THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TSAMADOS (sitting alone)**

BETWEEN:

Mr Arum Joseph **Claimant**

AND

Wanstor Ltd **Respondent**

ON: **10 March 2017**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr Peter Lukes, the Respondent's Managing Director**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Claimant was unfairly dismissed;

2. The Claimant is awarded £3,649.25 payable by the Respondent as compensation for unfair dismissal and his tribunal costs of £1200 payable by the Respondent, making a total of £4,849.25.

REASONS

Claims and Issues

1. By a Claim Form received by the Employment tribunal on 20th September 2016, the Claimant has brought a complaint of unfair dismissal against the Respondent, Wanstor Ltd. He alleges that he was dismissed because he had been absent from work due to back problems and in any event should not have been dismissed for the reasons alleged by the Respondent. In its Response received by the Tribunal on 21st November 2016, the Respondent denies that the Claimant was unfairly dismissed and alleges that he was dismissed either by virtue of misconduct or for not performing his duties properly.

2. At the start of the hearing, I explained to the parties the matters that I needed to determine in a claim of unfair dismissal and which they needed to address in their evidence and submissions. These are summarised as follows:

   2.1 What is the reason, or if more than one the principal reason, for the Claimant's dismissal?

   2.2 Is that a potentially fair reason within section 98(1) and (2) Employment Rights Act 1996 ('ERA 1996')? It is for the Respondent to show a potentially fair reason.

   2.3 If shown, is this a sufficient reason within section 98(4) ERA 1996 and with regard to the test within BHS v Burchell [1978] IRLR 379 and the band of reasonable responses?

   2.4 To what extent if any should any compensation awarded to the Claimant be reduced because his actions contributed to his dismissal within section 123(6) ERA 1996 and/or by applying the principles contained with the case of Polkey v A E Dayton Services Ltd [1987] IRLR 503?

The Evidence

3. It became clear at the outset of the hearing that neither party, and in particular the Respondent, had fully complied with the case management orders which had been set. Whilst I took into account that neither party was represented, I did make the point that the case management letter was clear as to what needed to be done.

4. Mr Lukes provided a copy of what appeared to be a witness statement but in reality was a narrative of events, not all of which he was involved in and so was witness to first hand. He had also provided a witness statement from a Mr McGoldrick, who was not present to give evidence at this hearing. Mr Rai, the Operations Director and Ms Rolfsman, the HR Manager, were both present at the Tribunal hearing and were clearly involved in the relevant events. However,

they had not provided witness statements and it was only after some prompting that Mr Lukes decided to call Mr Rai to give evidence.

5. Both parties also produced documents today which had not been disclosed in advance of the hearing, either at all or in the current format. Additionally, there were insufficient copies of the Respondent's documents.

6. All of this added to the time and to the task before me.

7. However, doing the best I could, I was able to ensure that everyone had copies of the various documents put forward, was given the opportunity to consider them during the reading adjournment and so a fair hearing could take place.

8. The Claimant gave evidence by way of a written statement to which he had appended relevant documents (which I refer to as the 'Appendix' and relevant page number where necessary) and in answer to questions. The Respondent gave evidence through Mr Peter Lukes, its Managing Director, by way of a written statement and in answer to questions. He had a handwritten prompt note which he wished to refer to when giving evidence and so I arranged for copies to be made and provided to me and to the Claimant. I also heard oral evidence from Mr Manmit Rai, the Respondent's Operations Director.

9. The Claimant provided a loose-leaf folder of documents (which I refer to as 'C1' where necessary) as well as a Schedule of Loss & Remedy. The Respondent provided a bundle of documents (which I refer to as 'R1' and the relevant page number where necessary) and a copy of its disciplinary procedure (which I refer to as 'R2' where necessary).

10. With regard to the witness statement and attached schedule from Mr Liam McGoldrick, one of the Respondent's Engineers, dated 9th March 2017, I explained to the parties that because he was not present to give evidence, this would affect what weight if any I gave to the contents.

