EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114331/2019 Hearing Held at Glasgow on 22, 23, 24, 25 and 29 November 2021

Employment Judge: M A Macleod

James McQuilken	**Claimant** **Represented by** **Mr A McIntosh** **Solicitor**
W & M Watson Packaging Limited	**Respondent** **Represented by** **Mr R Lyons** **Employment Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal succeeds; that the award should be uplifted by 10% to reflect the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures; that the award should be reduced by 25% on the basis of the claimant's contributory conduct; and that the respondent is ordered to pay to the claimant the sum of ELEVEN THOUSAND ONE HUNDRED AND THIRTY FOUR POUNDS AND EIGHTY FIVE PENCE (£11,134.85) in respect of his unfair dismissal by the respondent.**

2. **The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £8,673.72 (after**

25% reduction) and relates to the period from 22 August 2019 to 24 January 2020. The monetary award exceeds the prescribed element by £1,279.88.

REASONS

3. The claimant presented a claim to the Employment Tribunal on 12 December 2019 in which he complained that he had been unfairly dismissed by the respondent, and unlawfully deprived of payments to which he was contractually entitled.

4. The respondent submitted an ET3 response form in which they resisted all claims made against them by the claimant.

5. A Hearing was fixed to take place at the Glasgow Employment Tribunal Office commencing on 22 November 2021.

6. The claimant appeared at the Hearing, and was represented by Mr McIntosh, his solicitor. The respondent was represented by Mr Lyons, Employment Consultant.

7. The parties presented an Agreed Bundle of Productions to the Tribunal, to which reference was made throughout the Hearing.

8. The claimant gave evidence on his own account. In addition, the following witnesses also gave evidence to the Tribunal:

   - William Scott (known as Billy Scott), Sales Director;
   - Alison Macauley, Buyer;
   - Mark Esdale, IT Service Manager;
   - Catherine Bentaleb (known as Kate Bentaleb), Salesperson;
   - Louise McGowan, Buyer and Administrator;

- Christopher Kelly (known as Chris Kelly), Managing Director;
- William Armitage, Sales Director;
- Andrea Parsonage, Salesperson, and
- Richard Lyons, Employment Consultant.

9. Other than the evidence of Mr Esdale and Mr Lyons, the evidence in chief of each witness was presented by way of witness statements, and witnesses were subject to cross-examination in the Hearing before me.

10. In the course of the Hearing, Mr Lyons sought the permission of the Tribunal to add to the joint bundle a copy set of handwritten notes of his meeting with Ms Parsonage, to which no objection was taken by Mr McIntosh.

11. A Joint Statement of Agreed Facts was produced (36Lff), which was taken into account in finding the facts in this case.

12. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

13. The claimant, whose date of birth is 11 December 1958, commenced employment with the respondent on 10 February 2017, having previously worked for MacFarlane Packaging, another packaging company, and having experience of sales within the packaging sector for some years. His role was as a Salesman.

14. The respondent is a packaging company based in Glasgow. Christopher Kelly is the respondent's Managing Director. For some time he operated within the business along side his brother, Kevin Kelly, but following a disagreement between the brothers, Kevin Kelly left the business. The respondent employs approximately 45 staff in its Head Office and warehouse at 133 Barfillan Drive, Glasgow.

15. The respondent presented the claimant with a formal job offer on 20 February 2017 (51), in which the claimant was offered the position of Salesman, with a basic salary of £35,000 per annum, with a car allowance and a mobile phone.

16. The offer went on:

"The premise of your new role would be to deliver new business:

Sales: we understand that every salesman has a different skillset, with some being good at new account opening, whilst others are better at account management. However, it is important to stress your role would not involve any account management of any of the groups existing customer base. Your job would be to deliver new business, which you could then account manage. To that end, your performance would be evaluated on what business you bring either directly or indirectly. That means the new business does not have to be 'landed' by yourself, as long as you can draw a clear line that shows you had an input. Therefore, should you assist either through advice or lead generation in landing any new business, the company would acknowledge this as originating from yourself."

17. The letter went on to say:

"Through our conversations, it is my firm belief you would fit in well with the existing sales team at Watsons. As a company, we avoid giving individual's (sic) sales targets, in preference to providing more global figures to be achieved by the team. We believe firmly in the collective over the individual, allowing each sales person to play to their core strengths. However central to you coming on board is that you understand you will be expected to achieve sales that cover the cost of your employment."

18. In his witness statement, the claimant said that he understood the post to be "an external salesman" (paragraph 4); Mr Kelly did not accept that, in evidence. It is not entirely clear what the claimant meant by the phrase, other than to emphasize that he was to be out of the office visiting customers and potential customers, in the same way as he had been

accustomed to working in his previous jobs. Mr Kelly was adamant in his evidence that the way in which the claimant and other sales staff were expected to work was by phone and email, with fewer visits to customers required. The sales team operated without dedicated sales support teams. Each received a salary and worked together with the team in order to achieve a group bonus payment.

19. In addition, the claimant stated that he did not understand, on his arrival, that he had to process sales through the Sage computer system. Again, Mr Kelly was adamant that from the start of his employment, he was required to do so, and that it was expected of all sales staff that they would be familiar with the Sage system so as to input details of sales therein.

20. An example of a sales form was produced (44B). On 22 March 2018, the claimant recorded that he had received an order from McAuslan Crawford, noting the postcode and telephone number of the business. He noted that the order had been taken by him, at 1615 hours. He confirmed the cost price as £1.88/K, and the product as "LABTT4634 46X34 Thermal Transfer Label"; the quantity was 80,000, and the sell price was £1.88/K.

21. The claimant maintained that when he completed that form, he would hand it to the administrators who would then process it on to the Sage system.

22. The claimant was shown how to use Sage by Peter Campbell, one of the other sales staff in the office, when he arrived. He was able to have access to the system, in particular to look up the price of a particular item in order to quote it to a customer inquiring about a purchase. Catherine Bentaleb also confirmed in evidence that the she had shown the claimant at least twice how to process an order on Sage. The claimant was not confident using the computer system but was able to use it.

23. Each member of sales staff based in the Glasgow office of the respondent had a standardised IT set up, with their own PC, email account and Sage account. They are given a username and password for use on their PC. All sales staff, including the claimant, have their PC set up in the same way to allow them access to the Sage system.

24. Between February 2018 and early 2019 the respondent instructed sales staff not to process the orders on the system, but to pass them to the administrators Chloe and Louise to do so. The reason for that was that Kevin Kelly, one of the then directors of the respondent, was concerned that too many errors were being entered on the system by sales staff, and decided that the processing should only be done by the administrative staff.

25. However, in early 2019, the respondent determined that sales staff should once again be involved in processing orders, including the claimant, and advised them that this would be the case. On 1 February 2019, there was a meeting of the sales staff with Mr Chris Kelly, in which it was stated that "all quotes must be processed on sage" (45), in a note taken of that meeting, at which the claimant attended.

26. At that meeting, the claimant was not specifically instructed to restart processing of orders on Sage. On 2 April 2019, Kevin Kelly emailed the sales and administrative staff, including the claimant, and in that email said *"That way when Chloe and Louise go to process the order, they have all the details they require to hand…"*

27. In January 2019, and on other occasions, Chris Kelly had cause to speak to the claimant about the amount of time spent out of the office. He was of the view that the claimant was making unnecessary visits to customers and as a result his mileage expenses claims were much higher than other sales staff. The claimant did not like spending time in the office and considered that the best use of his time was to be out with customers on site maintaining the contracts and building his relationships with them.

28. On 29 April 2019, Mr Kelly issued an email to sales staff, including the claimant, advising that sales staff were not to carry out deliveries for the warehouse, as it was not a cost-effective use of their time (46).

29. On 13 May 2019, the claimant became unwell with a chest infection. He obtained and provided to the respondent a statement of fitness to work from his General Medical Practitioner, dated 13 May, advising that he was not fit for work from 13 May until 24 May 2019 (47A). He attended work on 20, 21

and 22 May, notwithstanding the terms of the fit note, but was unable to complete his day's work on 22 May, and Ms Bentaleb drove him to hospital.

