismissal and this they failed to do.

81. In terms of section 98 of the Employment Rights Act 1996 ("ERA") no procedure had been adopted. There was no warning. The claimant was not able to contest any matter. There was no meaningful appeal. At all stages the claimant was prevented from making any representation. Matters could easily have been discussed with the claimant albeit the restrictions might make that conversation by way of telephone or other form of social media. The farm was still operational at the time and the claimant was still around. Mr Graham Snr could have taken an appeal meeting remotely over the telephone.

82. In terms of the ACAS Code the respondents had failed completely and unreasonably to follow procedure and so there should be an uplift of 25%. There had been no investigation and no process followed.

83. Dismissal did not fall within the band of reasonable responses. There was no reasonable investigation the damage to the wall had occurred fourteen weeks

earlier and the claimant could have been reassured about further work but none of that happened. After the event dismissal was sought to be justified. No reasonable employer would have dismissed.

84. It was submitted that section 123(6) of ERA did not bite so far as contributory fault was concerned. The claimant has not caused or contributed to his dismissal. It was submitted that the claimant had not been aggressive and not culpable for any damage to the wall. Neither would it be just and equitable to reduce the basic award In terms of section 122(2).

85. A *Polkey* deduction would only apply if the dismissal was not substantially unfair. If the respondent had properly investigated matters that may make a difference but here there was never any discussions or investigation and so it would not be appropriate to reduce the award under *Polkey.*

86. So far as the schedule of loss was concerned average pay over the year had been calculated to overcome the variable hours. The gross amount did not reach the cap and so the full amount in the schedule should be awarded.

87. So far as failure to mitigate loss was concerned the claimant was 70 years old and had worked in farming all his life and knew nothing else. He was only required to do what was reasonable. He had gone online and sent to texts to contacts in the area seeking work. He had been overcome by ill-health as the respondents' actings had made him ill. He had taken reasonable steps.

88. Garden work had always been available to the claimant along with the farm work and built into his earnings. There should be no deduction for that element of work continuing to be available to him.

89. The issue of wrongful dismissal was effectively tied in with the case of unfair dismissal. The respondent had not been able to show conduct which would be repudiatory of the contract by the claimant.

90. There was no evidence of any Statement of Terms and Conditions being supplied to the claimant and the maximum award should be made in respect of that claim.

Discussion

Relevant Law

91. In the submissions made there was no dispute on the law and the tests that should be applied. Reference was made to Section 98 of the Employment Rights Act 1996 (ERA) which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in Section 98(1) and (2) of ERA and(2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under Section 98(4). As is well known, the determination of that question:-

> "(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) 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/"

92. Of the six potentially fair reasons for dismissal set out at Section 98(2) of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondent in this case.

93. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. A "reason for dismissal" has been described as a "set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee" – *Abernethy v Mott Hay and Anderson [1974] ICR 323*. If an employer fails to show a potentially fair reason for dismissal the dismissal will be unfair.

94. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

95. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case *(Iceland Frozen Foods Limited v Jones [1982] IRLR 439).* In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

96. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR 379* with regard to the approach to be taken in considering the terms of Section 98(4) of ERA:-

> "What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. 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. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances."

97. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

98. Additionally a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not "descend into the arena" – *Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283.*

99. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins [1977] ICR 662.*

100. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. An employer may be found to have acted reasonably on grounds of an unfair procedure alone.

Again however when assessing whether a reasonable procedure has been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury's Plc v Hitt [2003] ICR 111.*

Reason for Dismissal

101. The respondents relied on conduct as the reason for dismissal. The claimant indicated that it was not the true reason for dismissal but a pretext for wanting rid of the claimant because the respondents had found someone else to do the work of the claimant and had promised that individual enough overtime to be able to do all necessary work.

