THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr S Chambers	Ovalway Hydraulic Engineering Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 8th& 9th (deliberations 20th) March 2018
EMPLOYMENT JUDGE GARNON

Appearances
For Claimant: in person

For Respondent: Ms J Dalzell Solicitor

JUDGMENT

1. The claim of unfair dismissal is well founded. I award compensation of £ 2934, being a basic award only, to which the Recoupment Regulations do not apply.

2. The claims of wrongful dismissal and entitlement to a redundancy payment are not well founded and are dismissed.

3. I make an increase to the award under s38 of the Employment Act 2002 (the 2002 Act") of two weeks pay, subject to the statutory maximum , being £ 978.

REASONS(bold print is my emphasis unless otherwise stated)

1 Issues and Relevant Law

1.1 The claims are unfair dismissal, breach of contract and a reference as to entitlement to a redundancy payment and an uplift under s38 of the 2002 Act.

1.2. The issues are

(a) What were the facts known to, or beliefs held by the respondent which were the reason, or if more than one the principal reason, for the claimant's dismissal on 17th August 2017?

(b) was the principal reason for dismissal that the claimant was redundant?

(c) If not, did it relate to his conduct?

(d) If the latter, did the respondent act reasonably in all the circumstances of the case:
(i) in having reasonable grounds after reasonable investigation for its beliefs,
(ii) in following a fair procedure, and
(iii) in treating the reason as sufficient to dismiss?

(e) If the respondent acted fairly substantively but not procedurally, what are the chances it would still have dismissed if a fair procedure had been followed?

(f) did the claimant , by his culpable and blameworthy conduct, cause or contribute to his dismissal, and if so by what, if any, amount should compensation be reduced?

(g) in the wrongful dismissal claim, was he in fact guilty of gross misconduct?

1.3. Section 98 of the Employment Rights Act 1996 (the Act) provides:
"(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 dismissal
(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
(b) relates to the conduct of the employee
(d) is that the employee was redundant "

1.4. In Abernethy v Mott Hay & Anderson, held the reason for dismissal is a set of facts known to the employer or may be beliefs held by him, which cause him to dismiss the employee. **Devis-v-Atkins held the employer cannot rely on matters it did not know at the time it decided to dismiss.**

1.5. Redundancy is defined in s 139 which says dismissal shall be taken to be by reason of redundancy if, among other circumstances it is wholly or mainly attributable to the fact the employer intends to cease to carry on the business for the purpose of which the employee was employed by him. Safeway Stores –v- Burrell, affirmed in Murray-v-Foyle Meats fully explains, if there was (a) a dismissal and (b) a " redundancy situation" (shorthand for one of the sets of facts in s 139) the only remaining question under s 98(1) is whether (b) was the wholly or mainly the cause of (a).

1.6. In ASLEF v Brady it was said:
Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….. .

It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that was indeed the operative reason, ... For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct merited dismissal.

On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.

1.7. Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

1.8. If the reason for dismissal relates to conduct, an employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did take place. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, see British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald. Stephenson LJ in Weddel v Tepper gave invaluable guidance on the "Burchell Test"

Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. ***They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case".*** *That means they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."*

1.9. Also, in A v B [2003] IRLR 405 Sir Patrick Elias said:

"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances,

anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.
Where the investigation is defective, it is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair and the fact that it may have caused no adverse prejudice to the employee goes to compensation."
When His Lordship refers to "*the investigation"* I believe he means the whole process up to and including the disciplinary hearing.

1.10 As for fairness of procedure Lord Bridge said in Polkey v AE Dayton "*in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation"* Khanum v Mid Glamorgan Area Health Authority and Spink v Express Frozen Foods [1990] IRLR 320, held the basic requirements of natural justice to be complied with during an internal disciplinary enquiryare (i) an employee should know the nature of the case against him, (ii) be told the important parts of the evidence upon which reliance is placed and (iii) given a fair opportunity to state his case . Also the decision maker must act in good faith.