30. He was then on holiday until 4 June 2019, when he returned to business.

31. Chris Kelly was concerned, during the claimant's absence, that his behaviour had become suspicious. The respondent provided the claimant with a company car, which, in April 2019, had had to be taken off the road due to mechanical problems. During his absence in May, the claimant telephoned to find out whether his car was now available. Due to his suspicions, Mr Kelly instructed the mechanic to tell him that the car had now been repaired. The claimant returned to work on 20 May, but, in Mr Kelly's view, when it became clear that the car was not in fact ready for use, went off sick again and then went on holiday.

32. Mr Kelly reviewed the claimant's mileage expenses for the previous 12 months, during his absence (77, 77A and 78). He concluded that the claimant was either fraudulently claiming for mileage not done or carrying out a number of unproductive visits wasting time. Mr Kelly's view was that the claimant was visiting customers excessively without any resultant purchases or income arising for the company.

33. When the claimant returned to the office on 4 June 2019, he was asked to attend a meeting with Mr Kelly in the presence of his line manager, Mr Scott. No notes were taken of this meeting. Mr Kelly asked the claimant why he was visiting customers so frequently, and showed him a breakdown of his mileage expenses. The claimant was annoyed by this and became angry, and asked why he was being accused of something. Mr Kelly explained why he was concerned, and told the claimant that he was to be chaperoned to meetings with customers by Mr Scott for the next month, in order to assess where he was "going wrong" with visits. The claimant was very unhappy at the suggestion that he should be chaperoned.

34. Mr Kelly also asked the claimant about his refusal to process invoices. The claimant said that he did so, but that he was out on the road so often that it

may appear that he did not. He also said that he was out a lot helping the warehouse with deliveries.

35. On 5 June 2019, Mr Scott met with the claimant to discuss his use of the CRM and processing of invoices. He told him to keep his head down and any concerns he had with the system would soon blow over. Mr Scott formed the impression that not only did the claimant not like processing invoices, but that he also considered that this was not part of his duties.

36. Mr Scott made it clear to the claimant in that discussion that he required to process orders on the computer system. The claimant suggested that this was the first occasion upon which he had been told to process orders in this way, and that he told Mr Scott that he would get very stressed trying to use the computer system. His evidence was that Mr Scott then told him that this was just a matter being raised by Mr Kelly, and that he should not worry about it as it would blow over. Mr Scott's evidence was different: he said that the claimant told him he was worried that he would lose his job because his sales were down, and that he needed to increase his sales by travelling to see customers. Mr Scott said that the claimant was "known for making this stuff up" to try and explain why he was never in the office, and that he told him to keep his head down, stop the nonsense and that any concerns he had would soon blow over.

37. On the balance of probabilities, I prefer the evidence of Mr Scott about this meeting. I considered that the concern about the claimant's travel was one which had been clearly raised with him before, and that his mileage claims had already been brought to his attention. I do not accept the claimant's interpretation that Mr Scott was telling him, in effect, that he could ignore Mr Kelly's instruction as it would blow over, but that Mr Scott was instructing him to stop travelling from the office so much and to get his head down in the office, which would then result in his concerns about his sales figures receding.

38. In addition, a printout of the claimant's sales orders and quotations, recorded on the computer system, was produced to the Tribunal (96/7). In

my judgment, it is clear from those records that the claimant, contrary to his evidence before the Tribunal, had entered sales orders and quotations on the computer system on a number of occasions prior to June 2019. From 2 August 2017 until 4 October 2018, 33 sales orders are recorded as having been entered by the claimant on the system. There was then a gap until March 2019, when 6 further sales orders were processed on the system, and 4 more in June 2019.

39. The claimant had two explanations as to why this might be. Firstly, he suggested that someone else had used his username and password to log in on his computer to process sales orders. I reject this suggestion. There is no reason why any other sales person would require to log in to his computer, and if they did, why they would not simply log in using their own username and password. The IT manager, Mr Esdale, advised that passwords were not shared, and the other sales staff did not accept that passwords were kept on sticky notes left on computer screens so as to be shared with others. I am not persuaded that the claimant's password was readily available to others, but further it is entirely unclear why any other sales person would wish to be identified as the claimant when processing a sales order.

40. Secondly, the claimant suggested that there were customer accounts managed by particular individuals, and that his name appeared against his accounts when sales orders were processed for them. Mr Kelly contradicted this evidence, and confirmed that sales orders were processed in the name of the sales person who had taken the order. He stressed – and I accepted this – that sales targets were allocated to the entire team, and not to individuals, and therefore there was no need for sales staff to be territorial about particular customers or sales.

41. In addition, it was the clear evidence of Mr Esdale that the sales staff who had processed sales orders on Sage up to the claimant's departure in 2019 included Alison MacAuley, Billy Scott, Chris Kelly, Catherine Bentaleb, Peter Campbell and the claimant, and others. I accept this evidence as accurate.

42. On 12 June 2019, a further meeting took place between the claimant, Mr Scott and Mr Kelly. The claimant had asked for the keys to the company car in order to visit customers, but had not checked with Mr Scott that he was available to chaperone him. By that date, Mr Scott had attended two customer visits with the claimant, albeit that the claimant was very unhappy that he had done so. The claimant said that the reason why Mr Scott was not attending was because he had suffered concussion playing football the night before. Mr Scott had not suffered concussion, and on that morning had driven some distance to attend the office without having any concern about his ability to do so. The claimant accepted that he had been "chancing his arm" about this.

43. The claimant remained upset and angry, and believed that he was being accused of something. Mr Kelly stressed to him that he was not being accused of anything, but that he was not satisfied with the reasons he gave for visiting customers, and said that he should remain in the office for the rest of the day, making sales calls and processing orders. The claimant said that he felt sick, got up and walked out of the office. Mr Scott and Mr Kelly waited for about 5 minutes, and then Mr Scott went to the claimant's desk, where he was sitting, and asked him to return to the meeting. The claimant agreed to do so.

44. When he returned, the claimant said that he had gone to the toilet to be sick. Mr Kelly asked the claimant why he was intending to visit the same customer again, and told him that he would still be expected to process orders and be chaperoned. Mr Kelly stressed that the claimant was not being asked to do anything different to other sales staff. The claimant became angry again, and said to Mr Kelly and Mr Scott that he had "had enough of the crap", and that he was "out of here, I can't take this any more". He then left the office.

45. Both Mr Kelly and Mr Scott formed the view that the claimant intended to resign when he left the office. In their evidence, they both state that the claimant said something to the effect that they could "shove their job" or that he was quitting.

46. The claimant passed Catherine Bentaleb as he left the main office and said "see you then, I've had enough of this, that's me away", or words to that effect. Ms Bentaleb considered that the claimant was saying goodbye to her. She heard him telling other staff that he was leaving and would not return to the office.

47. After he left the meeting, the claimant made to leave the building. Mr Scott followed him and told him that he thought the claimant was being stupid, and that it was not worth walking out on his job. He suggested that the claimant should come back in to the office, but the claimant was very angry and upset, and declined to do so. He asked if the claimant was sure he was leaving, to which the claimant replied that he was. Mr Scott then asked him to give him the company mobile phone, which the claimant said was in his desk drawer. Mr Scott confirmed that he would advise Mr Kelly that the claimant had decided to leave the company, but that he could contact him by telephone if he wanted to speak further.

48. When Mr Scott checked the claimant's desk drawer, he found no mobile phone. He received no phone call from the claimant. The claimant's evidence was that he attempted to call Mr Scott that day with his company mobile phone – which he retained – but found that it had been cut off by the respondent and so was unable to speak to him. He did not attempt to call from any other phone available to him.

49. On the following morning, 13 June, the claimant attended at the house of Louise McGowan at approximately 7.45am. Ms McGowan was surprised to see him. The claimant handed his mobile phone to her and asked her to hand it to Mr Scott as "I won't be going back there". She asked him why, and he said that it was because he had had enough of the place. When she asked him how he was feeling, he said he was fine, but that he had had his fill of the place and was disappointed with himself and how things had finished. He then left. Ms McGowan was left with the clear impression that the claimant had left the employment of the respondent.

50. She provided the mobile phone to Mr Kelly on her arrival at work that morning. He switched the phone on and found that its contents had been wiped.

51. Andrea Parsonage, a long standing friend of the claimant who had known him before his employment with the respondent and remains close to him, was contacted by the claimant who told her that he had had a very bad meeting on 12 June with Mr Kelly. She then contacted Mr Kelly to suggest that he should meet with the claimant, and he agreed to do so on 17 June 2019.