102. The dismissal of the claimant took place on 24 July 2020. No reason was given by the respondent at that time for dismissal. Reasons were given in the subsequent letter of 30 July 2020 (J66) and were after the event and not necessarily indicative of the reasons for dismissal at the time. However it was the position of the respondent that not only "confrontational attitude" on 24 July 2020 constituted the misconduct but (a) previous "diminishing quality of work"; (b) "subsequent" reports of aggressive manner with other employees; and (c) damage to the neighbouring farmer's wall on 14 April 2020. It is not easy to discern whether those were the reasons in mind of the respondent at the time.

103. As regards the discussion on 24 July 2020 I did not find either the respondent or the claimant to be entirely candid about that matter. The position of the claimant was that he was perfectly calm and reasonable; the position of Graham Bell was that he was perfectly calm and reasonable. I did not consider either to be right.

104. I did not consider it at all likely that Graham Bell believed that he or his parents' safety was at risk by the actings of the claimant. Mr Bell's evidence in respect of his parents' anxiety was contradictory in suggesting that his parents had expressed concern to him about the claimant's actings at the time and then retracting that assertion. I accept that the claimant was to some extent "in his face" and that Mr Bell was irritated at the claimant questioning

his hours of work and the manner in which that was done. On a number of occasions Mr Bell referred to the claimant as being a "casual" worker by which I considered he meant that the claimant had no real say in whether he was required to work or not or who did what duties. On being questioned on this he became angry.

105. In so far as the claimant is concerned he had clearly got himself into a position where he believed that "his work" was to be taken on by Mr Nicholson. He did not consider that was fair. I considered that he was very upset and angry about that matter and determined to have it out with Mr Bell. There was no reason, other than that, for him to be at the farmyard that day. From the way he gave evidence on this issue I consider that he did face up to Mr Bell in an aggressive manner on 24 July 2020 and was but he was not as hostile as was made out by Mr Bell who I considered exaggerated the circumstances.

106. In support of the respondents position that it was not only the stated "confrontational attitude " in mind on 24 July 2020 there is evidence that certain other matters formed part of the discussion that day. It was agreed that the discussion contained reference to the barley seeding and damage to the wall. The claimant sent a text message that day to Graham Bell. The document narrating the text (J63) is headed "On my return home I sent Mr Bell the following text message" which included:-

"As for the wall that was your decision not to claim your insurance. As for the drilling 7 acres you don't know yet if you have lost any yield and it was the first time drilling barley with it. As for the wall and barley if it bothered you I should have received a verbal warning then perhaps a written one instead you said it's not the end of the world. Before I decide what to do next I await your reply."

107. That these matters were raised at the time is supportive of the resondents position. While I consider that the actings of Mr Bell on 24 July 2020 were driven by a certain amount of pique at being challenged I accept that concerns over the conduct of the claimant in his work allied to the attitude shown by the claimant on 24 July was the reason for dismissal.

108. The onus on an employer at this stage of the enquiry namely asserting the reason for dismissal is as stated not a heavy one. I consider that the reason for dismissal was related to the conduct of the claimant being a potentially fair reason. I do not therefore uphold the view that conduct was being used as a pretext for getting rid of the claimant as the respondents had found someone else to cover the work that had been carried out by the claimant. I did not consider that was shown to be the case.

Reasonableness of dismissal

109. Identifying a reason capable of justifying dismissal does not mean that in all the circumstances an employer is actually justified in dismissing for that reason. In this regard there is no burden of proof on either party and the issue is a neutral one for the Tribunal to decide. What a court or Tribunal must not do is put itself in the position of the employer and consider what it would have done in the circumstances. The issue is whether or not the actings were that of a reasonable employer in that line of business.

110. The position of the respondent was that the claimant's behaviour on 24 July 2020 was extreme in that he had concerns for his and his family's safety. I did not find Graham Bell credible in that respect. I did accept that there was an attitude being expressed by the claimant but not to any extent that the respondents could be fearful of the claimant. While I accept that the claimant was likely to have been somewhat aggressive in his stance I do not consider that there was behaviour which could be described as gross misconduct by a reasonable employer.