1.11. When considering the sanction, previous good character and employment record is always a relevant mitigating factor. However, if the misconduct goes to the heart of the employment relationship, dismissal for a first offence may be fair.

1.12. West Midlands Co-op -v-Tipton held an internal appeal should in most circumstances be afforded, but there are problems doing so if the initial decision is reasonably taken by the highest ranking members of an organisation.

1.13. In all aspects substantive and procedural the rule in Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt, is I must not substitute my own view for that of the employer unless its view falls outside the band of reasonable responses.

1.14. Gross misconduct is defined in Laws v London Chronicle (Indicator Newspapers as conduct which shows the employee has fundamentally breached the employer/employee contract and relationship. Dishonesty towards the employer is the paradigm example of gross misconduct. However dishonesty is a broader concept than theft for personal gain and other behaviour may fall into the category even where there is no intention to deceive see Adesokan-v-Sainsbury's Supermarkets. The main differences between unfair and wrongful dismissal are that in the latter I may substitute my view for the employer's and take into account matters the employer did not know about at the time (see Boston Deep Sea Fishing Co –v-Ansell). Unless the respondent shows on balance of probability gross misconduct has occurred, dismissal is wrongful

1.15 Section 38 of the 2002 Act says if in proceedings to which it applies, and it does in this case, when proceedings were begun the employer was in breach of his duty under section 1(1) or 4(1) of the Act, the tribunal must make an award of two weeks pay and may, if it considers it just and equitable in all the circumstances, award four weeks pay instead. The duty does not apply if there are exceptional circumstances which would make an award or increase under that section unjust or inequitable. The amount of a week's pay must not exceed the amount for the time being specified in section 227 of the Act

2. Findings of Fact

2.1. I heard the claimant and for the respondent I heard Mr Malcolm Stewart and Mr Dennis Skelton, its directors and majority shareholders who did the investigation and took the decision to dismiss, and Mr Gary Atkins a former colleague of the claimant. I will deal first with my findings as to what on balance of probabilities actually happened which is key to the wrongful dismissal claim. I will later make findings relevant to the unfair dismissal tests. As I discovered when deliberating, chronology is absolutely vital.

2.2. The respondent's business involves providing hydraulic and mechanical services to local industry amongst other things. The claimant was born on 10th July 1980. His continuous employment began on 17th January 2005 and ended on 17th August 2017 when he was dismissed without notice for alleged gross misconduct. This was the day before he would have been dismissed by reason of redundancy.

2.3. The claimant was recruited as a service engineer by Mr Stephen Robinson who was a manager along with Mr Terry Robinson. Until a few years ago, the directors were actively involved in day-to-day management but later moved towards semi-retirement . Mr Stephen Robinson left and the directors stepped back from day-to-day involvement. The claimant was appointed as a manager alongside Mr Terry Robinson. His remuneration package was increased to about £50000 p.a. plus a company car and other benefits . As a manager his role was wide ranging. In his 12 years service , he never had any disciplinary issues or conflicts with the directors.

2.4 Despite the substantial change in his terms and conditions no new contract, or even the standard form statement of terms of employment which had been drafted by Peninsula, was given to the claimant. I do not accept it was his job to issue one to himself . Mr Stewart said he never asked for one when he was promoted. He does not have to.

2.5. I accept the claimant had dedicated many years of working life to managing the respondent company. He and Mr Robinson effectively ran the business for several years and kept it profitable. The claimant said they had occasionally asked the directors what their "exit strategy" was, indicating they would have been interested in acquiring some share in it . No such offer came from the directors.