52. The claimant attended at the respondent's office on 17 June, and met with Mr Kelly and Mr Scott. Kevin Kelly was also present. The claimant recorded the meeting, but did not disclose to the respondent that he was doing so. The Tribunal had the benefit of listening to the recording, and of reading a transcript of that recording (50ff). The transcript represents an accurate record of the meeting.

53. At the outset of the meeting, Mr Kelly asked the claimant how they could help him. He responded by asking how he could help Mr Kelly. The claimant suggested that Mr Kelly had initiated the meeting by speaking to Ms Parsonage, but Mr Kelly clarified that he had told her that if the claimant wished to have a conversation about what had happened, he was happy to do so.

54. He went on:

"Clearly it is always on a human level concerning that someone would hand their notice out and have gone somewhere without a job but in that respect it was more to cover off and I had not sought a conversation with you…so we are clear I wasn't looking for a chat with you, I was just certainly not, when somebody normally walks out of a company, especially in the nature you walked out on the company you tend to find the company turned round and says [makes noise] and I said no, on a human level, James is still a person who's worked here."

55. There followed a discussion in which the claimant suggested that he should have been allowed to have someone accompany him in the previous meetings which had taken place, and Mr Kelly disagreed. Mr Kelly then said:

"No last week again was a conversation about your work in which you then stropped off in a huff and said 'that's me, I'm leaving, I can't take this, I'm leaving' before saying goodbye to the people in the office and walking out. Last week was a conversation about your everyday work. That was a work conversation, not a disciplinary conversation, actually we were talking about why you were going out to see various customers. To which you stropped off on."

56. There followed a discussion between Chris Kelly and Kevin Kelly, and they left the room to continue that discussion. When they returned, the following exchange took place:

"CHRIS: So again to clarify Jamie your point.

JMCQ: Well you said my figures don't stack up, Chris.

CHRIS: That's right.

JMCQ: You say you run reports.

CHRIS: That's right.

JMCQ: You were getting quite aggressive when you were getting back to me on the Optical, not the Optical, the Wallace Cameron when I told you three times that I had checked this and you says 'I run the reports' and then it was getting louder and that is when I started getting a little bit agitated.

CHRIS: No again Jamie I then checked the figures and said nope Jamie you're right it is 80,000. Did I not Billy? Yes I said yip that is 80,000 you're right.

JMCQ: You didn't even apologise.

CHRIS: No you're wrong, I think you'll find I did. I said you're right Jamie, sorry you got that one right.

JMCQ: No you didn't. You just said you're right Jamie, you got it right.

CHRIS: And so that's why you walked out the company?

JMCQ: I said to you I'm feeling sick here and I said I need to go to the bathroom right, and I came back and then you said to me, 'that was stage managed' and that's when I went, 'That's it'.

CHRIS: I'm not convinced that's what actually happened Jamie I think if you backtrack down again we had the conversation again in which, I can't remember the finer details of the conversation, to which you said 'I'm feeling some stress coming on', and I said, 'Well, that feels very staged to me Jamie' and you said 'I'm definitely feeling stress coming on, that's it, I'm leaving.'

JMCQ: I didn't say that.

JMCQ: I didn't say 'definitely'.

CHRIS: Well on that basis Jamie unfortunately it's your word against mine and Billy do you recall the nature of what happened at any point?

BILLY: I remember Jamie saying he felt sick and he went to the toilet and came back, he said he was feeling sick and wanted to go home.

JMCQ: Now Billy didn't repeat what you said. He didn't mention stress once there."

57. Mr Kelly then asked "where are we going here?" The following exchange was then recorded:

"JMCQ: Right. Is there a job for me here? Under a zero conditions out of all this chaperoning, I'm not happy with that one iota.

CHRIS: No. But you mean you're doing… So you've walked out on your job.

JMCQ: Yeah.

CHRIS: There's not a… No I'm not looking to re-employ you.

JMCQ: That's fine. Billy came after me and told me twice to rethink about it.

BILLY: I tried to get you to come back. When you walked out the gate.

JMCQ: Yes and I said you, you said, 'Think about it and give me a call'.

BILLY: That I really wanted you to come back in, Jamie.

JMCQ: Yes I know you did.

BILLY: (Inaudible) I said 'Come back in.'

JMCQ: You're 100% right. But I was in no fit state to come in. So if there is no job for me then I think we'll just call it at that and I'll just go and I'll see what I've got to do.

CHRIS: But we're all in agreement, you walked out. You walked out the company. Yes?

JMCQ: I had a change of mind at the gates when Billy spoke to me and I said 'I will think about it and I will call you.' and then, you cut the phone off. You got the phone cut off.

CHRIS: No it wasn't at the gates, your phone didn't cut off for some substantial time after that.

JMCQ: No no no.

CHRIS: Because I did call you and you [inaudible].

JMCQ: I didn't say, I didn't say, I didn't' say that you had cut the phone off at the gate. I said when I left and I said to Billy, 'I will call you this afternoon.' And then I says later on in the afternoon, probably I think the phone got cut off about 2 o'clock or something like that.

CHRIS: So for clarity, okay. Are you saying you handed your notice in and walked out the other day?

JMCQ: I never said to you I was handing my notice in…

CHRIS: Right so you didn't hand your notice in, so, that's fine. On that basis, we'll take legal advice on it, but I suspect then at this point, what was… what happened then the other day?

JMCQ: As in what?

CHRIS: What happened when you walked out?

JMCQ: I went home.

CHRIS: So it was just a sick day we're saying?

JMCQ: Whatever you want to call it Chris.

CHRIS: Right so you're saying, again, so, all I can do now is take employment advice. Moving forward you are operating on exactly the same basis as we have discussed. I have to take advice now from an employment company on where it stands. In terms of moving forward I suspect that we are in a position that having not received a full handing your notice in, then I'll take advice on it, but nothing's changed in terms of then how you're being managed. So a) you would have to process orders in exactly the same way as every single member of the sales team, fill out all the various paperwork that they all fill out and at the moment you're not going to see any customers unless someone's with you.

JMCQ: Well for clarity when I got an interview for this job there was no mention of me processing orders etc etc. I was hired as new business.

CHRIS: So you were hired as one of the sales team and all the sales team process orders, are you saying to me you're not prepared to process orders? Because that's part of the sales team role. We didn't go through…

JMCQ: You never said to me once that I would have to process orders.

CHRIS: But that is part of the sales team's function Jamie so therefore are you saying you are not prepared to do… what they do?

JMCQ: What I'm saying to you is I was employed as an external sales person.

CHRIS: No Jamie you were employed as a sales person.

JMCQ: External Chris…

CHRIS: No Jamie, you're employed to do sales and the same as every other sales person. So you're not being asked to…

JMCQ: Did you tell me Chris when you interviewed me that I would be doing order processing? Did you? No you didn't.

CHRIS: We told you you'd do sales and that is part of the sales function in the company Jamie.

JMCQ: External sales.

CHRIS: Okay look Jamie this is categorically then. Are you saying that you don't process orders? Because what you're saying is you are not performing your job then in which case you are technically being suspended until such time as we can determine how this goes because filling out the orders is a sales function, it's the same as every other sales person, every other sales person in that room.

JMCQ: Then why don't you ask the sales persons if they are happy with it?

CHRIS: Sorry Jamie again now you're moving in a different direction. It's irrelevant to me whether the sales people are happy doing that, okay? What they are doing is part of their sales role. Therefore are you not prepared to do that?

JMCQ: No.

CHRIS: That's fine.

JMCQ: No and I'm not prepared to be chaperoned.

CHRIS: Right but we don't even need to get to that point Jamie because you are not prepared to perform the same basic function, sales function, that everyone performs. So on that basis we will suspend you at the moment okay? You'll get a letter out but at this stage if you are not prepared to do or perform the same function as everyone else that does sales in there, then clearly you are not prepared to do your job. That's an issue for the company.

JMCQ: That's fine."