Findings of Fact

11. I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

12. The Claimant was employed by the Respondent as a Technical Consultant from 16th May 2013 until his dismissal on 17th August 2016. At the time of the events in question he had approximately 10 years' experience of working in IT. I was referred to his contract of employment at R1 1-2.

13. The Respondent is an IT services company which was formed 15 years ago and employs 120 staff. The company provides services to medium size businesses, so as to enhance or replace their in-house IT services. This covered a range of services including security, projects, back up, e-mail systems, line of business

applications, remote access, the provision of lap-tops, internet access and provision of equipment. The Respondent has an in-house HR Manager.

14. Peter Lukes is the Managing Director, Manmit Rai, the Operations Director, Katarina Rolfsman, the HR Manager, Sajal Patel, the Service Desk Manager, Laura Mehew, the Service Desk Team Leader, Julie Lonergan, the In-house Wagamama Project Manager, and Liam McGoldrick, a first line Engineer.

15. The Claimant was part of the Service Desk Team. He was a second line Technical Consultant, reflecting the degree of experience and competence he had. A first line consultant answers calls from clients and the third line consultant ultimately deals with the issues and possibly has specific experience of that issue.

16. One of the Respondent's largest clients is the restaurant chain Wagamama to which it provides IT support services. On 25th May 2016, Ms Mehew, assigned a service desk call, or 'project' as it has been referred to at times, to the Claimant. This was to *'check all (Wagamama) restaurants have a backup of the micros database'* and further specified *'can you please work to check that all sites have a backup configured, if not, we need to get this in place'*. This is set out in the call log which is at R1 24-25.

17. The Claimant explained that this was a response to a recent hard disk failure at one of the Wagamama stores' micro servers and that the Respondent was unsure whether the database was being copied to another location for a 'quick restore' once the third party company (Oracle) had built and configured the hardware and operation system. The Claimant further explained that backing up was done by a rudimentary script on the servers, that ran once a day, simply deleting the current database on a back-office PC or laptop, then copying the database file from the server to the store's back-office PC or laptop.

18. This script was set up and managed by Oracle who maintained the server's hardware and software. The Respondent sat in the middle when it came to Oracle systems. Should a Wagamama store contact the Respondent about an issue, the agent would take all the pertinent information and log the call with Oracle. On occasions the Respondent could do some troubleshooting and attempt to do general fixes but in most cases Oracle had this responsibility.

19. The existence of a back-up is vital to the proper management of a server system and it relies on a series of steps. Put simply this involves the copying of data from one location to another, which is initiated by a script. Mr Lukes explained that the existence of a script alone does not mean that the back-up exists in the same way as the existence of a brake pedal in a lorry does not mean that the brakes were effectively.

20. This was the first project of this kind that the Claimant had undertaken. He usually carried out daily checks for Wagamama. When he received the call, he spoke to Ms Lonergan, who is the in-house Wagamama Project Manager, to find out more information as to what he was required to do and to obtain the requisite documentation. Ms Lonergan is an ex-employee of Wagamama and projected

managed all of their projects. The Claimant believed this was the normal procedure to follow. He viewed Ms Lonergan as someone who was more experienced, had technical knowledge, knew specifically about Wagamama and would advise him what needed to be done. After a few days she responded and explained what he needed to do.

21. Ms Lonergan clearly explained to him that he had to check if the executable file (the 'script') existed in each of the 120 or so Wagamama micro servers and if it was not there, to create it and request Oracle to create the scheduler. He understood that the scripts run the backup. He set about and checked what he thought he had to check, namely, the existence of the script, and if it was there, this meant that the backup was working. He understood that there were two parts to the action involved: firstly, an executable file copied the database file from the server to the back-office PC/laptop; and secondly, a scheduler was configured by Oracle to run the executable file periodically.

22. The Claimant spent the next few days doing this work and this is set out at paragraphs 10 to 12 of his witness statement. He completed the work on 15th June 2016 (R1 25) having made a spreadsheet of what he had done (R1 28-30).