2.6. The respondent's business was devastated by the closure of the steel company, SSI. This was the third blow similar to that felt by many companies in this sector in this region. After 35 years of building the company from scratch, the economic situation which confronted it in 2017 would have been as hard, if not harder, on the directors than it was on the claimant and Mr Robinson. Discussion about possible closure of the business began in around February 2017. In the next couple of weeks offers were made by the directors to the claimant and Mr Robinson for what could be broadly described as a management buyout. The figures did not stack up any better for them than they did for the directors. The claimant revealed an element of resentment when he questioned Mr Stewart about why he had not made an offer to himself and Mr Robinson to take some stake in the business at a time when it was profitable. From a question he put to Mr Stewart, it was plain he disapproved of the directors paying money into their personal pension schemes, which they are perfectly entitled to do. He did not know the directors waived repayment of some personal loans to the company. At some point earlier, in an attempt to avoid closure everybody including the claimant went onto a four-day week. His hours of work dropped from 39 to 32 but were restored well before closure. I believe in the last few months of his employment the

claimant's resentment at losing his job, just as he was about to get married, gave him the view he would need to look after himself by " looking after", for his own future purposes, contacts he had in the industry. It also caused him to feel less loyalty to the directors.

2.7. In February 2017 the claimant decided to place an order for his wedding invitations with County Print with whom the respondent had an account. The wedding was booked for 31st July at a venue in Northumberland. It is an accepted practice that employees can order goods using the respondent's account and pay the money to the respondent when the invoice arrives and they are asked to pay usually by Ms Kirsty Cronesberry who dealt with accounts. County Print sent an invoice which was not paid. The claimant says it was always his intention to reimburse the respondent but no-one told him the invoice had arrived and he simply forgot about it. Nevertheless, for many months, the claimant had the goods and must have known he had not paid anybody for them. I accept he had a lot going on in his life at the time however he placed another order with County Print on 27 July for some menu cards for his wedding on Monday 31 July for which another printer with whom he had placed an order let him down. He says he did not place it through the respondent and was expecting to pay County Print direct. However, County Print sent the invoice to the respondent. The claimant did not pay the respondent either. I will return to this because it is vital to assessing the claimant's credibility to see the chronological context

2.8. On 23 May 2017, along with every other member of staff, he received a letter saying the respondent was to cease trading with effect from Friday, 30 June. He like everyone else was to receive a redundancy payment. Because he had a 12 week entitlement to notice, he would continue to be employed in the winding down of the business until18 August. From 23 May to 4 August he was to attend work as usual assisting in that wind down. He says he was to be free not to come to work from then until 18 August, though he would be paid. Mr Stewart in evidence did not agree this was so , but by that time there would have been nothing for the claimant to do if he had come into work ,as will be seen . Also it was normal if he or Mr Robinson needed to be off work for any reason for them to tell the other who would "authorise" the absence. That happened in respect on 3 and 4 August which the claimant told Mr Robinson he was taking off work to look for a job . I was not impressed by Mr Stewart's replies, on more than one occasion, the claimant should have informed himself or Mr Skelton "out of courtesy" .. If directors leave the day to day running of the business to managers, there is no need for them to be informed of routine matters.

2.9. In June 2017, the respondent was finishing off contracts, disposing of saleable assets and restoring the workshop it leased from Middlesbrough Council to its original condition . This involved dismantling partitions, getting rid of scrap and later cleaning the floor before re-painting it. In the early part of June the claimant was on holiday abroad.

2.10. A most relevant document is at page 92f. The respondent had an account with a scrap metal company named EMR from about 2013. The claimant later opened a personal account with EMR. The entry on the print out of his account for 19 September 2016 is a legitimate disposal by him to a EMR of scrap metal from the renovation he was doing his own property. The sum paid to him is only £48. There is then a delivery of scrap metal to EMR in a company vehicle on 6 June 2017 when the claimant was abroad on holiday and £975 credited to the claimant's bank account. When, on return from holiday, he discovered this, he told Mr Skelton on 16th June what had happened and paid the money to him. The claimant's explanation for this is a clerical error by EMR which Mr Skelton thought likely if it

was a single error but not if it happened again. In this computerised age, if an error is made once, until someone corrects the database, it is likely to be repeated.