58. The meeting ended at that point.

59. The claimant understood that following that meeting he was suspended from duty by the respondent.

60. On 21 June 2019, he emailed Chris Kelly to say that *"Further to our meeting on Monday 17th June with Billy Scott and Kevin Kelly present you notified me that I was suspended and that a letter would be sent to me regarding this situation. As of today this has not been received, can you please send this as soon as possible."* (59)

61. Mr Kelly replied that day (59):

"Hi James.

No, you appear to be slightly misguided.

Last week you walked out the company announcing you had left, handing your phone back to the company and saying your goodbye to staff etc sighting (sic) stress as the basis for your departure. Following this you requested I meet you for a chat before arriving on Monday morning and then insisting it was the other way around. I am not clear as to where this confusion came from, as I explained in the meeting.

At the same meeting you advised that you had not in fact left the company and was off sick with stress. I advised on your return you would be required

to fill out sales orders etc in the same manner as everyone else and that your performance was such, that you were now under supervision on customer visits. You told me that was stressful and you wouldn't be prepared to do that. I advised that failure to do as you are being asked would most probably result in disciplinary.

You then left the company again.

As it stands you are current off sick.

Thanks.

Chris"

62. Mr Kelly believed that by confirming this to the claimant it would allow him to return to work should he wish to do so.

63. The claimant did not return to work.

64. On 7 August 2019, Stacey Gavan of the NHS Money Advice and Welfare Rights Project at Castlemilk Citizens' Advice Bureau emailed Mr Kelly (60) to attach a letter of grievance dated 5 August by the claimant (61).

65. The letter of grievance read as follows:

"Dear Chris Kelly,

I am writing in regards to the recent meeting we had on Monday 17th June where I was called into your office to discuss my work and where I was subsequently suspended until you spoke to the legal team to see where you went from there.

I emailed you on the 21st June as I was told at the meeting I was suspended and that a letter would follow in the post within a few days but I had yet to receive this. I received a response to my email from you claiming that I seem to have been misguided on what had actually happened and that as far as you where (sic) concerned I walked out claiming I had left the

company, handing back my work phone saying my goodbye to other members of staff.

It is then claimed by you that I requested a meeting and at this meeting claimed I was off on the sick due to stress and as far as it stands I am currently off sick.

This is not that case of the meeting as due to nature of the way I was called in for a meeting and having no one as my witness I recorded the meeting for my own peace of mind and it clearly states on my recording that I have been suspended and a letter will follow in the post. There was no minutes of the meeting took I have not been contacted by HR regarding my absence from work or as you state my sickness in order to receive sick pay, discuss my sickness or to hand in a medical certificate.

I have had no payment of wage from the 19th June as there seems to be this dispute about the reason I am off when I have a clear recording of you stating I am at the moment suspended and a letter will follow. I have had no income and would like my payment of wage as I have been unable to return to work due this disagreement I will forward the recording if you still dispute this matter.

Yours sincerely,

Mr James McQuilken"

66. Mr Kelly did not respond to that email or the grievance. In his evidence, he said that he had not noticed the email arriving, though he accepted that it had been received.

67. On 19 August 2019, he emailed the claimant (62):

"James,

Please note that as yet we still have not received any correspondence as to the reason for your continued absence following the email below, [a reference to his earlier email of 21 June] which I assume is because, as initially stated by you to all staff and myself on the date you walked out, you

have chosen to leave the company and your failure to return is not illness related.

Again, I cite your conversations with staff, which I appreciate are second hand following which you wiped your company phone of all details and contacts before handing it back to Louise advising you will not be back.

Likewise conversations with Andrea where you have made mention of looking for a 'pay off'.

As far as the company is concerned you have made it crystal clear, you will not be prepared to process orders and sit at a desk like the rest of the sales staff, your failure to correspond to the below email leaves us none the wiser.

As it stands you are now entitled to a tax refund on your wages, so we need to bottom this out.

Would you like me to issue a P45 and process the tax refund through your final months wages at the same time.

Regards,

Chris"

68. The claimant replied to that email on 20 August, referring to his earlier email of 7 August, to which he had had no reply (63).

69. Mr Kelly then responded, having found the email of 7 August and the attached grievance, on 20 August (64). He reiterated the respondent's position that the claimant had walked out on them, and that he was not suspended. He concluded by saying: *"It appears evident to me that you have no intention of returning, not least because you wiped your phone of all contacts and messages before handing it back, told all staff you were leaving, advised Louise you would never be back, told Andrea you would like a 'pay off' etc. thus my email yesterday was to ask if you would like me to issue a P45 at this stage as you had not replied to my email of the 21st of June and it was my belief that we need to draw a line under it and also that you have a tax return that I assume you would like to receive."*

70. It is understood that Mr Kelly meant to refer to a tax refund, rather than a tax return.

71. The claimant replied on 21 August (65):

"Just to clarify, my reason for not being at work was not because of sickness but what you clearly stated on June 17th with Kevin and Billy present that I was suspended subject to the company seeking legal advice and a letter would follow in due course, this did not materialise. I emailed you to this effect on the 21st of June and you duly replied that as it stands you are off sick, surely if you are off sick for a period of time someone from the HR department would make contact to ask were (sic) your sick lines are and make sure that you are ok. I was not contacted once. Your email from 19th of August also confirms that my absence was not illness related. Can you please send me the reasons for my suspension, I am also looking for payment of wages lost since June 17th due to this ongoing suspension. I do not require my P45 to be sent to me as I am suspended and therefore still employed with the company subject to any grievance procedure. All money due to me via a tax rebate should be deposited into my bank account forthwith."

72. Mr Kelly replied that day (66), reiterating that the claimant was not suspended, and that he had stated that the work he was required to do caused him stress and that he was not willing to do it. He queried why, if the claimant was not sick, he had not replied to the email of 21 June which had said that he was. He also pointed out that no sick pay would be paid unless the respondent were presented with a sick line. He confirmed to the claimant that *"As it stands James you are welcome to attend work if you feel fit enough to return."* Finally, he offered the claimant the opportunity to have a meeting if he wished to discuss the matter.

73. He also contacted the claimant by telephone, in order to discuss the matter further. The claimant reiterated that he was not ill, but that he was suspended, and that in the meantime he would not be returning to work owing to his unwillingness to process invoices or to be chaperoned. He

expected to receive full pay in light of his suspension. They agreed that it would be appropriate to meet, and accordingly a meeting was arranged for 22 August 2019. Mr Kelly emailed the claimant to confirm this (67).

74. The meeting took place at 11.30am on 22 August 2019. The claimant attended, and Mr Kelly, Allan Cochrane and David Harper were also present. Mr Harper took notes (72).

75. It was recorded that the claimant said that he felt sick (at the meeting with Billy Scott and Chris Kelly) but that it was not job related. Again he and Mr Kelly disagreed about whether or not he had been suspended.

76. It was then noted: *"Chris asks James whether James had previously claimed he would not process orders at the previous meeting and reminds him that his job includes answer phone and processing orders. James was also told he was to be chaperoned as a result of the frequency he was visiting clients that did not place orders, citing 30 visits to one customer with only a modest level of orders in return."*

77. The note records that:

"Chris asks James if he is prepared to check with him for approval before he goes out to visit clients.

James does not answer the previous question but again stresses that he will not process orders, saying 'I will definitely not process orders'

Chris suggests if James is not prepared to process orders then his job would have to be terminated."

78. After asking whether the respondent had an HR department, and being told that they did, the claimant is noted to have left the meeting.

79. Mr Kelly then wrote to the claimant on that date (73):

"Dear James,

Thank you for attending today's meeting on Thursday the 22nd Aug 2019 to discuss your recent absence from work.

From the company's perspective this had been clarified on an email dated the 21st of June 2019 clarifying that you were regarded as being off sick with stress. The detail within this debate was not bottomed out.

During this meeting there was a discussion held relating to the tasks you were expected to undertake upon your return to work, namely answering calls and processing orders. These tasks are in line with the rest of the Sales Team and the functions they undertake as part of their role. You then stated several times that you would not be processing orders, despite this being outlined as a key function of your job.

Due to the importance of the situation I explained to you that if your (sic) refusing to carry out the tasks that made up the role then it would mean the only outcome could be termination of employment. You accepted this as the outcome if you continued to refuse to process orders, but you reiterated that you would not be processing orders.

Sadly, at this juncture it was felt there was no other choice but to terminate your employment with immediate effect.

