Case Number 2501312/16

THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr B El-Buka	**MAN Diesel and Turbo UK Ltd**

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH **ON 4th & 5th April 2017**
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: Mr S Healy of Counsel
For Respondent: Mr P Gorasia of Counsel

REASONS (bold print is my emphasis)

1. Introduction and Issues

1.1. The claims are of unfair and wrongful dismissal. The response denies both claims.

1.2. In Price-v-Surrey County Council Carnwath LJ, sitting in the EAT observed "*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented*" The parties had agreed a list of issues which sets out every issue which could arise in a case of this kind, rather than those which do arise in the present case. If I prune away everything but the real issues, what remains is:

1.2.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for dismissal?
1.2.2. Were they, as the respondent alleges, related to the employee's conduct?
1.2.3. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:
(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal ?
1.2.4 If it acted fairly substantively but not procedurally, what are the chances it would still have dismissed the employee if a fair procedure had been followed?
1.2.5. If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct ?
1.2.6. In the wrongful dismissal claim the issue is whether he was in fact guilty of gross misconduct

2. The Relevant Law

2.1. 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 relates to ..... the conduct of the employee.”

The Reason

2.2. In Abernethy v Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. The reason for dismissal must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal. Although it is an error of law to over minutely dissect the reason for dismissal, it is essential to determine its constituent parts.

2.3. 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 that was indeed the operative reason, even a potentially fair 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 in fact merited dismissal.

On the other hand, the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that 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.

2.4. In Orr-v-Milton Keynes Council the question was whether an employer, considering dismissal for misconduct, is to be taken to know exculpatory facts which are known to the employee's manager but are withheld from the decision-maker. Moore-Bick LJ said

60. Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include … any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. To impute to that person knowledge held by others is to reverse the principles of attribution formulated in

the Meridian case and to place the whole exercise on an artificial footing. The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained.

Fairness

2.5. 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."

Reasonable belief and investigation

2.6. An employer does not have to prove, even on a balance of probabilities, that the misconduct he 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 the employer 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.)

2.7. In A v B [2003] IRLR 405. Elias J in the EAT 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. This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. 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."

2.8. In that case and Orr, the word “ investigation” refers in my judgment to the whole process not merely to the first stage labelled as “investigatory”.

Fair procedure

2.9. In Polkey v AE Dayton it was held a fair procedure must be followed . The requirements of natural justice which have to be complied with during proceedings of a domestic disciplinary enquiry are : firstly, the person should know the nature of the accusation against him; secondly, should be **given an opportunity** to state her case; and thirdly, **the dismissing officer** should act in good faith. As a general rule, a person who has been a witness to acts alleged should not hold an enquiry or decide the outcome. In Moyes v Hylton Castle Working Mens Club. a “pre-Polkey” case , a club steward, was dismissed following two incidents of alleged sexual harassment of a barmaid, both of which he denied. The second incident was observed by the Chairman and Assistant Secretary of the Club. Those two people went on to be involved in the investigation and the disciplinary hearing. The EAT held no reasonable observer would conclude that in view of their dual role justice was or appeared to be done. Whilst there will inevitably be cases where a witness to an incident will be the person who has to take the decision to dismiss, in the present case it was unnecessary because there were many other committee members. It was impossible for the Chairman and Assistant Secretary to dissociate their role as witnesses from that of judges and it put the others involved in the decision in an impossible position. The EAT said departure from the rule of natural justice known by the Latin maxim “ Nemo Judex in sui Causa” “ (no-one should be a judge in their own cause) meant dismissal was unfair.

Fair Sanction

2.10. Ladbroke Racing v Arnott held rule which specifically states that certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer’s disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employee to consider all the facts relevant to the nature and cause of the breach, including the degree of its gravity. A previous good employment record is always a relevant mitigating factor.

2.11. British Leyland –v-Swift held an employer in deciding sanction can take into account the conduct of the employee during the disciplinary process, so that if he persistently lies, that can be a factor in deciding to dismiss him.

2.12. Even an admission of some misconduct will not automatically make dismissal fair as explained in Whitbread Plc v Hall [2001] IRLR 275:

Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant’s immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers.”