2.11. Mr Stewart says he was first made aware of payments being made to the claimant's personal bank account for scrap metal which belonged to the respondent when, on Thursday 8th June, a member of office staff named Shauna Henry showed him a receipt from EMR bearing the claimant's account details not the respondent's .As will be seen shortly from Monday 12th June to Friday 16th the claimant spent most of his time working at a site called Skinningrove. Mr Stewart asked the claimant why money had gone to his personal account, but he does not say when he asked him. I accept the claimant's evidence he paid Mr Skelton before Mr Stewart spoke to him. If he had anything to hide , he would have known the respondent had suspicions and would not be likely to repeat any wrongdoing involving EMR. Mr Skelton told Mr Stewart the claimant had repaid the money They jointly decided a company of EMR's "stature", to use Mr Skelton's word, was unlikely to make a mistake. Mr Stewart says on investigating he discovered evidence that appeared to indicate the claimant had unlawfully received money into his personal bank account for scrap from EMR on more than one occasion. He does not say when he formed this view, but it cannot have been in June because there was nothing more to find. He also says he began to investigate and discovered evidence of a number of other misconduct issues.

2.12. Mr Stewart obtained a print out of the claimant's EMR account which showed disposals of scrap on 6 July of a large tonnage of shearings for £1076 and on 12th July 2017 three types of metal together worth just over £500 and on 19th July a smaller quantity of shearings worth £210 80. On 6 July 2017 there was a **collection** of scrap from the respondent premises by EMR because the weight was too great for the respondent's vehicle. Whenever scrap is bought by EMR it provides the seller with a Waste Transfer Note (WTN) . On this occasion the WTN was actually left at the respondent's premises. It would then send an invoice to EMR. According to Mr Skelton, it did , and when they chased for payment EMR said they had already paid to the claimant's personal bank account. I put to Mr Skelton the obvious point that if the claimant had, as he suspects, intended to keep the £1076, he was committing an offence in circumstances where he would be almost certain to be detected. I asked was he not surprised any fraudster would be so foolish as to leave a paper trail leading to himself. He was lost for a reply.

2.13. The respondent says it did not rely upon this as one of the reasons to dismiss. Mr Stewart said they took advice from their solicitors throughout, who probably advised not to rely on it, and wisely so. Mr Skelton's statement says they suspect the claimant had diverted the value of scrap to his personal account since 2013. Mr Atkins says it was "common knowledge "the claimant disposed of scrap , with Mr Robinson's knowledge who said the money was used to give "the lads" a night out every month or so . If that is true, it is likely the scrap was sold for cash not transferred to the claimant's personal bank account. Although money for scrap was the item which caused the enquiries into the claimant's activities to commence, the evidence about it is the weakest item of all for the respondent. The police are investigating and may find evidence I have not heard. Despite Mr Stewart and Mr Skelton saying it was not part of their decision making process, I find it was.

2.14. Another allegation against the claimant is false claims for hours worked on timesheets for weeks commencing 10 June and 22 July with the intention of gaining additional remuneration. The respondent's workers would sign in to the site at Skinningrove using what Mr Stewart called the "British Steel" signing in book. They were entitled to be paid

from leaving home or base to getting back again . When they arrived at site they had to put on Personal Protective Equipment and walk from the car park to the signing in book. Mr Atkins said the claimant was supposed to be helping him and was not there during the whole 12 hour shifts the other people worked but would frequently arrive at least two hours after them and leave earlier. Documents 67 a-c are timesheets of the other three men doing work on site Mr Atkins, Mr Smith and Mr Purvis. Mr Atkins agreed if one looked only at the signing in book, it shows none of them were on site for all the hours they were paid.

2.15. The difference between the claimant's times and the others is greater and his explanation is that he had other things to do including fetching materials for the job. Mr Stewart said there were not many other things to do because the company was winding down. For 12-16 June that is plainly wrong. However, Mr Stewart said there was no need for the claimant, as opposed to Mr Atkins Smith and Purvis, to be working overtime during this period and he would have been seen at the workshop, although he can do email work remotely, if he was working there when his timesheet for pay purposes (page 60) showed him as being at Skinningrove. The payslip of the claimant page 249 shows he was paid for 57 hours that week . I will return to the second period when it arises in the chronology.