Please find enclosed a copy of your P45 and the company wishes you well in your future endeavours.

Yours sincerely,

Allan Cochrane"

80. Allan Cochrane was the respondent's HR Manager.

81. The claimant's P45, attached to that letter, gave the final date of employment as 22 August 2019 (75).

82. Following the termination of the claimant's employment, he applied for Universal Credit, and received payments in this regard from 19 September 2019 (£457.43) at varying amounts (set out 240/1) until the date of the

Employment Tribunal Hearing. Since January 2020, the claimant has been unfit to attend work.

Submissions

83. For the respondent, Mr Lyons' primary submission was that the claimant resigned on 12 June 2019, and that if that is so, the claim is out of time, and that it was reasonably practicable for the claimant to have presented the claim in time to the Tribunal. The claimant knew he had resigned and everything that followed amounted to an attempt to extort damages through this claim.

84. Referring to the case of **Sothern v Franks Charlesly & Co [1981] IRLR 278** Mr Lyons submitted that the Tribunal should not find, in this case, that there were exceptions to the rule about the use of unambiguous words. It is necessary to look at the surrounding circumstances, and consider how a reasonable employer would have interpreted the words used.

85. The claimant used clear words on 12 June 2019, both to Mr Scott and Mr Kelly in the meeting, to his colleagues as he left the office and again to Mr Scott at the gate. In addition, he told both Andrea Parsonage and Louise McGowan that he was leaving the respondent. He handed back his mobile phone, which was his "bible", containing all of his contacts, which had been wiped.

86. The Tribunal may only consider whether there were special circumstances if it is persuaded that there was doubt on whether the claimant intended to resign.

87. This was not a heat of the moment resignation. It was a straightforward resignation.

88. The respondent repeatedly left the door open to the claimant to return, which is why the meeting of 17 June took place. The claimant's persistent reliance on the respondent's reference to suspension is disingenuous. Mr Kelly said he did not know where he stood legally at that point and would need to check. The claimant did nothing for 6 weeks, and confirmed in his

telephone call with Mr Kelly on 21 August that he had been advised to sit tight. Mr Lyons described this as “outright deception”, and if the claimant should benefit from that deception it would ride a coach and horses through the public perception of fairness.

89. Although resignation may give rise to a claim for constructive dismissal, Mr Lyons argued that no such claim has been made in this case.

90. If the Tribunal does not find that the claimant resigned, then the claimant must have continued in employment with the respondent. He was not sick – this was a device by Mr Kelly to leave the door open. The claimant said he was stressed. He was absent without leave, deliberately staying away from work. Mr Kelly did not know he was being recorded at the meeting of 17 June. This was cynical manipulation by the claimant.

91. If the claimant was still employed after his apparent resignation, the end of the relationship came on 22 August 2019. The meeting on that date was not a disciplinary hearing – if it had been, the proper process would have been followed.

92. This is, he submitted, an exceptional case in which going through any form of process would be futile.

93. The claimant repeatedly refused to process orders via Sage. It was a reasonable instruction by Mr Kelly that he should do so, and if an employee refuses to comply with a reasonable instruction, that amounts to a dismissal on the grounds of some other substantial reason, as the relationship has fundamentally broken down.

94. Mr Lyons argued that any compensation should be reduced on the grounds of the claimant’s culpable and blameworthy conduct prior to his dismissal.

95. For the claimant, Mr McIntosh made an oral submission.

96. He argued that there was no resignation in this case. The claimant was agitated at the meeting, which should have raised doubt in the minds of the respondent about what the claimant was saying to them.

97. There were heated words at the meeting of 17 June, and the claimant left in an agitated state, though there is a dispute as to what was actually said. He commended the claimant's account to the Tribunal. The words used were ambiguous and required clarification. At the meeting of 17 June, Mr Kelly asks for clarification about what the claimant intended, and the claimant confirms that he did not hand in his notice. That clarified the matter. Thereafter both parties acted inconsistently with the claimant having resigned. The respondent said he was suspended, and then that he was on sick leave. The P45 says that his termination date was 22 August 2019.

98. With regard to the disciplinary procedure, there was no investigation. The issue of processing order forms did not arise until 17 June and the claimant was peremptorily sacked on 22 August. Mr Kelly did not consider carrying out an investigation, and he did not ask the claimant why he was refusing to process orders.

99. Mr McIntosh suggested that an investigation would have uncovered a number of facts which Mr Kelly did not know, or did not take into account, by asking, for example, who was actually carrying out the processing of orders in June 2019, what issues relating to training arose and what instructions had been given by the respondent to sales staff over the previous months in this regard.

100. There should have been an investigatory meeting, as well as a disciplinary meeting, but here there was only a disciplinary meeting. When the claimant was invited to attend the meeting of 22 August, he was told the purpose of the meeting was to discuss his absence, not a disciplinary issue.

101. No right of appeal was given to the claimant following dismissal. There was no chance given to him to explain his position in relation to what had happened.

102. There should be no reduction for contributory conduct as the claimant was asking for what he was legally entitled to.

The Relevant Law

103. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case."

104. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **Burchell** and **Iceland Frozen Foods Ltd**, to which we were referred by the parties in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

105. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that

belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

106. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds the Tribunal that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

107. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

108. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*
>
> *(1) the starting point should always be the words of S.57(3) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

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

109. In the case of **Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183**, the issue of whether an employee had used unambiguous words to convey his intention to resign from employment was considered. In that case, an employee, angered by being issued with a written warning, walked out and told his employers subsequently that he would take them to an Employment Tribunal. The Employment Tribunal found that the employer had a duty to check that the employee's true intention was to resign, and that since they had not done so, the dismissal was unfair. On appeal, the Employment Appeal Tribunal found that the Tribunal had imposed to high a burden on the employer by saying that they always had a duty to ascertain an employee's true intentions. Ordinarily, an employer is entitled to rely upon unambiguous words of resignation, but where special circumstances exist an employer should allow a reasonable period of time to elapse during which facts may come to light casting doubt on the original interpretation of those words.

110. I was referred to the judgment in **Willoughby v CF Capital PLC [2012] ICR 1038**, addressing the question of special circumstances and

providing a useful summary of the law relating to unambiguous words of resignation.

Discussion and Decision

111. The issues for determination by the Tribunal are set out in the Note following Preliminary Hearing issued by Employment Judge Hoey (38Aff). I have adjusted the order of the issues but otherwise maintained their terms as set out therein.

112. The issues are:

Unfair Dismissal

1.1 Was the claimant dismissed?

1.2 What was the reason or principal reason for dismissal?

1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

1.3.1 there were reasonable grounds for that belief;

1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.3.3 the respondent otherwise acted in a procedurally fair manner;

1.3.4 dismissal was within the range of reasonable responses open to a reasonable employer in all of the circumstances of this case.

Remedy for Unfair Dismissal

1.4 The claimant seeks compensation only. If there is a compensatory award, how much should it be? The Tribunal will decide:

1.4.1 What financial losses has the dismissal caused the claimant?

1.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.4.3 If not, for what period of loss should the claimant be compensated?

1.4.4 Could the claimant have been dismissed fairly anyway, if a fair procedure had been followed, or for some other reason?

1.4.5 If so, should the claimant's compensation be reduced? By how much?

1.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.4.7 Did the respondent or the claimant unreasonably fail to comply with it?

1.4.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%?

1.4.9 If the claimant was unfairly dismissed, did he cause or contribute to the dismissal by culpable and blameworthy conduct?

1.4.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.5 What basic award is payable to the claimant, if any?

1.6 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Time Limits

1.7 Did the claimant's employment end on 12 June 2019 when the respondent argues he communicated his intention to resign with immediate effect on 12 June 2019 (which is disputed by the claimant)?

1.8 Was the unfair dismissal claim lodged within the time limit required under the Employment Rights Act 1996? The Tribunal will decide:

1.8.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

1.8.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.8.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it presented within such time as the Tribunal considers reasonable?

113. It is necessary, then, to address these issues in turn.

a. Was the claimant dismissed?

b. Did the claimant's employment end on 12 June 2019 when the respondent argues he communicated his intention to resign with immediate effect on 12 June 2019 (which is disputed by the claimant)?

c. What was the reason or principal reason for dismissal?

d. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

i. there were reasonable grounds for that belief;

ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

iii. the respondent otherwise acted in a procedurally fair manner;

iv. dismissal was within the range of reasonable responses open to a reasonable employer in all of the circumstances of this case.