Appeals
2.13 In determining the fairness of a dismissal, where the employer's disciplinary procedures include a right of appeal, information that becomes available in the course of the appeal is to be taken into account: see West Midlands Co-operative Society Ltd v Tipton [1986] 1 A.C. 536. Taylor-v-OCS Group 2006 IRLR 613 held that whether an internal appeal is a re-hearing of a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

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

Wrongful Dismissal
2.15. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws v London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. Dishonesty towards the employer is an example of gross misconduct. In John Lewis v Coyne [2001] IRLR 139 the EAT said: "*..,there are two aspects to dishonesty, the objective and the subjective, and judging whether there has been dishonesty involves going through a two stage process. First, it must be decided whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If so, then secondly, consideration must be given to whether the person concerned must have realised what he or she was doing was, by those standards, dishonest*

2.16. 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, the dismissal is wrongful and damages are the net pay for the notice period less any sums earned in mitigation of loss.. The statutory minimum periods of notice are set out in Section 86 of the Act A key clarification of this area of law is to be found in the judgment of Lord Justice Elias in a case heard on 13th December 2016 of Mr Colin Adesokan –v- Sainsbury's Supermarkets Ltd

2.17 . Santamera v Express Cargo Forwarding said of the disciplinary hearing for unfair dismissal purposes
"The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which it may lack the means. That is why cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct.
There may be cases, however, in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted. Ulsterbus Ltd v Henderson *could not be read as laying down the proposition that cross-examination can never*

be required in any investigation carried out by a reasonable employer. The issue under s.98(4) is always reasonableness and fairness. In each case, the question is whether or not the employer fulfils the test laid down in British Home Stores Ltd v Burchell and it will be for the tribunal to decide whether the employer acted reasonably and whether the process was fair.

2.18. Where witnesses with first hand knowledge are not called so their evidence can be challenged at the disciplinary and/or appeal hearings (for reasons including that the claimant did not ask they should be) , the employer permissibly may have taken the view fairness did not require it. However, in the wrongful dismissal claim, as this case illustrates, I may find I cannot be satisfied the employer has shown on a balance of probability , ie that it is more likely than not, gross misconduct actually occurred.

3. Findings of Fact

3.1. I heard the claimant and his one witness Mr Andrew Richardson . For the respondent I heard Mr Derek Wendel who joined it in April 2012 as General Manager for Field Service Diesel and Turbo Machinery, Mr Howard White who worked for it since 2007 and is Head of Region Europe, for MAN Diesel & Turbo, and Technical Director for MAN Diesel & Turbo UK Limited, Ms Andrea Haughton who joined in February 2006 as HR Manager and been Head of HR since June 2016 and Mr Andrew Bellamy employed since April 2006 promoted to Managing Director of the UK business in 2012.who left it on 31st January 2017.

3.2. The claimant joined the respondent in March 2010 . Around August / September 2013, he became head of the Teesside office. Part of his role was to visit customers, suppliers and engineers on site. Mr Wendel , based in Stockport, became his line manager in 2013. By 2016 the working relationship between them was poor . Mr Wendel had conversations with him about his performance. His appraisal in February 2016 did not go well. The claimant raised an issue of stress with Mr Wendel around May / June 2016 by email (page 119) when Mr Wendel had been highlighting various performance matters.Mr Wendel did nothing other than say they would talk about it later. Mr Wendel's statement says " *I had a choice to make about whether to go through a formal performance management process but I had exercised my managerial judgment and opted to work informally with him* " . Andrew Richardson says If Mr Wendel took exception to an employee, he set about making it as difficult as possible for the individual to carry out their job. I accept that. I too formed the clear view, based on evidence I will set out later, Mr Wendel was intent of "catching the claimant out" doing something wrong or "managing him out" of the business. **What is more, the claimant knew that**.

3.3. There is a difference between what can be termed "planned" and "impromptu" leave . The former is for days (usually several) which an employee knows well in advance he wishes to take . The latter are days (usually single) which, for a variety of reasons, an employee needs to take to deal with some unforeseen matter. The claimant was a senior employee paid £50000 per annum plus bonus and a company car etc . His contract says his working week is 37 hours worked at specified times plus whatever his manager asks of him . There should be "give and take" and always had been as to when hours were worked , so an employee who worked outside his contracted hours and asked to take some hours within those times in lieu would normally be allowed to. Also the requesting of additional days of "impromptu" leave

prior to Mr Wendel's appointment would not be a problem where a reasonable request was made. The Employee Handbook contains page 75
"*Wherever possible an employee will be allowed to take the leave time they wish, but all requests for holiday must be agreed in advance by the employee's immediate Manager/Supervisor*"

It does not provide for a minimum period of notice of a holiday request or that all approval should be in writing, let alone made using a particular form.

3.4. Mr Wendel was the claimant's line manager and therefore responsible for approving holiday requests. Prior to Mr Wendel becoming his manager , and for some time after he did, the claimant often did not get advance conformation of authorisation so did not find it unusual not to. He simply booked holidays through Ms Christine Barker an administrator based in Teesside and some were signed off retrospectively, especially impromptu requests.