2.16. Another allegation is failure to notify the respondent of an overpayment of salary from May to August. This was dropped and rightly so. The overpayments were due to the change of the claimant's working week from 39 to 32 and back again.

2.17. In the last two weeks of June the claimant did mundane work such as pushing a hired floor cleaning machine over the workshop floor and then painting it. A major task was to catalogue and sell off equipment. Some was bought by a company named Hydrasun Ltd. At pages 227-232 there are invoices relating to the sale of goods to Hyrdasun and a copy of the respondent's asset list . On 4 July, an email at page 224 tends to show the claimant, who was interested in a job at Hydrasun, suggesting to a Mr Rhucroft of that company that the invoice price could be abated if he paid some of the value in cash. The claimant denies any improper agreement with Mr Rhucroft and as I have not heard from him , I cannot find otherwise on balance of probability. The police are investigating and may find evidence I have not heard. However, the claimant admits he sold items to a Mr David Grice, an engineer, and received £600 in cash in mid to late July. He says neither of the directors were available to be handed the money so he kept it temporarily and did not have an opportunity to hand it over before his wedding. That explanation is possible.

2.18. By far the most important matter related to dealings with a company called HSM Aero. The respondent is authorised to perform tests on parts HSM Aero supply to the aeronautic industry which need test certificates provided for each item. Not long before the final day of trading, 30 June, 72 items were delivered for testing to the respondent's workshop, for which it would normally charge £150 per item . On or just before 26th June the claimant sent an email to Mr Paul Eglington of HSM saying the respondent was ceasing to trade and could not do the testing because their last invoice had not been paid. The claimant's version is that he had been in discussions with Mr Eglington by telephone before sending the email during which Mr Eglington said the contract between HSM and its customer prohibited testing by a company which was in financial difficulties and had HSM known beforehand the respondent was , the goods would not have been sent to it . He said the respondent had let HSM down.

2.19 The claimant says he altruistically recommended to Mr Eglington two other companies one of whom is known to Mr Stewart and does have authority to test such items . The other is a small company called Kastle Engineering where the claimant's contact was Mr Richard Birkbeck. The claimant says Mr Eglington agreed to send a purchase order to Kastle with whom the claimant would work to get the tests done. From about 1 July, 72 items were tested using the respondent's equipment. The tests were performed by the claimant in his own garage. The items were ready to be couriered back to HSM by 6th or 7th July though the test certificates may have been completed by the claimant and sent later. The actual testing would take about 1 hour per item.

2.20. Those 72 certificates were issued on the respondent's headed forms adapted by the claimant to show the items having been tested by "*R Birkbeck of Kastle Engineering and Fabrication Ltd*" witnessed by "*S Chambers of Ovalway Hydraulic Engineering "* . The claimant accepted Mr Birkbeck was not even present for the tests. I reject the claimant's evidence that if one of these items failed the liability would attach only to Kastle because the purchase order was placed with them . I believe, as Mr Stewart said, the respondent would be liable. I also do not accept the claimant's evidence that Mr Eglington **refused** to have the respondent test the items, because had that been the case HSM would not have accepted test certification on the respondent's printed forms. No payment has ever been received by the respondent for these tests.

2.21. The claimant says he believes HSM have paid no one for these tests. Not only is that improbable , the claimant is unable to explain in any satisfactory way an email of 27 July at page 95 shows him chasing HSM for payment of the monies he says are due to Kastle. Mr Stewart believes the claimant had an arrangement with Mr Birkbeck he was to be paid part of the money. I have not heard evidence sufficient to convince me of that. The evidence convinces me the claimant personally gained, if not financially, by doing a huge favour for HSM and Kastle likely to help him make a new career . There would be nothing wrong with that unless he did so at the respondent's expense and or risk. I find on a balance of probabilities he knowingly made no effort to secure for the respondent £10,800 worth of work which he did using its equipment and partly in time for which it was paying. He accepts he used the respondent's equipment but says it was in his own time.

