



EMPLOYMENT TRIBUNALS

Claimant

Mr K Pickford

Respondent

Caljan Limited

v

Heard at: Cambridge ET

On: 9 July 2024

Before: Employment Judge Conley

Appearances

For the Claimant: Himself, as a litigant in person

For the Respondent: Mr D Wright, Managing Director

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The claimant's claim for unpaid accrued holiday pay is not well founded and is dismissed.
3. The claimant's claim of unlawful deduction of wages is not well founded and is dismissed.

REASONS

1. From the outset I must apologise to the parties for the delay in completing this decision, which has been caused as a result of a significant backlog of work following the summer recess. I appreciate that the parties will have been awaiting this decision with some anxiety and I regret any aggravation of that anxiety that the delay may have caused them.

BACKGROUND

2. By a claim form presented to the Employment Tribunals on 13 February 2023, following a period of early conciliation between 28 December 2022 and 17 January 2023, the Claimant sought to pursue a number of complaints in relation to the following:
 - i. 'Ordinary' unfair dismissal

- ii. Unpaid accrued holiday pay
 - iii. Unlawful deduction from wages.
3. The basis for the unfair dismissal claim, put simply, was that the claimant, having admittedly committed an act of misconduct (namely being absent from work without permission), the decision to summarily dismiss him as a result was outside of the band of reasonable responses and was, as such, unfair.
4. The basis for the other two claims was unclear. It was not particularised in the ET1 form, and nor was it supported by any evidence in any form (either written or oral). Had the matter been listed for determination of a strike-out at some point prior to the final hearing, on the material before me it would doubtless have been struck out. In the circumstances, I intend to simply dismiss these claims without further comment. They are wholly without merit for the reasons I have just given.

THE ISSUES

Unfair dismissal

5. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide (as per *British Home Stores v Burchell*) are:
- a. Was misconduct the reason for the Claimant's dismissal? (This is not in dispute.)
 - b. Did the Respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
 - c. Were there reasonable grounds on which that belief was founded?
 - d. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
 - e. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
 - f. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?

THE EVIDENCE

6. The evidence in this case came from the following sources:
- a) The written and oral evidence of Chris Jackson (Area Service Manager), David Lowe (Service Director) and Derek Wright (Managing Director) on behalf of the Respondent;
 - b) An agreed Bundle of Documents (unpaginated but with documents divided into numbered plastic sleeves which were indexed).
 - c) The oral evidence of the claimant - no witness statement having been prepared.

7. It should be noted that the claimant was given a considerable amount of leeway in relation to the provision of his evidence. He did not comply with the Case Management Order to provide a witness statement in advance of the hearing. Ordinarily I might have simply allowed the claimant in these circumstances to adopt the content of his particulars of claim as his evidence in chief. However, the particulars of claim contained on page 7 of his ET1 form are very brief indeed (4 lines) and as such were of little to no assistance to me in determining his claim.
8. Being mindful of the overriding objective to deal with cases fairly, and of the fact that the claimant clearly found the handling and preparation of documents particularly difficult, I was prepared to allow him to provide oral evidence relating to the circumstances of his claim. In doing so I acknowledge the fact that this did place the respondent in a difficult position in being able to prepare cross-examination, and I have made all due allowances for this in reaching my decision.
9. I should also note that the bundle included a quantity of 'without prejudice' correspondence between the parties and ACAS. Clearly this should not have been in the bundle. I make it clear that I have not read any of these documents. I am satisfied that this material was not included in the bundle mischievously but in error. I note that neither party is legally represented.

FINDINGS OF FACT

10. The Claimant was employed by the respondent as a Service Engineer from 23 March 2018 (on which date his employment was transferred to the respondent under TUPE) until that effective date of termination (EDT) which was 20 June 2023, when he was summarily dismissed for an act of gross misconduct. His period of continuous employment commenced on 1 November 2009.
11. His total period of continuous employment, therefore, was 13 years, 7 months and 19 days.
12. The claimant had a number of long standing health conditions (for around 20-25 years), including stress, acid reflux, and an undiagnosed illness which causes severe nausea and cyclical vomiting for which he has undergone many tests which do not appear to have identified a definitive cause. The claimant has for some years had his conditions managed by having regular injections. These were administered by a nurse until the Covid pandemic when the claimant began to inject himself.
13. As a result of these conditions, he had a poor record of attendance; although it should also be said that a number of his absences were in no way connected to his ill health - for example, on 16 December 2022 he reported that he could not come into work because of a 'split pipe', and on 10 January 2023, because his daughter's husband had been in a car accident.
14. As a result of the claimant's health conditions, the respondent referred him to Occupational Health (OH) on two occasions. On 22 May 2022, the first OH

report (prepared by Dr Nikhil Kapoor, OH physician) identified that the most recent deterioration of his vomiting condition stemmed from an operation on his abdomen around 7 years previously which was then exacerbated by a bout of food poisoning. It advised that the claimant was fit for work, and that the only adjustment required was that when the claimant suffered an episode of sickness and received an injection he should stop driving. It indicated that the claimant's condition *might* engage the disability provisions of the Equality Act but did not give a definitive view on this.