23. The work undertaken by the Claimant on this call was chargeable to the customer. The Respondent has a process whereby it reviews the level of chargeable calls. Mr Rai reviewed the time spent on this call on 1st July 2017. He thought that the work had not been untaken properly because it was not possible to do it in 3 hours. So he assigned it to another engineer for checking.

24. The Claimant was on annual leave from 4th to 5th July 2016.

25. The work was assigned it to Mr McGoldrick for review on 8th July 2016 (R1 48). Mr McGoldrick's review indicated that the Claimant had not checked the content of the script and had not checked to see if the back-ups had ever taken place and had not reported his concerns about potential script failing even where it existed. Reference was made to the spreadsheet attached to Mr McGoldrick's witness statement. The Claimant had not seen this it was sent to him the day before this Tribunal hearing and he never saw any previous versions of this spreadsheet during the events in question.

26. Mr Rai called to the Claimant to speak with him in an informal meeting. Neither the Claimant nor Mr Rai could remember the exact date of this meeting but it was more likely than not to have been between 1st July, when Mr Rai was aware of the low level of chargeable hours on the Wagamama call and his last day of work on Friday 8th July 2016 before commencing annual leave on Monday 11th July 2016.

27. A number of issues were raised by Mr Rai at this meeting, his main concern being the lack of chargeable hours logged against the Wagamama call. The Claimant explained that he only needed to check the existence of the file on each of the servers and did not need to do anything else. Mr Rai said that he should have gone above and beyond the customer expectation and checked if the back-ups were working. The Claimant said that he was not asked to do this

and did what Ms Lonergan advised him. Mr Rai told the Claimant that generally he needed to log more time and although he was on holiday next week he would be checking the Claimant's logged time. There was no mention that the work he had carried out on the Wagamama call was inadequate or incorrect, simply that he should bill more time.

28. The Claimant was unaware at the time that Mr Rai was concerned about the quality of the work he had done or that he had assigned it for review by Mr McGoldrick. He made the point in questions to Mr Rai at the Tribunal hearing that if Mr Rai knew about the issue from 1st July and left work on 8th July starting his leave on 11th July 2016 and he thought there were problems with the work, then why not speak to the Claimant about this at their informal meeting?

29. Mr Rai's responses were equivocal. At one point he stated that he would not have had the chance to review all aspects of the 'ticket' (meaning the call) by then. At another point he stated that if he had raised the issue, it would have been a very different and longer conversation with the Claimant. At yet another point he stated that that if he was to speak to every engineer about every piece of work created, he would never get anything done. Whilst accepting that Mr Rai was busy with his own work, I do find it surprising that he simply did not tell the Claimant of his concerns at their meeting rather than focus on the lack of billable time. It would been reasonable to have spoken to the Claimant and explained what the concerns were.

30. When asked why he did not raise the issue on his return from annual leave, he answered that he was busy, it was a conversation that could wait and that by then the Respondent had put measures in place (the assignment to Mr McGoldrick).

31. In any event, the Claimant was off sick from work from 18th July 2016 onwards, due to back pains, which he has suffered from for several years (as set out at paragraph 20-21 of his witness statement). He provided a statement of fitness for work certificate (a medical certificate) from his doctor dated 20th July 2016 advising that he was not fit to work from 18th July to 18th August 2016 due to 'back pain' (Appendix page 2).

32. I heard evidence about a sequence of events in which the Respondent queried the validity of the medical certificate for a number of reasons which caused the Claimant to obtain several certificates. I do not propose to set this out here but refer to the Claimant's witness statement at paragraphs 22-27 and the Appendix pages 1-18. I asked Mr Lukes why he challenged the medical certificate, did he think the Claimant had stolen it? Mr Lukes stated in evidence that he believed he was perfectly entitle to challenge the authenticity of various medical certificates which were not stamped by the doctor's surgery and which had an unreadable doctor's signature on it. He referred specifically to R1 15. I do not dispute that an employer is entitled to check such things but I was surprise of the tone of his approach which appeared to betray an unreasonable and inappropriate starting point of mistrust and disbelief as to the Claimant's medical condition. I am concerned by the extent to which it characterises the meeting which then took place and the matters that Mr Lukes raised, as set out below.