2.22. On his own account he started testing on Saturday 1 July. His payslip shows he was paid for 32 hours for work for the respondent from Monday 3 July to Thursday 6 July and the actual testing, without completion of any paperwork, took 72 hours. So out of 144 hours maximum he had 40 hours to eat and sleep over 6 days. That is highly unlikely.

2.23. On 25 and 26 July he was back at Skinningrove. The site signing in book is not inconsistent with what he was paid for those days. On Thursday 27 July he ordered the menu cards from County Print. That would have "jogged his memory" that he had not paid for the goods he received in February, yet on 28 July, when he was in work with nothing much to do, he did nothing about paying it.

2.24. The next allegation is of falsely claiming fuel expenses on an expense form. The fuel card the claimant had entitled him to petrol for his company vehicle which was a petrol hybrid. The fuel purchased on this occasion was diesel valued at £52.58 for which he obtained a receipt from Morrisons Supermarket Filling Station plainly showing the fuel type as diesel. He attached this to a manuscript expense claim form. His and his wife's private car is diesel. The respondent believed the claimant was fuelling a private car for his wife's

use. His case is that he used his private vehicle for what would be a high mileage weekend driving to various places and eventually to his wedding venue because the company vehicle was nearing a mileage limit he had originally been told, and still believed, was 10800 miles , and the company would be penalised if they handed the vehicle back with greater mileage . Unbeknown to him, the mileage limit had increased to 11800.

2.25. Whatever the limit was, Mr Stewart accepted the claimant's salary package entitled him to fuel for private as well as business use and his tax code reflects that benefit in kind. He added that would only be so if he was using the company vehicle. I could understand him being suspicious if the claimant regularly put in claims for diesel because that may point to his wife fuelling the private vehicle at the respondent's expense. However, this is the only claim of which I was told. It is unlikely the claimant and his wife travelled to their wedding and short honeymoon in separate cars. No reasonable employer could view saving mileage on the company vehicle and putting fuel to which he was entitled anyway into his private vehicle to be dishonest. This charge was ludicrous and convinced me that wherever the truth lay on any point Mr Stewart would accept nothing the claimant said.

2.26. The last allegation is of being absent from work without permission on 3 and 4 August. Mr Terry Robinson had authorised this weeks earlier. Mr Stewart says the directors should have been consulted but they never were on annual leave or anything of that nature. The company was by then closed down. Whilst I accept the claimant did not have authorisation from the directors spending two days looking for other work, with Mr Robinson's knowledge, was not in my judgment dishonesty.

2.27. I now move to the unfair dismissal findings and start with what the respondent knew. Some time earlier the claimant had a relationship with Ms Cronesberry which ended badly and she may have felt some resentment towards him. On 31 July, Ms Cronesberry drew the diesel receipt and the County Print invoice for the goods ordered on 27 July to Mr Stewart's attention. On 4th August when the claimant called by the workshop with his family, Mr Stewart asked him about the fuel claim, the time spent at Skinningrove, the County Print orders, his absence on 3 and 4 August and the overpayment of salary. The claimant gave short but credible replies but Mr Stewart accepted none of it Although the County Print invoices are fairly small it is the one strong pieces of evidence against the claimant. **On this day I would have expected the claimant to volunteer he still had £600 received from Mr Grice** .Neither Mr Stewart nor Mr Skelton attended the wedding probably because they harboured doubts about the claimant since June. Those doubts had increased now with scant investigation, **I believe they decided then the claimant had betrayed them** . The allegations were set out in a letter to the claimant 9 August he was invited to an investigation meeting on Monday 14 August.