111. I have found that the contractual relationship between claimant and respondent did not include a term express or implied that the claimant was guaranteed particular hours or work at the farm. However it was the case that he had been carrying out duties for approximately four and a half years with some regulatory of work on a seasonal basis. He had seen elements of that work being done by Mr Nicholson (ploughing and hedge cutting) and while there may be no contractual entitlement it was not unreasonable to obtain from the respondents some reassurance that he was not being sidelined and

that there would be work available for him on a continuing basis. While he might have put that case in an aggressive way I could not consider that those circumstances would mean a reasonable employer would dismiss. A reasonable employer may well have offered reassurance that the job was not at risk and that he still saw a role for the claimant to appease concerns.

112. The position of the respondents was that the attitude being expressed by the claimant was the trigger which "brought to a head" matters of concern in work performance. As indicated the two issues that seemed to arise on 24 July 2020 were (i) damage to the neighbouring farmer's wall and (ii) miscalibration of drilling seed. It would appear that the issue of the miscalibration of barley seed being drilled occurred 30 March 2020 and the damage to the wall 14 April 2020. In neither case had the claimant had been reprimanded for these matters. He had continued to be employed for approximately 17 weeks since drilling the barley field and 14 weeks since the incident with the neighbour's wall. In that period there was no evidence of an investigation taking place with the claimant to ascertain if there was negligence on his part and if so the level of that negligence. Given there was no investigation into the matters the respondents were unable to say that they had conducted such investigation as was reasonable or that they had sufficient grounds to sustain a belief in misconduct. The claimant had continued to work for the respondent without any warning issued or any evidence of him being taken to task about either of those matters.

113. I did not consider that a reasonable employer having made no investigation or action against the claimant in respect of these matters could have considered that the incidents were of such moment that combined with the attitude of the claimant on 24 July 2020 that there was sufficient reason to dismiss. I do not accept that issues around the Covid pandemic meant the respondents were unable to investigate these matters and seek explanation form the claimant. Graham Bell had no qualms meeting the claimant to have an insurance form signed. There were other ways (written; telephone; meeting with social distancing; arranging video call, seeking assistance to set up a Zoom call) to have pursued an investigation if these issues were of such

concern that they were likely to have been categorized by a reasonable employer as misconduct.

114. The position of the respondent in the letter of 30 July 2020 was that there was an accumulation of diminishing work requirements. Those were not specified in that letter. At Tribunal it was claimed that the respondent had in mind various issues listed in the document produced (J71). Again there was no evidence of investigation being made in respect of any of those matters with the claimant. There was no evidence of any warning being given to him about quality of work. While the respondent indicated that these matters had been noted from the "farm diary" there was no record in that diary of any discussion with the claimant about these matters. Even if they did form a background there was again no evidence of investigation or enquiry which would have enabled the respondent to come to a belief, based on reasonable grounds, in the guilt of the claimant in respect of these issues such that the combination of circumstances would lead a reasonable employer to consider that there was gross misconduct by the claimant.

115. The letter of 30 July 2020 mentions reports "subsequently" made to the respondents on the behaviour of the claimant towards others. Given that these were not reports available to the respondents at dismissal they could not form part of the reason for dismissal on 24 July 2020 or have been in the mind as part of any "gross misconduct".

116. Neither was there any procedure adopted with the claimant to advise him of the problems; seek his response and give him an opportunity to put forward his position as to any of these matters listed in the document at J71 or in respect of the wall or the barley prior to dismissal. Neither was the claimant able to make any representation in relation to the discussion on 24 July 2020. The terms of his text later that day clearly indicates someone who was confused as to the outcome of the discussion. He followed that up with the "grievance" of 28 July 2020 after he had received advice from ACAS clearly considering that he may still be employed at that stage and requesting clarification.