33. The Claimant received an e-mail from Ms Rolfsman dated 21st July 2016 asking him to attend a meeting with Mr Lukes at 11 am on 1st August 2016 to discuss his current illness and absence levels (Appendix 11-13).

34. Both Mr Lukes and Ms Rolfsman were present at the meeting. The Claimant's evidence is that this was a hostile meeting in which Mr Lukes questioned the authenticity of his medical certificate and clearly believed it was not genuine, asked him if he had mental health issues, which the Claimant found most upsetting, suggested that his ability to work was affected by the medication he was taking and was disbelieving of his back pains, questioning sick absences he had taken in the past. This meeting is set out in further detail at paragraphs 26-36 of the Claimant's witness statement. Mr Lukes stated in evidence that the Claimant recollection of their meeting on 3rd August was quite different to his. On balance of probability, I accept the Claimant's evidence given Mr Lukes' strident challenges to the authenticity of the medical certificates as referred to above.

35. On 3rd August 2016, Ms Rolfsman e-mailed the Claimant requesting him to attend a disciplinary hearing on 5th August regarding the allegation '*performing substandard work when checking if Wagamama's servers were backed up'* (R1 31).

36. The Claimant attended the meeting. It was conducted by Mr Rai with Ms Rolfsman in attendance. The Claimant's account of that meeting is set out at paragraphs 37-51 of his witness statement, which was disputed.

37. The gist of this is as follows: he was not provided with any further information about the allegation in advance of the meeting and was not given any documents in support; he explained what work he had carried out on the clear instruction of Ms Lonergan; Mr Rai said that Ms Lonergan was not a technical person, the Claimant should not have sought advice from her but should have gone to him if he did not understand the task; Mr Rai accepted that there was only one server with the missing file which could be down to human error as there were 120 servers to check; Mr Rai said that the Claimant should have checked that the back-ups had run; Mr Rai stated that the Claimant should have used his intuitive.

38. On 17th August 2016, the Claimant was telephoned by Ms Rolfsman. She told him that he was summarily dismissed by reason of inadequacy of his work on the Wagamama project and the Respondent's inability to trust him on future projects. This was confirmed in a letter enclosing a copy of minutes of the meeting which the Claimant received that evening (R1 34-35 and 32-33).

39. The letter set out the grounds for dismissal as follows:

'As you will be aware from our discussion on 3 August 2016 it was alleged that you have performed work which fell grossly below an acceptable standard. Specifically, you were asked to check if a client's restaurants have a back-up of the micros database. The Micros database is a fundamental component of the

Point of sale systems, and a failure means that the stores are unable to trade. The back-ups are an essential part of the recovery process in the event of equipment failure. Given that much of the equipment is old, and that there have been recent instances of failure, the accuracy of these checks and the assurance that they provide was regarded as high profile and essential. You have been working as part of a team of staff which are dedicated to this customer and were aware of these facts.

At the disciplinary meeting you said that you thought you were asked to check the existence of a script, rather than the existence of a backup file. You also advised you checked each server had the script configured by either logging on or browsing using the UNC path. Consequently, this work has been assigned to another engineer where we identified some site Micros servers where the script does exist (the task which you said you completed).

After careful consideration, I find your explanation unacceptable because the instructions were clear in the call reference to "check all restaurants have a back-up of the micros database".

The consequences of this failure could have certainly been the loss of customer data, the inability of the client to trade within their stores.

We have found this lack of attention to be gross misconduct. You action has fundamentally undermined our relationship of trust and confidence.'

40. The letter offered the Claimant the right of appeal to Mr Lukes.

41. The Claimant wrote a letter to Mr Lukes on 23rd August 2016 which he called *'Response to my dismissal and grievance regarding the procedure'* (R1 36-41). However, it was accepted by both parties that this was intended to be an appeal against dismissal.