2.28. At the meeting on 14 August the claimant was shown evidence indicating he had opened a personal account with EMR together with copies of accounts from EMR showing dates and times money was paid into his bank account. The claimant said he had initially disposed of scrap from carrying out work at his own property to explain why he had an EMR account. Mr Stewart said many of the transactions related to large volumes more than the claimant would have produced. The claimant never said otherwise rather that the first payment was a clerical error and he had failed to notice £975 paid into his personal account earlier than the time he paid it to Mr Skelton. That wholly plausible explanation was not credible to Mr Stewart who says this matter is still under investigation by the police who have submitted a file to the Crown Prosecution Service. The fact it has taken so long shows

this allegation is far from clear-cut . My finding on the evidence I have heard is that not only has the respondent has not proven a balance of probabilities the claimant stole any scrap but no reasonable employer could have formed the view he had, based on the investigation done at the time, which is why they later claim they did not rely on it.

2.29 The claimant was invited to a disciplinary hearing on Thursday17 August at 14:00 hours. The allegations were in an invite letter and "pack" he received at 19:39 on 16 August and included falsifying timesheets, submitting an expense form for the incorrect fuel type, obtaining stationary for his wedding,and irregular payments for scrap into his personal bank account. He was sent a summary of the findings of the investigation together with documents including copies of the Skinningrove signing in book, wage slips, fuel expense forms and many other documents. The allegation of being absent from work without permission on 3- 4 August was omitted from the letter but re-emerged in the hearing. Had he not slept, he had only 18 hours to consider all of it.

2.30. On the day of the hearing the matters relating to HSM Aero and Hydrasun came to light. Another investigation was conducted immediately before the disciplinary hearing and the claimant was shown emails relating to the sale of goods to Hydrasun and the dealings with HSM Aero. After discussion with the claimant it was decided the allegation of sale of company goods to Hydrasun Ltd would not go forward to the disciplinary hearing as there was insufficient evidence. This matter was also reported to the police. However, **after dismissal** be respondent obtained information the claimant sold its goods to Mr Grice and received £600. Mr Stewart discussed with the claimant on 29 August asking the claimant pay back the money. He did so and, as with the money from EMR and the goods from County Print, says he had never intended to deprive the respondent of anything.

2.31. The respondent accepts the process was rushed and when the claimant asked for a postponement to the following week so he could consider the evidence and have a representative, the words attributed to Mr Stewart that he "*wanted it all over*" are not denied. They did want to get the matter over with because they feared unless dismissal for misconduct was effected by 18 August his dismissal by reason of redundancy would be effective on the following day and he would receive a redundancy payment. He was offered an adjournment until the next day which he declined because his representative could not be present and the time was insufficient. He believed, rightly, the directors' minds were made up whatever he said . Mrs Stewart kept good minutes of the meeting, as she had of the one on 14th, which show the claimant being bombarded with a variety of allegations and evidence he had little if any, chance to consider. He gave much the same explanations as he had on 14 August and not a word of them was accepted.

2.32. On 24 August he received a package containing his dismissal letter and which gave him the right of appeal. He says he did not appeal because the whole process showed prejudgment and bias. There was no-one left to whom to appeal anyway.

4. Conclusions

4.1. Three classic components of a crime are motive, means and opportunity. The claimant had had the means and opportunity to take advantage of the respondent for years, but there is no evidence he did. Realising his 12 years work was to come to a sharp end, he now had the motive to look after himself, which would be permissible unless he did so at the respondent's expense and/or risk. His actions in relation to a HSM definitely came in

that category. Failing to pay for the wedding invitations obtained in February and the sale to Mr Grice probably did too. Whether any of these acts would pass the criminal law standard of proof beyond reasonable doubt or the test of dishonesty set out in R-v-Ghosh, is doubtful but not for me to decide. However, I find on a balance of probability he was guilty of gross misconduct. Therefore the wrongful dismissal claim fails.