Appeal

117. In certain circumstances an appeal can resolve deficiencies in investigation and the ability of an individual to make representation on a dismissal. However in this case there was clearly no re-hearing of the matter that may have cured lack of investigation and enquiry and sufficiency of reason. As was pointed out the claimant had requested in his appeal letter of 3 August 2020 details of allegations that he had acted in an aggressive manner towards other staff "in the form of witnesses, times dates and details." By that stage the respondent was in receipt of the statement from Mr Grainger but that was not passed to the claimant for any response. By that time also the respondent had received the invoice from Bowran & Son (J73) alleging damage to the trailer and also the statement from Mr McQueen the neighbouring farmer whose wall was damaged (J69). None of that was put to the claimant for any response. Neither was the document at J71. The first time these documents appeared was after the Early Conciliation Certificate had been issued by ACAS (J76).

118. None of the matters raised in the appeal outcome letter were discussed with the claimant at any form of hearing. Again I did not consider that the excuse of the pandemic was sufficient to overcome the lack of investigation and opportunity for the claimant to put his side of events before any decision was taken.

119. In all the circumstances therefore I consider that no reasonable employer would have dismissed in these circumstances. I did not consider that the decision to dismiss the claimant for misconduct fell within the band of reasonable responses which a reasonable employer might have adopted. I considered the dismissal procedurally and substantively unfair in terms of section 98 of ERA.

Remedy

120. In this case the claimant seeks compensation at which is made up of a basic award and a compensatory award (s118(1)(a) and (b) ERA. The basic award

is calculated by use of a statutory formula. The compensatory award is "of such amount as the 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" – s123(1) of ERA.

"*Polkey*" reduction

121. The compensatory award can be reduced by what is commonly known as a "*Polkey* reduction" after the case *of Polkey v A E Dayton Services Ltd [1998] ICR 142*. Such a reduction is made when calculating the amount that it is "just and equitable" to award. Such reductions are common where a dismissal has been rendered unfair but the Tribunal is satisfied that the employee could nevertheless have been fairly dismissed at a later date or if the employer had followed a proper procedure. Such rule is not limited to any specific reason for dismissal and would include conduct as is the case here.

122. It was submitted that the failings here were substantive and so a *Polkey* reduction could not apply as that would only apply to procedural failings. The distinction between what is "procedural" and what is "substantive" can be difficult to draw and in the case *of O'Dea v ICS Chemicals Ltd [1996] ICR 222* the Court of Appeal indicated that the procedural/substantive distinction is not the way to assess matters. In terms of *Software 2000 Ltd v Andrews [2007] ICR 827* the approach should be to have regard to all relevant evidence if an employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted. While that will introduce a degree of uncertainty it is not an excuse not to conduct an exercise of seeking to reconstruct of what might have happened. However there may be cases where a Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.

123. In this case the Tribunal were not being asked to consider whether the employment might have come to an end because of retirement or ill-health or

redundancy or the like but essentially because a fair procedure would have allowed a fair dismissal.

124. In that respect reliance was placed on the list of issues in the document at J71; the report from Mr Bowran regarding damage to the trailer; the statement from Mr Grainger regarding an abusive telephone call (J70); and letter from McQueen, the neighbouring farmer whose wall was damaged (J69). The claimant denied responsibility for any of these matters and not easy to judge how matters might have developed had there been a proper disciplinary process; namely had the ACAS Code been followed in informing the employee of the problem; holding a meeting to discuss matters; allowing the employee to be accompanied' deciding on appropriate action and providing an opportunity for a proper appeal. These were basic procedural steps even for as small an employer as the respondents.

125. It is difficult task to determine whether after appropriate hearings with the claimant to consider his representation the matters listed in the document at J71 and the other material would still stand up. However it has been held that a Tribunal's duty is to make a prediction and that they cannot opt out of that duty merely because the task is difficult and may involve speculation. It must take into account the evidence available.