42. The content of the letter is very much repeated in the Claimant's witness statement.

43. The letter deals with the Claimant's objections to the accuracy of the minutes of the disciplinary meeting (repeated at paragraphs 57-73 of his witness statement), the way in which the disciplinary process was conducted, his objection to the reasons for his dismissal, his concerns about the previous informal meeting with Mr Rai in July 2016 and the meeting with Mr Lukes on 3rd August 2016, his general good conduct at work and customer satisfaction, and his belief that his dismissal was *'influenced and driven by the fact that (he) had been absent from due to his back problems and (his) back problems in general'*

44. Mr Lukes dealt with the Claimant's letter on paper only. He accepted in evidence that in his mind it was a letter of appeal. Whist he acknowledged that the disciplinary procedure referred to a hearing, he did not believe that the outcome would have been any different had the Claimant attended one.

45. He responded by letter to the Claimant dated 24th August 2016 (R1 42-43). The

following is the gist of that letter. Mr Lukes rejected the Claimant's grounds of appeal against his dismissal. He also responded to those matters concerning his absence from work due to back pain refuting his allegation regarding the conduct of the meeting on 3rd August 2016, denying his assertion of good conduct and customer satisfaction by reference to negative feedback from two clients and by reference to his attendance records.

46. The letter then stated:

'Taking all of these factors into consideration, I believe that you have been treated fairly at work and that your dismissal on the grounds of gross misconduct is merited. Following you work in reviewing the customer back-ups, it is clear that there will be a substantial erosion of trust that we would no longer be able to assign work to you.'

47. The letter then concluded by offering to pay the Claimant for his notice pay period and commented that the Claimant was not dismissed because of his back pain but because of the low standard of his work and the consequences of that and that dismissal is not something taken lightly and that the Claimant should have no difficulty finding further employment given the historically low levels of unemployment.

48. Whilst the Claimant was concerned at the Tribunal hearing that evidence had been sought to his attendance and customer and staff feedback, Mr Lukes stated that he only raised these in response to the Claimant's assertions in his appeal letter.

49. Mr Lukes referred the Claimant's attendance because the Claimant had stated in his appeal letter that he came into work half an early (R1 38B fourth paragraph). As result the Respondent then produced the spreadsheet at R1 45 to refute this. Mr Lukes only raised the other matters because the Claimant had brought them all up. He said at the Tribunal hearing that he was clear that the dismissal was about sub-standard work but that he did consider the Claimant's employment in the round.

50. The Claimant's position regarding the allegation of poor work on the Wagamama call is that he did what he was told to do, which was to simply check for the existence of the script. The Respondent's position is that this is not true and this is evidenced in the call log records at R1 24.

51. Mr Rai explained in evidence that a script copies the data from one location to a secondary location and a backup is the copy of the data stored. He said that a first liner service desk analyst would understand this and so he would have expected the Claimant to have as well

52. Mr Lukes' evidence is that as a second line engineer, that is someone with 3-5 years' experience, the Claimant would undoubtedly have known that the existence of the script alone did not constitute the present of a back-up. Mr Rai explained that there was no question that this work was within the Claimant's capability. Mr Rai explained in evidence that in comparison Mr McGoldrick had 6

months' experience and so was very junior and started as a call logger.

53. Mr Lukes gave evidence that the potential consequences of this for the customer would have been a greatly reduced ability to recover services in the event of an equipment failure which could have led to a catastrophic impact on the Respondent's reputation and loss of the client.

54. I am not a technical person but having considered the evidence I do not see these two positions as being mutually exclusive. The issue for me is whether it was reasonable of the Respondent to discount the Claimant's evidence as to his knowledge and his reliance on Ms Longergan for advice as to what he should do and the extent to which they were able to reasonably reach the conclusion that this was a task he should have known how to do..