4.2. On the unfair dismissal and redundancy payment issues are

(a) the directors genuinely believed the claimant had been dishonest. That reason related to her conduct. It was not in their minds to dismiss for that reason with the intention to avoid making a redundancy payment. Dismissal on 17th August was not by reason of redundancy.
(b) the directors had reasonable ground after a reasonable, albeit swift, investigation in his guilt on the HSM Aero matter which alone would have made dismissal a sanction within the band of reasonable responses , but the respondent took into account two days absence from work without permission, and the claim for diesel fuel. No reasonable employer could have formed a reasonable belief these acts were misconduct They conducted a far from adequate investigation before dismissing into the overtime claimed in June , the sale of scrap metal and the sale of company goods to Hydrasun and although they claim not to have relied upon the last two, I am convinced they were in the forefront of their minds.
(c) They followed steps correctly advised by their solicitors but fairness is not just a matter of steps but of having an open mind and listening to what the claimant has to say. All the tenets of fairness set out in A-v-B were disregarded. As said in Weddle-v-Tepper, Mr Stewart in particular *jumped to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case".* Following the dismissal, Mr Stewart found out about the £600 for the goods sold to Mr Grice. The claimant offered to pay that and £130.80 for the wedding stationery and £1817.80 for the sale of scrap to EMR. The directors say this should be seen as an admission he **fraudulently** obtained these sums. No reasonable employer, based on what they knew at the time, could hold that view. He owed the money and was repaying it.

4.3. The disciplinary hearing was nothing resembling fair. No reasonable employer could have adopted such a procedure. If the claimant had an explanation to give, including for the HSM Aero matter, he had real opportunity to do so. I do not believe Mr Stewart or Mr Skelton have always been so unreasonable, and the claimant does not suggest they were. They jumped to the conclusion the claimant had betrayed them, which shocked and angered them. The anger blinded them to any exculpatory evidence and even the good explanations the claimant gave. Mr Stewart put all the allegations with vigour making some points, such as the fuel purchase being dishonest, which were risable. He was not prepared to listen to anything the claimant had to say. The respondent owes a debt of gratitude to Ms Dalzell. Her cross examination and submissions were not in the same style as Mr Stewart's evidence that any sensible person should share his view the claimant was guilty of everything alleged. Rather she focussed, gently but firmly, on the two or three items which the claimant simply could not explain, especially HSM Aero.

4.4. In Polkey v AE Dayton Lord Bridge of Harwich said :
…If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been

taken. On the true construction of section 98(4) this question is simply irrelevant. … In such a case the test of reasonableness under section 98(4) is not satisfied … but if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different.
This dismissal was substantively and procedurally unfair and the fact that, thanks to Ms Dalzell, I have found with hindsight gross misconduct did occur does not change that.

4.5. There are two elements to compensation : the basic award set out in s 122 , and the compensatory award explained in s 123 which as far as relevant says:
(1) .., the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .
Section 123(6), explained in Nelson-v-BBC gives power to reduce a compensatory award if culpable and blameworthy conduct of the claimant caused the dismissal. This can be in addition to a Polkey reduction (see Rao-v-Civil Aviation Authority). In my view the claimant could have been fairly dismissed had he had a fair hearing on the HSM Aero charge alone and caused his dismissal by the acts which now are proved so a 100% reduction is merited.

4.6. Section 122(2) empowers me to reduce the basic award on account of his conduct before the dismissal. His conduct certainly did not cause the respondent to use such a bad procedure, but it does not need to in order to enable a reduction. However, I think it is neither just nor equitable to give the claimant no basic award, despite Ms Dalzell's argument I should reduce it by 100% too. I believe a 50% reduction is fair to both sides in that it marks the fact the claimant was only guilty of less than half of the allegations put to him, was largely motivated by trying to secure a future job and had done nothing to deserve being treated as a thief before any reasonable investigation had been undertaken .

4.7. As for the increase under s38 of the Employment Act 2002 (the 2002 Act") there are no exceptional circumstances justifying no award , but at least the respondent had a standard statement so no reason to make the higher award

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Employment Judge Garnon
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21st March 2018