126. Considering the matters within the document at J71 the most material issues of recent origin listed there (going back in time) would appear to be the incident of 14 July 2020 regarding a hedger not being correctly constructed; an incident of May 2020 regarding the alleged lack of greasing to a tractor by the claimant; an incident of 4 May 2020 regarding similar lack of grease to a fertiliser spreader which required to be repaired; damage to the neighbouring farmer's wall on 14 April 2020 and the miscalibration of the barley seed of 30 March 2020. In the event that there had been an appropriate disciplinary hearing then the invoice from Mr Bowran would have been received and there would have occurred also the incident of 27 July 2020 regarding the plough which required new bearings again through lack of grease. In respect of any

consideration of a fair dismissal I do not consider incidents prior to 30 March 2020 to be relevant in this assessment.

127. In respect of the damage to the wall; statement from Mr Grainger; and the invoice from Mr Bowran there has to be a suspicion that these statements were obtained from those well disposed to the respondent and perhaps to order. However I do not consider these matters were fabricated (as would appear to be the claimant's position) and thus require to approach the matter on the basis that these were real issues (albeit not necessarily implying fault by the claimant) and not manufactured.

128. Uncertainties are clearly created by the fact that other than a blank denial there has not been no opportunity for the claimant to address these issues in detail and certainly not at the relevant time. However they would appear to relate to the conduct of the claimant and not be capability issues and require to be put in the balance in combination with the attitude of the claimant on 24 July 2020. The neighbouring farmer does give an account of the claimant being "in such a rage he pushed the dung against the wall of my shed causing such damage that the wall became unsafe and has required to be rebuilt" (J69) Mr Bowran states that damage was caused to trailers on more than one occasion when the claimant was the operator.(J73) Mr Grainger gives detail of abusive calls.

129. A *Polkey* reduction is not "all or nothing" There is doubt that the claimant would have been dismissed and it is by no means a certain position. However on the information available I consider there would have been some chance of a fair dismissal and put that at 20%. In those circumstances I would think it reasonable to estimate that the investigative/ enquiry/ disciplinary hearing process would have concluded by 31 August 2020 and the "*Polkey* reduction" of 20% takes place from that date in respect of any monetary award to reflect the chances of a fair dismissal.

Contributory conduct

130. The legal basis for making a "*Polkey* reduction" under section 123(1) of ERA and reductions on account of an employee's contributory conduct under section 123(6) of ERA are very different. In particular the evidence that is germane to whether or not an employee has "caused or contributed" to his or her dismissal may not be the same as that relevant to assessing what is "just and equitable" to award a claimant having regard to the loss sustained in consequence of the unfair dismissal.

131. In some cases there may be good grounds for making both types of reduction. However it had been made clear that in approaching the issue of contributory conduct a Tribunal should bear in mind that there has already been a *Polkey* reduction (*Rao v Civil Aviation Authority [1994] ICR 495* and *Grantchester Construction (Eastern) Ltd V Attrill EAT 0327/12).*

132. In this case I consider that it is not appropriate to make any reduction for contributory conduct on the basis that there has been a *Polkey* reduction and that has taken into account conduct which may have led to dismissal. I considered it would be double counting to dwell on contributory matters such as the damage to the wall and the aggressive attitude of the claimant on 24 July 2020. Accordingly I would make no reduction in this respect.

Adjustment for breach of ACAS Code of Practice

133. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides that "if in any proceedings to which the section applies it appears to the Employment Tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant code of practice applies; (b) the employer has failed to comply with that code in relation to that matter and (c) the failure was unreasonable, the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

134. This reflects the fact that the code is aimed at encouraging compliance by employers and employees. Jurisdictions to which this section apply include unfair dismissal.

135. The adjustment only applies to compensatory awards and does not apply to the basic award.

136. It applies where a Tribunal considers that the failure is "unreasonable". In this case I find that there was a failure to comply with the ACAS code on disciplinary procedures. There was no hearing with the claimant. There was never any opportunity for him to present his case. There was no statement informing the claimant of the concerns on workmanship and that dismissal was being considered.