55. Mr Lukes was not present at the disciplinary meeting but dealt with the Claimant's appeal after a discussion with both Mr Rai and Ms Rolfsman. Mr Rai and Ms Rolfsman conducted the disciplinary hearing and made the decision to dismiss. Mr Lukes was aware that it was proceeding and they discussed it with him beforehand.

56. Mr Rai never spoke to Ms Lonergan to confirm what the Claimant had said as to the advice she provided. He said he had no need to because the instructions on what to do were clearly set out in the call notes. Mr Rai said in evidence that Ms Lonergan is not a technical person, she organises engineers to go to site. She is an IT Co-ordinator. The Claimant stated, and I accept, that he did not know this. Mr Lukes never spoke to Ms Lonergan as to the advice she had given to the Claimant. He said it was not relevant to speak to her.

57. Mr Rai accepted that he was not familiar with the disciplinary procedure and that he expected HR to be familiar with it. He stated that he did not make the final decision to dismiss but discussed it with Ms Rolfsman. He admitted that he did not draft the letter of dismissal, it was an HR matter and that it was for Ms Rolfsman to do this.

58. The Claimant gave evidence as to mitigation after losing his employment with the Respondent on 17th August 2016. I refer to the information contained within his Schedule of Loss and Remedy as part of his evidence. He registered with two employment agencies, Reed and Monster, and applied for about 200 jobs online. He said was honest as to the reason why he had lost his employment with the Respondent and it is to his credit that he found further employment so quickly. He commenced employment with his new employer on 3rd October 2017 as a Senior Consultant and looks after all priority one calls for five major banks. His earnings in his new employment are higher than with the Respondent and so his loss of earnings is for the period of 18th August to 2nd October 2016 less payment in lieu of notice received to 17th September 2016. It was agreed that this was a figure of 2.5 weeks and that his net wages were £1766.14 per month.

Closing Submissions

59. Having directed the parties as to the legal issues at the outset of the case and as to matters possible reduction of any award of compensation in respect of Polkey and/or contributory fault, I asked if they had anything they wished to say by way of closing submissions.

60. The Claimant made the following points:

    60.1 the Respondent did not follows its disciplinary procedure correctly: he was not given an appropriate hearing; he was not provided with evidence at the time; evidence was sent after the dismissal and/or after the appeal outcome; there was no clear record of any form of investigation;

    60.2 the Respondent did not speak to Ms Lonergan to confirm what she had said to him;

    60.3 the Respondent had no reasonable basis on which to dismiss him;

    60.4 he was dismissed whilst off sick after difficult conversation with Mr Lukes about his ill-health; he was dismissed because of prejudice about his sick absences;

    60.5 no reduction should be made he did not do anything wrong, he was not supported by the Respondent, he was unaware Ms Lonergan was not the right person to speak to, the Respondent could have confirmed what she had said by speaking her. All the Respondent had to do was to speak to him at the time and said this is what you should have done and then he could have done and would still be working there.

61. The Respondent made the following points:

    61.1 The Claimant was not dismissed because of his bad back;

    61.2 he was given a relatively straight forward task to do and for all of his obfuscation he knew the context of the work, a recent server failure, he knew what to do and didn't do it;

    61.3 we had no choice but to sack a person who we assigned work to do and trusted him to do and he did not do it;

    61.4 the issue of Ms Lonergan is a complete red herring. If asked to check the existence of backups and if don't exist put them in place. That is a clear as clear;

    61.5 any deficiency in the disciplinary process would not have affected the outcome at all;

    61.6 the Claimant is entirely to blame for his dismissal. He is asked to do a piece of work which was entirely within his skill level and he treated it in such a superficial manner so that we lose trust in him and puts in jeopardy our relationship with a big customer (Mr Lukes also referred to customer

and staff complaints but these were not raised in evidence);

61.7 if we cannot hold people to account for the work that we do, how can we run a company? There is a duty of care on the part of employees as well.

Relevant Law

62. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (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.'