3.5. At the beginning of the 2016 holiday year, Mr Wendel asked Ms Barker, to send a note to all his direct reports, including the claimant (page 114) saying an electronic holiday form could be located on the Turbo central files which employees needed to complete and email to himself, copied to Ms Barker, for approval. Mr Wendel's statement says

26. A number of members are managed remotely and I am often required to travel as a part of my role. As a consequence, I do not always respond immediately to requests for holidays. I did receive some feedback from the Claimant that I didn't always reply quickly enough to his requests, I however have no evidence of this nor can I recall any specific conversations where he raised this with me. In any case, if for whatever reason I did not respond or had forgotten to do so, I made clear that my team must get my approval before taking leave. Therefore, if I hadn't responded to a request, employees knew that they should chase me for a reply and that they were not permitted to simply take the leave without authorisation.

and later

30 As a number of employees are remotely based, there was an element of trust required in the management of the holiday request system.

The "trust" was one way in Mr Wendel's view. If he expected to be able to trust his " reports" to ask for leave in the way he specified, they should be able to trust him to reply promptly **.** Ben Godden was another employee at Teesside The claimant's holiday request form for the year 2016 included cancelled holidays, where he had changed dates due to the needs of the business and to accommodate a change in Mr Godden's holiday . He then requested holiday 6th to 13th June which was approved by Mr Wendel verbally but never signed off by him . The claimant took this holiday and Mr Wendel never alleged he had breached procedure by going on holiday prior to it being signed off by him. It was not unusual not to hear from Mr Wendel prior to taking the day, The claimant also requested the 1st August via email to Mr Wendel and this was never responded to (see later).

3.6. It was common practice for Mr Wendel to call the claimant on holiday several times to deal with a work issue. He would always answer despite being on holiday. He received numerous calls the previous year whilst on holiday with his daughter.

3.7. In around May 2016, the claimant requested a number of holidays in 2016 and these were approved and added to his holiday form (page 115). This included 25 – 29 July 2016.He was taking his daughter, Daisy, who was 5 years old at the time, to Norway to visit friends and originally planned to fly on 23rd July . He is separated from Daisy's mother and they have joint custody. He then had to change his flights to accommodate his friends' ability to collect him from the airport which was a long way from where he would be staying. His new flight time was 8.30 pm , with a latest check in at 7.30, from Stansted Airport.

3.8. He was then asked to attend a management round table event in London on 21st July 2016, which was being organised by Mr White. .He emailed Mr White's secretary and office manager Christa Rewcastle on 9th May 2016 (page 116), stating
Hi Christa hope you are well?
The 21/7 is fine but I am on vacation the following week.

3.9. The claimant's statement says at paragraph 18
Following my emails to Christa, I decided I would need an additional day's holiday on 22nd July 2016 as I had changed my holiday plans, deciding that I needed a day to prepare for holiday as I needed to be in London on the evening of 22nd July to fly to Norway.

He also emailed Mr White and copied in Ms Rewcastle on June 24th 2016 that he would be flying to London and back on the same day, rather than staying in London like the rest of the respondent's employees for dinner in the evening as he did not want to travel from London back to Teesside to collect Daisy from her childminder in Hartlepool only to travel back to Stansted the same day. He says he instructed Ms Barker to request this extra day, amend his holiday form and send it to Mr Wendel who was already aware of the change and the reasons for it. The claimant's evidence that he did this on 14th July , saw the amended holiday form and failed to notice the 22nd July was missing was not reliable in my view. Mr Gorasia cross examined on the basis he was lying. He may or may not have been. Another possibility is that he intended to do as he says now he did, but forgot. A third possibility, which is not the case the claimant ran either here or at his disciplinary and appeal hearings, is that when he had to change his flight, he thought it would be possible to do his packing during the week leading up to his holiday, leave work a little early on 22nd July and still get to Stansted in time.

3.10 The claimants suffers from Irritable Bowel Syndrome. On Sunday 17th July 2016 he was unwell . He text messaged Mr Wendel to say he was not well enough to attend work next day and followed this up with an email to his team. He went to Daisy's sports day on 18th July because her mother at short notice could not attend, her grandfather had taken ill and the claimant did not want Daisy not have any family members there. He would not have been able to attend work because stress played a big part in the effects of his symptoms, and work was extremely stressful at this time, especially with the attitude of Mr Wendel.