114. I have introduced issue 1.7 into the issues under unfair dismissal as it is clearly related to the question under 1.1, namely whether the claimant was dismissed. The Tribunal must determine whether the claimant resigned on 12 June 2019, or was dismissed on 22 August 2019.

115. This is a critical question. It is appropriate, in my judgment, to consider the circumstances of the claimant's departure from the office on 12 June and also the surrounding and subsequent circumstances arising.

116. The claimant has sought to convey to the Tribunal in his evidence that while he left the meeting with Mr Scott and Mr Kelly, twice, on 12 June 2019, the first time was to be sick as he was so stressed, and the second time was to leave in order to go home.

117. The claimant's evidence has resolutely asserted that he did not hand in his notice or say, in express terms, that he was "quitting" or "resigning".

118. In evidence before the Tribunal, the claimant was somewhat evasive and argumentative, under cross-examination. He developed a habit of simply repeating certain phrases in order to reinforce his point, rather than addressing the particular question put to him.

119. As a result, I found it necessary to treat the claimant's evidence with a degree of caution. I am not persuaded that his evidence was entirely reliable, particularly when it was contradicted by the evidence of others within the office.

120. It is necessary, when seeking to determine whether or not the claimant's actions amounted to a resignation on 12 June 2019, to take account of the facts which I have found, and which assist in reaching a conclusion in this matter.

121. Both Mr Scott and Mr Kelly said that when the claimant left the office on the second occasion on 12 June, he said that he had "had enough of the crap", and that he was "out of here, I can't take this any more".

122. They were both convinced that his manner and his words were seeking to convey his intention to leave.

123. In their evidence, they both state that the claimant said something to the effect that they could “shove their job” or that he was quitting.

124. In my judgment, neither Mr Scott nor Mr Kelly were absolutely clear, in their evidence before me, that the claimant had actually used the word “quitting”, nor that they could “shove their job”, but it is plain that they were both convinced that he did intend to resign at that point.

125. The claimant then left through the main office, and I am persuaded that he said goodbye to a number of staff as he did so, confirming that he would not be back.

126. When Mr Scott caught up with the claimant at the gate as he was leaving the building, he asked him for his mobile phone back. I am prepared to accept the evidence of the respondent’s witnesses that a sales person requires a mobile phone to do their job, and stores on it all sorts of contact information which is essential to the carrying out of their duties. The claimant did not argue with Mr Scott about the need to hand back his mobile phone, as he might have been expected to do had he intended to return, but told him it was in his desk drawer.

127. As a result, on 12 June, the claimant’s actions were sufficiently unambiguous as to leave the respondent with the clear impression that he did not intend to return, and thus that he had resigned.

128. Taking into account, then, the surrounding circumstances, the claimant then visited Louise McGowan on 13 June, handed his company mobile phone to her and asked her to hand it to Mr Scott as “I won’t be going back there”. She asked him why, and he said that it was because he had had enough of the place. I accept Ms McGowan’s evidence as clear and accurate, and as confirmation of the claimant’s intention to resign his employment with the respondent.

129. When the claimant's mobile phone was switched on, he had wiped all of his contacts and information from it. If he intended to return to work with the respondent, he would require that information.

130. In addition, at the meeting of 17 June 2019, which the claimant recorded, Mr Kelly put to him a number of times that he had walked out of his job, and he agreed.

131. These facts do, in my judgment, tend to show that the claimant intended to leave his employment on 12 June 2019, and believed, within the days thereafter, that he had done so.

132. However, there are other surrounding circumstances which must be taken into account.

133. After handing back his mobile phone, the claimant made contact with the respondent through his friend Andrea Parsonage, following which a meeting was arranged with Mr Kelly on 17 June 2019. The claimant attended that meeting.

134. In my judgment, it is clear that the claimant was happy for such a meeting to be arranged. His attitude in evidence, and at the start of the meeting, was that the meeting had been arranged by Mr Kelly and it was therefore for Mr Kelly to make the running. This was, in my view, an extraordinary attitude to display. Mr Kelly was plainly perplexed by the claimant's approach, but sought to open up the conversation in a constructive manner in order to try to understand the claimant's intentions.

135. However, on a plain reading of the transcript of that meeting, the outcome was that the respondent understood that the claimant did not wish to resign, but wished to find a way in which he could return to work. As a result, Mr Kelly told him that he was suspended, since he was refusing to carry out what he regarded as important aspects of his job, namely contacting customers by telephone and processing orders on Sage.

136. Suspension may be considered to be inconsistent with the claimant having resigned on 12 June with immediate effect.

137. Further, while the claimant did not attend for work again, nor was he paid after 12 June, he was not provided with his P45 until 22 August, with his letter of dismissal; and indeed, he was sent a letter of dismissal on that date, confirming that his employment was ending at that point.

138. In my judgment, what emerges from these facts and circumstances is an extraordinary series of events in which the claimant's employment was left in a state of uncertainty and confusion from 12 June until 22 August. It is difficult to disentangle the events so as to obtain a clear picture of the claimant's employment status after 12 June.

139. However, having considered all of these circumstances, I have concluded that the claimant did intend to resign his employment with the respondent on 12 June 2019, and conveyed that to them by both word and deed on that and the following day, and in the meeting of 17 June 2019; but that following the discussion which took place on 17 June 2019, his employment continued and the respondent did not implement his apparent resignation. There is no question here of a "heat of the moment" resignation, in my judgment; the claimant made plain by his actions on the following day, by handing in an essential piece of equipment, his mobile phone, wiped of all the essential information to do his job, that he was reaffirming his intention to leave. However, the surrounding circumstances do not support the finding that the claimant's employment ended with effect from 12 June 2019 by his resignation.

140. If the claimant's resignation had been effective, as the respondent now argues, there would have been no reason to have issued him with a letter of dismissal on 22 August 2019, nor to delay issuing his P45 to him, with a termination date of that date; nor would there have been any reason to treat the claimant as having been suspended, or, as the respondent would have it, being on sick leave due to stress, both of which they sought to maintain from 12 June to 22 August, at different points.

141. I was referred to the case of **Willoughby v CF Capital PLC**, in which, at paragraph 30, the Court of Appeal extracted a quotation from the

EAT Judgment in **Barclay v City of Glasgow District Council [1983] IRLR 313**, at paragraph 12:

"We consider that the proper approach is to have regard, not merely to what was said on 15 April 1982, but to what happened the following day and indeed to the fact that the appellant did report for work on the following Monday apparently under the impression that he was still employed. At the very least there was, in our view, an obligation upon the respondents when the appellant reported on Friday, 16 April to seek some form of confirmation that his act of resignation was in fact a genuine one and fully understood."

142. While the circumstances of that case are not on all fours with this case, it appears to me to have some bearing on this decision, in that when the claimant attended at the meeting of 17 June 2019, and a discussion took place about his and the respondent's intentions, the outcome of that was not for the respondent then to implement the termination of his employment immediately, but to take steps which were incompatible with the ending of the employment relationship, that is, suspension and sick leave. It is only an existing employee of an employer who can be suspended by that employer. If the employment relationship had genuinely ended, and was fully understood by both parties to have ended, there was simply no logic in telling the claimant that he was suspended.

143. As a result, I am unable to conclude that the claimant's employment ended by his resignation on 12 June 2019; and that his employment was therefore terminated on 22 August 2019 by his dismissal.

144. Next the Tribunal must determine what the reason for the claimant's dismissal was.

145. Mr Lyons sought to argue that the claimant's dismissal was on the grounds of conduct, or some other substantial reason. The ET3 (35/6) asserts at paragraph 37 that as an alternative to their argument that the claimant resigned, the respondent would argue that it summarily dismissed the claimant on 22 August 2019 because it had a reasonable belief that he had committed an act of gross misconduct, specifically his continued and

wilful refusal to obey a reasonable management instruction, and because of a complete breakdown in trust and confidence.

146. In my judgment, the reason for the claimant's dismissal, which is set out in the respondent's letter of 22 August 2019 (73), was that of conduct, namely that the claimant was refusing to carry out "the tasks that made up the role", which were said to be "answering calls and processing orders".