15. The second OH report (this time by OH Advisor Mary Morris) on 9 January 2023, stated that, as of the date of the referral, the claimant was symptom-free, that he had made a good recovery under the care of his doctor and that he remained fit for work. It recommended completing a 'wellness action plan' (and suggested using the MIND template) and conducting regular one-to-one meetings to check whether the claimant was coping with his workload. Contrary to the first OH report, it indicated that the claimant was *unlikely* to engage the provisions of the Equality Act.
16. This second OH assessment came about shortly after the claimant came under the supervision of Chris Jackson, the Area Service Manager, from 1 September 2022. Following Mr Jackson's arrival there were a number of periods of absence from work by the claimant, including a three week period from 25 October 2022 to 17 November 2022. A Return to Work interview was carried out which resulted in, among other things, a decision to refer the claimant to OH for assessment.
17. Following the second OH assessment, there were further occasions of absence from work. On 25 January 2023, there was a single day of sickness absence, for which the claimant self-certified, indicating that his reason for absence was that 'he had a runny nose and felt sick'. In his return to work interview on 26 January 2023, he informed Mr Jackson that he had felt physically sick and had panicked because he thought that it could have been the return of his vomiting condition which had not been affecting him lately; however, he went on to say that he later discovered that the milk he had used to make porridge for breakfast had been 4 days out of date and that this, he believed, had been the cause of his sickness.
18. There followed a further period of 10 days sickness absence, from the 31 January 2023 to 10 February 2023, which was supported by a fit note from the claimant's GP, Dr John Bryant.
19. On 14 February 2023, following the claimant's return to work, he attended a Sickness Absence Meeting with Mr Jackson, in company with Ana Nedelcu, from the respondent's Human Resources department (as a note taker). The meeting lasted from 12.30pm to 1.18pm.
20. The claimant confirmed some details of the history of his condition (as per Dr Kapoor's OH report), and the treatment that he was receiving. Mr Jackson enquired as to whether the claimant would benefit from speaking to a 'mental health First Aider' and encouraged him to do so. He stated the importance of

the claimant phoning him directly to report any future absence, and not to email or message. The claimant confirmed that he understood this. Mr Jackson reassured the claimant that his performance was not in issue and that the meeting did not amount to a warning, and the claimant indicated that the outcome of the meeting was 'better than [he] thought'. Mr Jackson set in place an Absence Improvement Plan for a 6 month period, from 14 February 2023 to 14 August 2023. The objectives of the plan were clearly stated - to reduce absence, to report absence in the correct way (by calling Mr Jackson only, on each day of absence before 8.30am), and to improve communication - and were reasonable. I am satisfied that the claimant understood and consented to the plan.

21. Although on the day following the meeting the claimant initially called Mr Jackson intending to report a sickness absence, he later confirmed that he was feeling better and was able to work. Thereafter there was a three-month period without any sickness absence. The subsequent review meetings during this period indicate a degree of positivity from the claimant in relation to his management of his condition and improvements in his health.
22. During the period from January 2022 to June 2023, the claimant was absent from work for a total of 61 days.
23. In April 2023, the claimant booked some annual leave for the month of May. On 17 April 2023, Mr Jackson approved one day's annual leave for 24 May 2023, to enable the claimant to attend a Driver Awareness Course. On 25 April 2023, Mr Jackson approved a further day of leave for the claimant, on 19 May 2023, for the claimant to attend a dental appointment.
24. On 22 May 2023, the Monday which followed the claimant's day off for the Driver Awareness Course, the claimant called in sick, in partial compliance with the agreed procedure in that he attempted to call before 8.30am. Mr Jackson received two missed calls, at 5.45am and 6.39am respectively, leaving voicemail messages each time saying 'I'm not feeling well'. Mr Jackson returned the calls at 7.34am, and when the claimant answered he simply said 'I will have to call you back', whilst making wrenching noises.
25. However, the claimant did not call back as promised and indeed Mr Jackson made two further attempts to contact the claimant, leaving messages, but receiving no response, and did not receive any call by the end of the working day.
26. The following day, Tuesday 23 May 2023, Mr Jackson attempted to call the claimant at 8.05am, and again at 4.50pm. The claimant did not answer either call, and neither did he call or attempt to communicate in any way with the respondent during the course of the entire day. He failed to attend work with no explanation - something described by the respondent as going 'AWOL'.
27. On Wednesday 24 May 2023, a day that the claimant had previously booked as annual leave, Mr Jackson made further attempts to communicate with the

claimant but was unsuccessful. The claimant made no attempt to contact Mr Jackson or the respondent.