3.11. He returned to work on the afternoon of the 19th July 2016 to complete invoicing which had to be submitted despite still being ill. That night he drove to Crewe, stayed overnight, collected his new company car on Wednesday morning and drove back.

3.12. A document called the "weekly movement sheet" is supposed to be updated by Ms Barker (page130). It is a record of the weekly movements of Mr Wendel's " reports" . It is **not** regularly updated. It did not show him collecting a new company car from Crewe and showed him as being in London on 22nd when it was known he would not be

3.13. On 21st July 2016 he caught the 9am flight from Teesside to Heathrow to attend the management team day in London. During the day he had conversations with Mr Wendel and Mr White, , in the company of others, about his holiday and the reasons why he had to leave before the Thursday night activities for which everyone else was staying. Mr Wendel learned the claimant had earlier approached Mr White and exchanged emails with Ms Rewcastle to arrange this. Mr Wendel's statement says "*I became aware of this in a passing conversation with Howard, the Claimant was not stopping for dinner in London on the evening of 21 July.*"

3.14. I believe Mr Wendel was annoyed the claimant had gone direct to Mr White rather than through him. His statement includes " *on either Tuesday or Wednesday of that week I was curious to understand why the Claimant was returning early, as I ideally wanted everyone to stay in London for the dinner 2016. I was specifically informed by Brian he did not want to travel back up to Teesside on Friday 22 July, only to return back to London later that evening to take a flight out of Stanstead. The Claimant led me to believe he was flying out on holiday from Stanstead in the evening of 22 July. I therefore accepted the Claimant's request, which made sense and signed off his travel* (this is his travel between Teesside and London) . *I had a similar brief discussion with the Claimant in the hotel on Thursday 21 July 2016 in the presence of Howard White. Again, he repeated that he was "going on holiday" on Friday, but I understood this was after work **in the evening** of 22 July 2016.*

He later says

" *I expected him to be working on Friday 22 July, particularly as a conference call had been arranged for 2pm that day….. On 20 July 2016, I had emailed the Claimant and two of his colleagues arranging an internal pre-conference call discussion at 11:30am. (page 139.) The Claimant had accepted the request on 20 July 2016 (pages 140 – 141) and had sent me an email on 21 July 2016 at 19:48 to check whether he should call my mobile (pages 139). At no point did the Claimant say he could not attend because he was on holiday*

3.15. This evidence would not be credible from any person with even passing knowledge of the geography. Mr Wendel, and the claimant's contract, says staff finish at 3.30 on Fridays . To drive from the office in Wilton north to Hartlepool to collect Daisy from her childminder then head south to Stansted, park the car and check in baggage at a time anyone could reasonably describe as ***in the evening*** would be ambitious. To do so with a 5 year old child would be even more so. Anyone knowing the traffic around Teesside on Friday afternoons would find the proposition that it could be done laughable .

3.16. Ben Goddon asked Mr Wendel on Friday 22nd July if he could go home in the afternoon after he returned from London. Mr Wendel agreed rather than him going in to the office for an hour or two. He says he would have replied similarly to the claimant had he asked to leave early. The claimant would not have dared to ask in light of Mr Wendel's attitude towards him

3.17. On 22nd July 2016 the claimant did not go to Wilton . He would do the conference call using his mobile He had texted Daisy's mother on 20th July at 16.55 stating:
"*Hi Claire I have to pick Daisy up at normal time on Friday. Derek's booked a meeting from 2-3!! …Tell Eve sorry about the last minute change, pissed me off tbh!"*
He sent a further text message at 17.15 stating;
"*.Derek being a complete tosser today he's had my life, just means me and Daisy will have to travel down Friday eve now…"*

3.18 The first telephone call on 22nd July 2016 took place as planned between 11:30-12:00. During the call, Mr Wendel asked the claimant where he was . He says he assumed he would be in the office. The weekly movement sheet was wrong. Mr Wendel could hear seagulls in the background. The claimant said he was not in the office and was "off", "on holiday". Mr Wendel asked whether he had requested leave and if his holiday form was up-to-date. The claimant replied affirmatively. Mr Wendel's statement says "*Following the morning call, I was concerned I had missed the Claimant's holiday request, but as I was travelling by train at the time, I could not access the central holiday approval file. I emailed Christine Barker and asked her to send me a copy of the Claimant's latest holiday request form (page 146), so I could check and update my HR information as necessary*".