137. The failure to comply with the Code was part and parcel of the finding of unfair dismissal on the ground that the employer had not acted reasonably in all the circumstances. Given that position I could not find that the failure to apply the code was reasonable, on the issue of uplift, when finding it was unreasonable in relation to liability. There was no attempt to follow any of its provisions. It was not claimed that the respondent was ignorant of the code.

138. The amount of the uplift is whatever is considered to be "just and equitable". The dismissal here was taken in haste. The respondent is a small business with no administrative resources. It is clear that they should have followed the ACAS code and so some uplift is appropriate but I do not consider it would be "just and equitable" that the maximum amount be awarded given the size of the respondent. I would consider that an uplift of 15% was appropriate.

Basic award

139. It was accepted that on a calculation of the claimant's earnings over the past twelve months from date of dismissal his gross weekly salary came to £140 per week giving a net payment of £113.80 per week. While the work was admittedly seasonal that seemed an appropriate way to make the calculation of a "week's pay" where there are no normal working hours.

140. There was no dispute then that the basic award amounted to 4 x 1.5 (for years aged above 41) x £140 = £840.

141. A basic award is not reduced for any failure to mitigate or subject to a *"Polkey* reduction". Furthermore the provisions allowing adjustment where there has been a reasonable failure to comply with the ACAS code does not affect basic awards (s124A ERA).

142. I do not consider that it should be reduced on the ground of the claimant's conduct. The provision in section 122(2) of ERA advises that a reduction to basic award may be made where the Tribunal considers that "any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce or further reduce the further amount of the basic award to any extent". I would not be inclined to consider it just and equitable to make a reduction to the basic award on account of the claimant's conduct. I did not consider his conduct on the day in question so unreasonable to make such reduction and so far as other matters are concerned the lack of enquiry to establish fault on the part of the claimant means there could be no firm foundation to make it "just and equitable" to reduce that award. Thus the amount of the basic award in this case remains at £840.

Compensatory award

143. There was no dispute that the claimant's net weekly wage ran at the rate of £113.80 taking into account pay over a 12 month period prior to termination of employment

144. The claimant states that he has not been able to find work since date of dismissal. It was claimed that the claimant had failed to mitigate his loss.

145. Whether an employee has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. For example an employer cannot argue that a younger, fitter person could have found new work sooner; the question is whether the employee in question has taken reasonable steps to minimise loss. This claimant is elderly and has been involved in farming work for many years as well as some gardening

work. He stated that he had not carried out any such work since dismissal and that in November 2020 he had been signed off as unfit for work because of ongoing stress related to these issues. The "Fit note" produced is illegible and in any event there is no evidence of continuing inability on that account.

146. The respondent was critical of the enquiries that had been made by him for other work as being outwith the immediate area; that he had restricted himself to a narrow search for farm work; and also that he had not signed on with the Jobcentre to assess other employment prospects.

147. I was not able to take into account the respondent's position that the claimant should have made enquiries with farmers nearer at hand. There was no evidence from the respondent that that would have led to any success in application. If they had been able to show that jobs were available with farmers or in the immediate area then that may have been compelling but no such evidence was produced. The onus of showing a failure to mitigate lies on the employer as the party who was alleging that the employee has failed to mitigate his or her loss.

148. However failure to sign on at the Jobcentre is a reasonable step that one would expect an employee in the position of the claimant to have taken in a search to find alternative employment. It is, of course, one thing to register with the Jobcentre and another thing to be able to find suitable employment. Given the uncertainties on employment over the past period caused by the pandemic it would not be realistic to assume that signing on at the Jobcentre would have created some employment for the claimant. However by not taking that reasonable step he has excluded himself from that possibility. A percentage reduction for failure to mitigate loss should be avoided if possible. However here there is no more objective material available and I consider that the failure to sign on and make himself available on the job market justifies a percentage reduction of 10% for failure to mitigate. I consider that should apply from the end of his notice period of 4 weeks.

149. The claimant agreed that there is the prospect of him gaining employment in the Spring at least on gardening work. I accept that when employed by the

respondents he carried out such work but given he will have more time to perform such work than he would have had if employed by the respondents he should be able to increase that work. His pay per hour with the respondent would not seem to be out of step with the rate he might charge for gardening work.