147. Did the respondent have a genuine belief that the claimant was guilty of the conduct for which he was dismissed? In my judgment, they did. Mr Kelly was plainly convinced that the claimant was refusing to carry out the duties which the respondent believed were an important part of his job as sales person, and was quite sincere in his belief that this was so.

148. Did the respondent have reasonable grounds upon which to form that belief, and was that belief based on a reasonable investigation? In my judgment, this is a central part of the claim being made by the claimant.

149. It is not clear that the respondent carried out any investigation into this matter before reaching the decision to dismiss the claimant. The respondent's position was that the claimant had been adamant that he would not process orders on Sage, and that that required no further investigation. The claimant argues that the respondent should have made inquiries into whether the claimant's position was in any way reasonable, whether other staff were refusing to carry out such duties, and why the claimant said he would not carry out those duties.

150. Mr McIntosh suggested a number of matters which could have been investigated by the respondent, including whether the claimant had a particular problem with the computer he was using, what training had been carried out and given to the claimant, whether the claimant had in fact been processing orders on Sage himself, what were the timescales during which he and other sales staff were said to have been processing orders and whether Mr Scott's instruction to the claimant on 5 June 2019 was in fact the first time he had been told to process orders on Sage.

151. In my judgment, the claimant's criticisms of the process leading to his dismissal are entirely justified. The respondent carried out no investigation at all into these matters. It is plain that information was available to the respondent to enable them to consider the questions properly, and they could have addressed matters with the claimant in some detail in order to determine whether or not he was guilty of gross misconduct justifying summary dismissal. They were able to carry out further investigations in order to present a defence to this Tribunal, and to obtain both witness statements and computer printouts which, had they been presented to the claimant at the time of the decision to dismiss him, would have allowed him to understand the respondent's position more clearly. However, prior to reaching the decision to dismiss the claimant, they carried out no investigation at all.

152. It is instructive to consider the sequence of events which led to the meeting of 22 August 2019, at which the claimant was dismissed:

- On 12 June, the claimant left the workplace;
- On 17 June, he was advised, at a meeting with the respondent, that he was being suspended, and that he would receive a letter confirming this;
- On 21 June, when he emailed the respondent to ask why he had not received a letter from them, Mr Kelly told him that he appeared to be "slightly misguided", and that as it stood he was "currently off sick";
- On 5 August, the claimant submitted a grievance letter to the respondent, which was not initially noticed by them;
- On 19 August, the claimant was told by the respondent that it was assumed that the reason for his continued absence was that he had chosen the leave the company, and that his failure to return was not illness related;
- On 21 August 2019, the respondent invited the claimant to a meeting the following day to "establish the basis of your absence";

- On 22 August, a meeting took place at which he was dismissed, and this was confirmed by a letter of that same date.

153. In the period from 17 June until 22 August, it is very unclear what the claimant and respondent actually thought was the precise position between them. The claimant maintains that he believed he was suspended throughout that period; the respondent maintains that the position was made clear to the claimant that he was regarded as being off due to illness.

154. There was no letter confirming the suspension, the reason for the suspension or the terms upon which the suspension had been imposed and would continue, from the respondent. At no stage did the claimant submit any medical evidence or even a fit note to confirm that he was absent due to illness.

155. Both parties appeared to be waiting for the other to commit themselves to some definitive course of action. It is difficult to understand what the respondent's intentions were in this period. If they truly believed that the claimant had resigned, there was no need for them to define his absence, either as suspension or sick leave, since in those circumstances the relationship would have ended. At the same time, the claimant appears to have decided that he was going to bide his time and let matters unfold, without at any stage setting out very clearly what he believed his employment position to be.

156. What this led to, in my judgment, was a meeting, and a decision, on 22 August, which the respondent took without any clear understanding of how they should proceed.

157. It is my conclusion that the respondent did not carry out any investigation into the circumstances surrounding the impasse which developed between them and the claimant, prior to reaching the decision to dismiss him. As a result, it is my judgment that they did not have reasonable grounds, at that time, based on a reasonable investigation, upon which to conclude that he was guilty of gross misconduct. The information which has been presented to the Tribunal about the claimant's prior involvement in the

processing of orders and the number of visits to customers was not presented to the claimant or made available to the respondent in a form which would allow them to consider it as evidence at the meeting of 22 August.

158. It is also necessary to consider the fairness of the procedure followed by the respondent in reaching the decision to dismiss the claimant. In my judgment, it was plainly unreasonable. Given that no investigation of any meaningful sort was carried out, no information was gathered together to allow the claimant to consider the allegations made against him and the basis for those allegations, either in advance of or during the meeting of 22 August. The claimant was not told that the meeting was a disciplinary meeting: the email inviting him to the meeting (68) told him that he was to attend a meeting to establish the basis of his absence. There was no indication given to the claimant that his employment may be terminated at that meeting, nor that he was permitted to be accompanied by a representative or friend.

159. The respondent would say that the claimant was aware that one of the issue between them was that he was refusing to carry out the essential task of processing orders on Sage, but in determining the fairness of the procedure followed, it is necessary to have evidence from the respondent that they set the context and meaning of that meeting out for him so that he was able to understand the consequences of his responses. Since he was unaware that it was a disciplinary hearing, I consider that that hearing was entirely unfair to the claimant and the manner in which it was conducted simply compounded that unfairness.

160. In addition, the respondent failed to identify to the claimant that he had the right to appeal against the decision to dismiss him. The respondent might say that they are a small business and that they had nobody else available who could hear the appeal, but that was not explained to the claimant at the time, and in the context of the procedure which they actually followed, it is my judgment that the likely explanation was simply that they did not believe they needed to give him a right of appeal, in the same way

as they believed they did not require to follow a fair disciplinary procedure in leading to his dismissal.

161. Accordingly, it is my judgment that the respondent's decision to dismiss the claimant was unfair, for the reasons set out above.

162. The issues set out above also require the Tribunal to determine whether the decision to dismiss the claimant was within the range of reasonable responses open to a reasonable employer, but in light of the conclusion reached above, that the dismissal was substantively and procedurally unfair, that issue does not require to be addressed.

163. The Tribunal must then turn to the issue of remedy for unfair dismissal, as set out in the issues:

a. **The claimant seeks compensation only. If there is a compensatory award, how much should it be? The Tribunal will decide:**

i. **What financial losses has the dismissal caused the claimant?**

ii. **Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?**

iii. **If not, for what period of loss should the claimant be compensated?**

iv. **Could the claimant have been dismissed fairly anyway, if a fair procedure had been followed, or for some other reason?**

v. **If so, should the claimant's compensation be reduced? By how much?**

vi. **Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?**

vii. **Did the respondent or the claimant unreasonably fail to comply with it?**

viii. **If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%?**

ix. **If the claimant was unfairly dismissed, did he cause or contribute to the dismissal by culpable and blameworthy conduct?**

x. **If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?**

b. **What basic award is payable to the claimant, if any?**

c. **Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?**

164. The financial losses suffered by the claimant must be determined first. The claimant's gross weekly salary with the respondent was £673.07, and his net weekly salary was £525.68. The maximum weekly wage for the calculation of a basic award as at 22 August 2019 was £525.

165. The claimant has confirmed to the Tribunal that he does not seek compensation for loss beyond 24 January 2020, when he became unwell and thereby unfit to work.

166. The Schedule of Loss presented by the claimant (37) suggests that his past wage loss period should commence on 7 June 2019. However, at this point, the Tribunal is concerned with establishing the losses arising in consequence of his dismissal, which did not take place until 22 August 2019, and therefore only losses incurred after that date can be taken into account in relation to the compensatory award.

167. The claimant's employment commenced on 1 April 2017, and ended on 22 August 2019, a period of 2 years and 4 months. His age as at the

date of termination of employment was 60. As a result, the claimant's basic award amounts to 2 x 1.5 x £525, which comes to £1,575.

168. The claimant made a number of attempts to obtain alternative employment following his dismissal, and recorded these in a diary which he had to produce in order to ensure that he was entitled to receive Universal Credit. The claimant was not challenged on this evidence in cross-examination, and the respondent presented no evidence to contradict the claimant's assertion that he had made reasonable attempts to mitigate his losses. In my judgment, the claimant has made reasonable attempts to find alternative employment.