28. On Thursday 25 May 2023, a day on which the claimant was expected at work, once again there was no communication and the claimant remained 'AWOL'.
29. On Friday 26 May 2023, once again the claimant failed to attend work and made no attempt to communicate with the respondent in accordance with the agreed procedure. At 5.02pm the claimant sent Mr Jackson an email which stated as follows (verbatim):
'Sorry I missed all Ur calls but I wasn't home from Monday till now I will be back on Tuesday I have a cover note if needed really disappointed in myself over this ,call u Tuesday when at work'
30. The following Monday 29 May 2023 was a Bank Holiday and on Tuesday 30 May 2023 the claimant returned to work. The combined effect of the claimant's annual leave, authorised sickness absence, unauthorised sickness absences, and the Bank Holiday was that the claimant was away from work for a period of 11 days despite having taken just two days of annual leave.
31. The respondent's Disciplinary Policy identifies 'unauthorised and unreasonable absence from work' as examples of 'misconduct', and 'unacceptable levels of absence or absence without leave (AWOL)' as examples of 'gross misconduct'.
32. It states that *'Where misconduct is confirmed or you are found to be performing unsatisfactorily you will be provided with a first written warning. A further act of misconduct or failure to improve performance within a set period may result in a final written warning. Depending on the nature of the misconduct or unsatisfactory performance it may be appropriate to move directly to a final written warning. This might occur where actions have had or are liable to have a serious or harmful impact on the company...If the act in question is determined as gross misconduct, you may be dismissed without notice for a first offence.'*
33. On 31 May 2023 the claimant attended an investigatory meeting via Microsoft Teams, chaired by Mr Jackson and in the presence of Kimberley McKinley, HR Assistant (as note taker). The stated purpose of the meeting was to 'determine whether any disciplinary action against [the claimant] would be appropriate'.
34. The meeting commenced at 10.30am and concluded at 10.50am. The claimant explained that he had been intending to go to work on the Monday (22 May 2024) but felt dizzy as if he had vertigo. He stated that he did not think that it was a recurrence of his previous illness but something different. He had not yet obtained a fit note from his doctor, despite his indication in the email of 26 May 2024 that he did have one 'if needed'. He confirmed that he had been feeling 'on top of the world' prior to taking ill; and that he began to feel better on Friday 26 May 2024 but was unable to make contact because, having been with his sister, when he walked home he didn't have his work phone with him. He said that he had not been able to keep his scheduled dental appointment due to his ill health and this would need to be rearranged.

35. Following this meeting the claimant was invited to a disciplinary hearing which took place on 20 June 2023, chaired by David Lowe and with Ana Nedelcu from HR present as a note taker.
36. During the course of the meeting (from 1.00pm to 1.30pm) the claimant was asked to account for his absences during the week of the 22 May 2023 and in particular his failure to inform the respondent of his absences on 23 and 25 May 2023. His account was broadly in accordance with the account which he gave in the investigatory meeting: that he was severely unwell, and that for much of the time he was without the work phone that had been issued to him to enable him to communicate with the respondent. He accepted that he could have called using his personal phone or by some other means but that he did not think to do so. He stressed how much he loved his job and the efforts that he had made to improve his health and attendance levels.
37. At the conclusion of the meeting, following an adjournment from 1.30pm to 2.20pm, Mr Lowe decided that in relation to the claimant's absence levels, the appropriate sanction would be a final written warning; but that in relation to the act of going 'AWOL', this amounted to gross misconduct and the sanction would be one of summary dismissal. The meeting was terminated at 3.35pm.
38. The claimant was given the right of appeal, which he chose to exercise; the appeal was scheduled to take place on 18 July 2023, and was chaired by Derek Waite, the respondent's MD, and Leonie Waite, head of HR was present as note taker.
39. The claimant provided an account which was broadly similar to that which he had previously, but included some additional detail. He reiterated that he was extremely unwell at the beginning of the week. He went on to say that ordinarily he is supported by his daughter but on this occasion she was away and he was reliant upon his sister who is older than he is and equally infirm. She took him to her house because of his condition. Because of this, he was without his work phone and his sister was unable to help. In his frame of mind he did not consider any other way in which he could have communicated with the respondent.
40. However, upon further questioning by Mr Wright, it emerged that although the claimant had not contacted the respondent (either himself or via his sister), he *had* managed to make contact with the Driver Awareness Course organisers to inform them that he would not be attending - this was done by his sister who, upon the claimant's instructions, had managed to email them because, in the claimant's words, 'it had to be done'. Likewise, he had instructed his sister to contact the GP in order to obtain a fit note to cover his absence.
41. When pressed as to why he had not felt it necessary to inform the respondent of his inability to come into work, he repeated 'I did not think'.
42. Having considered the matter, Mr Wright upheld the decision to dismiss.