150. It may be reasonable to assume that work may become easier to obtain from 1 April 2021 as vaccination increases and restrictions ease.

151. Accordingly so far as compensation is concerned he would have been entitled to 4 weeks net pay which is 4 x £113.80 = £455.20 in respect of his period of notice.

152. I would then consider loss of net pay in the period from 24 August 2020 through to 1 April 2020 appropriate at which time the pandemic situation may well have eased to allow him to obtain some gardening work in excess of that he had when employed to limit loss. Net pay in the period 24 August 2020 – 1 April 2021 amounts to 31 weeks x £113.80 =£3,527.80

153. I consider loss for a further 3 months at reduced amount of £50 per week to take account of the prospect of the work becoming available and his loss ceasing at 30 June 2021 when the economy should have improved to allow him to gain sufficient work. That computes to 13 weeks x £113.80 = £1,479.40.

154. There also requires to be taken into account a sum for loss of statutory rights which is reasonably stated at £400. That would put his compensatory award (before adjustment) at:-

£400 for loss of statutory rights

£455.20 in respect of pay over the notice period

£3,527.80 in respect of the period 24 August – 1 April 2021

£1,479.40 in respect of the period 1 April 2021 – 30 June 2021.

Total = £5,862.40

155. That amount to be reduced by 10% on failure to mitigate excludes the notice pay and so the reduction is £5,407.20 x10% = £540.72.

156. The amount to be reduced by 20% by way of "*Polkey* reduction" excludes pay to 31 August 2020 being 5weeks x £113.80 = £569. The calculation then is £5,293.40 x 20% = £1,058.68.

157. The deductions total £540.72 + £1,058.68 = £1,599.40 to make the amount £5,862.40 - £1,599.40 = £4,263.

158. There would then require to be an increase of 15% given the failure to comply with material provisions of the ACAS Code of Practice on discipline being £4,263 x 15% =£639.45.

159. That computes the compensatory amount at £4902.45.

160. The order of adjustments reflects the case of *Digital Equipment Company Limited v Clements (No 2) [1997] ICR 237* modified to include adjustments that fall to be made in respect of breaches of the ACAS Code of Practice.

Failure to provide written particulars

161. Section 38 of the Employment Act 2002 states that Tribunals must award compensation to an employee where upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 5 (of which unfair dismissal is one) it becomes evident that the employer was in breach of its duty to provide full and accurate particulars under section 1 of ERA.

162. In this case there was no statement of particulars provided. That means that the Tribunal must award the "minimum amount" of 2 weeks' gross pay and may "if it considers it just and equitable in the circumstances" award the "higher amount" at 4 weeks' pay – s38(2), (3) and (4) Employment Act 2002. It is only if there are exceptional circumstances no award or increase should be made.

163. I consider that an appropriate award would be 3 weeks' gross pay. Being 3 x £140 = £420. While the parties seem to have been able to operate satisfactorily without a statement of terms and conditions it is an obligation on an employer to provide one. Also in this case they may well have provided a base platform of hours of work and duties and a template to which the parties could work. That for each party may well have been the useful reference point for the complaint by the claimant that duties and hours of work were being "taken away from him". Also it should set out a disciplinary procedure which could be followed by the respondent for matters of discipline.

Monetary award.

164. The total monetary award therefore comprises:-

Basic award -	£840
Compensatory award -	£4,902.45
Failure to provide statement of particulars.	£420
Total	£6,162.45

The statutory cap of 1 year's gross wage on compensation was agreed at £7,280. That cap does not apply.

165. I was satisfied that the claimant has neither received nor claimed benefits such as JSA, income related ESA, Income Support or Universal Credit so the provisions in respect of recoupment of monetary awards do not apply.

J.Young
Employment Judge

29 January 2021
Date of Judgment

Date sent to parties **03 February 2021**