169. Accordingly, the losses incurred by the claimant following dismissal amount to the loss of earnings which he suffered in the period between 22 August 2019 until 24 January 2020, a period of 22 weeks, at £525.68 per week, amounting to £11,564.96.

170. In addition, the Tribunal must account for the claimant's loss of statutory rights. A sum of £500 is attributed to this head of loss.

171. Accordingly, the compensatory award payable to the claimant is £12,064.96.

172. However, the Tribunal must next consider whether any reductions should be made to the sum to be awarded to the claimant.

173. Can it be said that the respondent could have dismissed the claimant fairly had a fair procedure been followed? In my judgment, in this case, it is very difficult to apply any degree of probability to this matter. The failure to carry out any form of investigation, and to allow the claimant to put forward his defence, means that it is still unclear what the claimant might have said in response to the allegation made to him, notwithstanding the additional evidence now available to the Tribunal. In any event, it is not clear what allegation would have been presented to him. It may well have been an allegation that the claimant was failing to follow a reasonable instruction, to process orders on Sage, and to allow himself to be chaperoned while on

customer visits. While this Tribunal has heard evidence about whether or not other sales staff, and indeed the claimant, actually processed sales orders, the claimant did not have the opportunity to question that evidence before the respondent, and further did not have the opportunity to present any explanation as to why he did not wish to process sales orders, including issues relating to training and support provided by the company.

174. Further, it is clear that the respondent decided to terminate the claimant's employment on the basis that he was not prepared to carry out an essential part of the role, namely the processing of sales orders. However, it is difficult to be sure that that was in fact an essential part of the role. For many months prior to early to mid 2019 the respondent had taken away from sales staff the responsibility of processing sales orders, and had required that administrative staff carry out that duty. As a result, it appears that it was not, at least for that period, an essential part of the sales staff's role.

175. In my judgment, it is not a safe conclusion to reach that the claimant would have been fairly dismissed had a fair procedure been followed, and accordingly I am not prepared to make any reduction on Polkey grounds.

176. I shall address the ACAS Code of Practice below, but next it is appropriate to determine whether there should be any reduction to either the basic or compensatory award based on the claimant's contributory conduct. Was the claimant guilty of culpable or blameworthy behaviour which caused or contributed to his dismissal?

177. In my judgment, it is clear from the evidence that while the respondent failed to follow a fair procedure, one of the reasons why they reached the point that they considered that they had to dismiss the claimant was that they believed that he was being obstructive and uncooperative in their attempts to return him to work. It was Mr Kelly's view that the claimant was simply refusing to do what everyone else in the sales team had to do, and that by that refusal the claimant was undermining trust and confidence between himself and his employer. In my judgment, it was also important

that the claimant had walked out on 12 June, and had thereby placed himself in conflict with the respondent. Had they chosen to implement his resignation at that point, they could have done so; but as I have found above they did not, and accordingly they required to deal with him as an employee. In doing so, it seems to me that they found it very difficult to accommodate the claimant's return to work because of his resolute refusal to do what he was asked.

178. While I have not been able to conclude that the claimant would have been dismissed, on the balance of probabilities, had a fair procedure been followed, it is my judgment that the claimant's conduct towards his employer from 5 June until 22 August was not designed to assist in restoring the relationship between them. His manner in the meeting of 17 June, for example, was notable evasive and non-compliant – it would not be unfair to describe his behaviour as passive-aggressive – and it is plain that he wished to offer the respondent no assistance whatever in their attempts to move the relationship forward.

179. I am not prepared to find that the claimant's conduct was such as to cause his dismissal, but in my judgment, his refusal to engage properly with the respondent on the question of chaperoning and on his being prepared to carry out the processing of sales orders did amount to obstructive and unhelpful behaviour, which came to the point of culpable and blameworthy conduct contributing to his dismissal.

180. It is my judgment that he contributed to his dismissal to the extent of 25%. It would not be fair to assess his contribution as being greater than that of the respondent, but at the same time I am in no doubt that his conduct was significant in pushing the respondent to the point of exasperation with him, leading to his dismissal. While that dismissal was unfair, it would not be just and equitable to award him his compensation in full in that light, so it is my conclusion that his compensatory award, and also his basic award, should be reduced by 25%.

181. Finally, under the heading of remedy, I must address the question of whether the respondent breached the ACAS Code of Practice, and if so, whether there should be any uplift on the compensation awarded.

182. In my judgment, there has been an unreasonable failure by the respondent to comply with certain aspects of the ACAS Code of Practice, and in particular, the requirement to establish the facts of each case (paragraph 5) by carrying out necessary investigations; the requirement that if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing (paragraph 9); the requirement that a notification should advise the claimant of the right to be accompanied at the meeting (paragraph 10); and the requirement that employers should provide employees with a right to appeal against their dismissal (paragraph 26).

183. It should be said that Mr McIntosh's assertion that there was a failure to carry out an investigatory meeting and that that amounted to a breach of the ACAS Code is not one I can sustain. There is reference to an investigatory meeting but of itself that is not a mandatory step in the procedure.

184. In my judgment, the respondent did unreasonably fail to carry out these steps under the ACAS Code of Practice, in that they simply did not address their minds to the fact that they were inviting the claimant to a meeting at which dismissal was possible for a disciplinary reason, but suggested that actually it was to establish the reason for his absence. While that may have been related to the issues they wished to address with him, in my judgment it was not the reason for the meeting, and so since they not only failed to tell him why he was being invited to the meeting but also misled him as to the nature of the meeting, their failure to take the steps required by the ACAS Code was entirely unreasonable.

185. It is plain that the respondent has had access to advice on Employment Law, from the representative who appeared in this case, but no explanation was provided in evidence as to why no advice was sought as to the process to be followed. It appears to me that the respondent

believed they could act as they pleased, while relying upon the claimant's earlier actions in (apparently) resigning from the business.

186. As a result, I consider that it is just and equitable to award an uplift to the claimant's compensatory award by 10%, to reflect their unreasonable failure.

187. Having considered all of these questions, then, I require to set out the following steps in calculating the awards to be made to the claimant in this case:

- The claimant is entitled to a basic award in the sum of **£1,575**, reduced due to the claimant's contributory conduct to **£1,181.25**;
- The claimant is entitled to a compensatory award for losses incurred since his dismissal, of **£12,064.96**;
- That award is to be increased by an uplift of 10% owing to the failure to comply with the ACAS Code under section 207A of TULC(R)A, thus taking the award to **£13,271.46**;
- The compensatory award, thus adjusted, is then subject to reduction by 25% due to the claimant's contributory conduct, which takes the award to **£9,953.60**.

188. Accordingly, in my judgment, it is just and equitable to order the respondent to pay to the claimant the sum of **£11,134.85** in respect of his unfair dismissal by the respondent.

189. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £8,673.72 (after 25% reduction) and relates to the period from 22 August 2019 to 24 January 2020. The monetary award exceeds the prescribed element by £1,279.88.

a. **Did the claimant's employment end on 12 June 2019 when the respondent argues he communicated his intention to resign with immediate effect on 12 June 2019 (which is disputed by the claimant)?**

b. Was the unfair dismissal claim lodged within the time limit required under the Employment Rights Act 1996? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iii. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it presented within such time as the Tribunal considers reasonable?

190. It is necessary to consider whether this claim was presented out of time.

191. In this case, the claimant's employment ended on 22 August 2019, as I have determined above, for the reasons set out.

192. It is agreed between the parties that the early conciliation process began on 13 November 2019 (36O).

193. That date falls within the period of three months following the effective date of termination of the claimant's employment.

194. As a result, the claimant retains the benefit of an extension of time of one month from the date of receipt of the Early Conciliation Certificate. Since early conciliation began (and the Early Conciliation Certificate was not presented to the Tribunal in the bundle) on 13 November, the claimant's time for lodging his claim was extended at least by one month from that date, taking him beyond 12 December 2019 when the claimant presented his claim to the Employment Tribunal.

195. Accordingly, the claim was not presented outwith the statutory time limits, and no question of time bar, or of the Tribunal's jurisdiction, therefore arises.

196. The claimant's claim therefore succeeds.

Employment Judge: **M MacLeod**
Date of Judgment: **18 January 2022**
Entered in register: **20 January 2022**
and copied to parties