Conclusions

63. I first considered whether the Respondent had shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) of the Employment Rights Act 1996. I was concerned by the extent to which the Claimant's absence from work formed part of the reason for dismissal. This was given Mr Lukes' reaction to the medical certificates and the tone and content of the meeting held on 1st August 2016. I was also concerned by the extent to which conduct formed the

reason for the Claimant's dismissal, given that the issue was not raised by Mr Rai at the informal meeting in July 2106 and that disciplinary proceedings commenced with a few days of the meeting held on 1st August 2016. Despite not being present at the disciplinary meeting it did seem clear that Mr Lukes was involved in the matter at that stage and that Ms Rolfsman was involved in both the meeting on 1st August 2016 and the disciplinary meeting on 3rd August 2016.

64. However, I was satisfied that whilst both matters were in the mind of the Respondent at the time of dismissal, the Respondent has shown that the principal potentially fair reason for dismissal was conduct.

65. I then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

66. I looked at the procedure followed by reference to the Respondent's own disciplinary procedure and also had in mind as a minimum standard the provisions of the ACAS Code of Practice (1) Code of Practice on Disciplinary & Grievance Procedures (2015).

67. It was quite apparent from the evidence that I heard and from the documents, that the Respondent had not followed its own disciplinary procedure in the following respects:

    67.1 There was no informal consideration of the matter in accordance with clause 7.3, paragraph 1. The matter proceeded straight to a formal disciplinary hearing;

    63.1 The Claimant was not given the opportunity to hear in full the reason for the discipline, so that he could consider his response in accordance with clause 7.3, paragraph 5). The Claimant was told blandly that the allegation was to do with sub-standard work;

    63.2 There was no initial interview followed by provision of an initial statement in accordance with clause 7.3, paragraphs 4-6. The Claimant was called to a disciplinary hearing and subsequently told that he was summarily dismissed;

    63.3 There was no appeal process held in accordance with clause 7.4. The hearing was by paper review and Mr Lukes did not believe the outcome would have been any different even with a hearing;

68. The process followed was also in breach of the ACAS Code of Practice which employers are expected to follow as a bare minimum in disciplinary matters. In particular, paragraph 5 relating to investigations, paragraph 9 as to notification of the disciplinary issue with sufficient information about the alleged misconduct or poor performance to enable to employee to prepare to answer the case at a disciplinary meeting, normally including copies of any written evidence, paragraph 26 as to the need for an appeal hearing.

69. The Respondent should take care in future to have in mind the contents of both its own disciplinary procedure and the ACAS Code of Practice when taking disciplinary action against its employees.

70. In the circumstances I therefore find that procedurally the dismissal was unfair.

71. I then turned to consider the substantive fairness or unfairness of the dismissal under section 98(4) of the Employment Rights Act 1996. I also had regard to the test contained within BHS v Burchell (1979) IRLR 379, EAT relating to conduct dismissals. This requires me to consider the following:

    71.1 Whether the employer believed that the employee was guilty of misconduct;

    71.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    71.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

72. When assessing whether the Burchell test has been met, the Tribunal must also ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

73. In addition, I reminded myself that I must be careful not to substitute my own decision for that of the employer when applying the test of reasonableness.

74. The Respondent's investigation of this matter was not reasonable in the circumstances at the disciplinary hearing and on appeal. This brought into question the conclusions reached and its belief of guilt.

75. The Respondent did not reasonably look into or take account of the stated Claimant's lack of experience of undertaking the task involved in the Wagamama call notwithstanding his ten years' of IT experience both at the disciplinary hearing and on appeal. The Respondent appears to have assumed he should have known.

76. The Respondent did not reasonably look into or take account of the Claimant's stated belief that giving his understanding of her position within the company, he could rely on Ms Longergan as someone technically experienced that he could turn to for advice on how to proceed both at the disciplinary hearing or on appeal. In particular, the Respondent did not even to speak to her to confirm that the Claimant had approached her and the advice she had given.

77. The Respondent unreasonably concluded that the Claimant was guilty of misconduct on the basis that he had not completed the task that it required of him but without determining whether he knew or it could reasonably assume he

had known this both at the disciplinary hearing and on appeal.