THE LAW AND CONCLUSIONS

Legislation

43. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.

44. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

(a) ...

(b) relates to the conduct of the employee,

(c) ...

(d) ...

(3)

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

45. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. It is not in dispute that 'conduct' was the reason for dismissal in this claim.

46. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell* [1978] IRLR 379, as per the list of issues set out above in paragraph 3 above.

47. The function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted: *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal itself.

48. The Court of Appeal in *London Ambulance NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct.

Genuine Belief

49. Did Mr Jackson and Mr Lowe, acting on behalf of the Respondent, have a genuine belief that the Claimant was guilty of the misconduct alleged? We are quite sure that they did. I accept their evidence on this point unreservedly. In any event, the claimant conceded (as he must) that he had failed to comply with the agreed procedure for reporting absence, and that this would amount to, at the very least, misconduct.

Reasonable Investigation

50. Did the respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case? Again, this is something of which I am perfectly satisfied. The investigation that was carried out was timely and thorough. Mr Jackson's investigation was also conducted fairly, and sensitively, in my view, and as the claimant's line manager he clearly possessed a detailed understanding of the background.

Procedure

51. I must next consider whether the procedure that the Respondent adopted was reasonable.

52. I find no basis upon which it could possibly be suggested that the procedures adopted were unfair or unreasonable. Mr Jackson conducted the investigation in an open and even-handed manner, gave the claimant every opportunity to make such representations as he wanted to. Mr Lowe, whilst having a different approach to that of Mr Jackson (being somewhat more direct and perhaps a little more adversarial), nevertheless gave the claimant a fair hearing and gave due consideration to all matters that were relevant to the decision that he was charged with making.

53. In my judgment both investigation process and the disciplinary procedure were conducted within the reasonable range of responses to the situation.

Sanction

54. Was the sanction within the band of reasonable responses? Ultimately this is the only question to which the Tribunal has had to consider at any length. However, even with this important and central issue, the decision is clear.

55. In reaching my decision in relation to this issue I have reminded myself about the importance of not seeking to substitute the Tribunal's decision for the respondent's decision - I understand and accept that a decision may not be unreasonable merely because it is not the decision that the Tribunal would have taken in those circumstances. I have instead sought to identify where the boundaries of that notional 'band of responses' lie, and whether the decision to dismiss fell within them.

56. I have considered the account provided by the claimant and I find that it lacks credibility. The claimant was in no doubt whatever as to the procedure to be adopted when calling in sick, it having been set out in clear and unambiguous terms as part of the Absence Improvement Programme. Not only had he

understood it, he had consented to it, and for a period of several months he had adhered to it. Whether or not he was unwell on the days in question, I find that there was absolutely no good reason why he chose not to communicate with Mr Jackson. The timing of the days of absence, combined with the failure to communicate and failure to provide any medical evidence leads to the conclusion that the claimant deliberately decided not to telephone Mr Jackson or indeed anyone at the respondent. It is likely, in my view that the decision to take these particular days as unauthorised sick leave was not coincidental but was to a certain extent premeditated, although for what reason I simply cannot say. I cannot accept the claimant's evidence that his failure to communicate was merely an oversight on his part, nor that his sister could not have communicated on his behalf had he been simply too ill to do so himself.

57. In these circumstances, it is difficult to see what possible alternative there was to summary dismissal. Some other employers might have given a final written warning to a long standing employee who was generally held in high regard but I believe they would be in the minority. Most would do as the respondent did here and I do not find that decision in any way unreasonable.

58. On the whole I found the respondent to be a sympathetic and considerate employer who had made efforts to support the claimant, even during the Tribunal process. I was particularly impressed with the management style of Mr Jackson which was robust yet supportive.

59. I am also sympathetic to the claimant, who I found to be a vulnerable man of mature years who may well struggle to find comparable alternative employment. This is a matter of sincere regret but it does not (and cannot) affect my decision in relation to his claim.

60. Accordingly, his claim for unfair dismissal fails, as do all of his other associated claims for compensation.

Employment Judge Conley

Date: 11 October 2024

Sent to the parties on: 17/10/2024

For the Tribunal Office