78. It could therefore not have reached a genuinely held belief of misconduct and in this case something that it concluded amounted to gross misconduct (although I accept that the Respondent made the concession of making payment in lieu of the Claimant's notice period).

79. There has been no evidence that the Claimant had any previous disciplinary warnings and nothing to suggest it. At the time, the Respondent's only other concerns appeared to be as to his ill-health absence and his lack of billable time.

80. The Claimant was not offered any structured support or guidance in carrying out his duties and relied upon Ms Longergan in her role as he perceived it.

81. The Claimant was not apprised at the pertinent time of the concerns about the Wagamama call beyond the lack of billable hours, he was not given the opportunity to rectify the matter but instead it was given to Mr McGoldrick. The Claimant only found out of the Respondent's concerns when he was called to the disciplinary hearing itself.

82. I find that in the circumstances dismissal was not within the band of responses open to a reasonable employer.

83. I therefore find that on substantive grounds applying the test within section 98(4) that the Claimant was unfairly dismissed.

84. I then turned to the question of any reduction of any award of compensation that I make.

85. In Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal. In such cases, the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed.

86. I do not find this is a case where it is appropriate to make any reduction. Had the Respondent taken into account those factors I have identified above then is likely on balance of probability that the Respondent could not have reasonably reached the decision to fairly dismiss the Claimant. The Claimant had taken on a task, which although he was unfamiliar with what was required, had taken advice from a person he belief was competent to seek advice from. Whilst the Respondent found his work to be lacking, this was not something he was aware of at the time, he was given no indication of what he had done wrong before the disciplinary hearing and no opportunity to put matters right. These are not the circumstances where it is reasonable to dismiss.

87. Under section 123(6) of the Employment Rights Act 1996, where an Employment Tribunal finds the dismissal was to any extent caused or contributed to by any action of the employee, it can reduce the compensatory award proportionally as

it thinks fit. For this to apply the Claimant's conduct must have been culpable or blameworthy and caused or contributed towards his dismissal.

88. In Nelson v BBC (No 2) (1980) ICR 110, the Court of Appeal said that the following factors must be satisfied before a Tribunal should find contributory conduct:

    88.1 The relevant action must be culpable or blameworthy;

    88.2 It must have actually caused or contributed to the dismissal;

    88.3 It must be just and equitable to reduce the award by the proportion specified.

89. I find that the Claimant did not contribute to his dismissal. Whilst the Respondent found his work to be lacking, this was not something he was aware of at the time, he took what he believed was competent advice, he was given no indication of what he had done wrong before the disciplinary hearing and no opportunity to put matters right.

Remedy

90. I make the following awards in accordance with my findings and the figures within the Claimant's Schedule of Loss and Remedy:

    90.1 A Basic Award of £1437;

    90.2 A Compensatory Award comprising of: accrued loss of earnings for 2.5 weeks of £1018 (£1766.14 x 12 / 52 x 2.5); + pension loss of £301.80 (£75.45 x 4); + loss of statutory rights £400; + job seeking expenses of £50 = £1769.80;

    90.3 Under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 where an employer has unreasonable failed to follow the ACAS Code of Practice (1) Code of Practice on Disciplinary & Grievance Procedures (2015) a Tribunal has the discretion to increase the amount of the Compensatory Award by up to 25%. Given my findings as to the degree of failure by the Respondent in following the Code of Practice I have decided to increase the Compensatory Award by 25%. This means that the Compensatory Award is in the sum of £2,212.25.

91. The total award of compensation for unfair dismissal is £1437 + £2,212.25 = £3,649.25.

92. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.

93. In addition, I make a costs order of £1200 in respect of the issue fee of £250 and the hearing fee of £950 totally £1200 which I understand from the Employment Tribunal office the Claimant paid.

94. In summary, the Claimant is awarded £3,649.25 payable by the Respondent as compensation for unfair dismissal and his costs of £1200 making a total of £4,849.25.

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Employment Judge Tsamados
Date: **14th April 2017**