3.19. I do not accept that was his motivation. He was thought he had "something on" the claimant and was looking for evidence. He received a response from Ms Barker at 12:10 (page 147) attaching the signed pdf holiday form and the holiday form from the central system (pages 148 and 149). Both recorded authorised holiday from the 25 – 29 July but not 22 July. Mr Wendel then checked the amendment request he had received from Ms Barker on 14th July 2016 and noted the recent amendments did not include a request for leave on 22nd July 2016 (page 127). He also checked with Ms Barker whether the office movements sheet was accurate, as it said the claimant was due in London (page 130). She apologised and said it was her mistake and it should have stated he was in the Wilton office.

3.20. At first the claimant did not know why Mr Wendel was questioning him about his whereabouts. He was obviously not in the office . Had he been it is doubtful he would have taken a call on his mobile. He attended a further conference call at 2pm. Mr Wendel asked again where he was and again he confirmed he was on holiday. He left Hartlepool for Stansted Airport at 3pm and arrived just in time.

3.21. First the claimant called Mr Wendel at approx. 14:45 because he wanted to clarify his holiday for week commencing 1st August 2016. Mr Wendel says " *He had every opportunity to tell me that his holiday form was wrong and that it did not include 22 July 2016. However, he did not do so.* At 9.49 pm (possibly Norway time), the claimant requested the additional day off on 1st August by email (page 150). Mr Wendel says " *but he did not attach his most up to date holiday request form. I was surprised by this, as during our phone call I had specifically*

emphasised that it was the Claimant's responsibility to make sure his holiday form was accurate and up-to-date" Mr Wendel seemingly expects the claimant, while on holiday ,possibly still on a plane with a 5 year old in his care, to access electronically and send a prescribed form .This speaks volumes about his attitude to leave requests and to the claimant.

3.22. At some time on 22nd July 2016 the claimant telephoned Ms Barker. The statement she later provided (page 237) stated the claimant asked her to update his holiday form and **add** Friday 22nd July 2016. He has denied throughout requesting her to add the date, saying he only wanted to check she had already put the date through as holiday. She told him she had already sent the form to Mr Wendel so no change could be made. He had also copied to her the request at page 150 for leave on 1st August.

3.23. On 23rd July 2016, the claimant became anxious about the way he had been questioned on 22nd July. He text messaged Ms Mandy Nalton asking, "*is everything ok, I've been trying to get hold of Christine but getting no response by email or phone is she off sick*?" He also asked if she knew whether Ms Barker had sent the holiday form. The reply told him not to worry and said of Mr Wendel " *I imagine he'll just enjoy pointing out the procedure and tell you to make sure you follow it next time* ".

3.24. The claimant e-mailed Ms Barker on Sunday 24th July (page 151):
"*what date did you send my holiday request to Derek? And have you had a response yet? …I don't want him saying I've took another day off without asking, I'll just tell him I forgot to add last Friday when you send my updated request, if I've got a job when I get back that is!!!"*
Ms Barker did not reply which he could not understand at the time.

3.25. On 25th July at 8.20 (again possibly Norway time which would be UK time 7.20 am) the claimant emailed David Peacock (page 156) stating:
"Hi mate
According to Christine Derek's been on the war path after me cos he never signed last Friday's holiday request for me? Even though I spoke to him and Howard about it. Chrissy said he's been asking for loads of info from her to send to him??? Where dya think I stand on that one?. I sent him holiday updates 3 weeks ago and missed it off but still had no response to date for all the others!!.
Holidays with Daisy going lovely, weather is great, just that twat bothering me!!"
Mr Peacock did not reply. At the time they had a very close friendship and working relationship so this too puzzled the claimant.

3.26. Mr Wendel says on 22nd July he wanted time to reflect on whether there was poor administration on the claimant's part, or whether he was trying to deceive him. He planned to speak to the claimant about it when he returned from holiday. However, on Monday 25th July 2016 at approximately 8am, he was approached by Mr Peacock, who is equal in rank to the claimant , based in Stockport but works also from Wilton and line manages Ms Barker. He said he had been contacted by her **on Friday afternoon.** She was uncomfortable over a phone call she had with the claimant after she had sent his holiday request form to Mr Wendel. There is no evidence of the time of that call.

3.27. Mr Peacock old Mr Wendel the claimant had asked Ms Barker to amend his holiday form to include 22nd July and contacted her on Sunday 24th July 2016 to check whether she had received authorisation for his additional request for 1 August 2016.

3.28. Mr Peacock also told Mr Wendel he had received emails from the claimant which he was not comfortable discussing, but were unprofessional and insubordinate.(Page 156.) He also said of the claimant's absence on 18th July he had sent a text message to the claimant to check if he was okay and the claimant had replied he was not ill, but intended to take an additional day off without approval. Mr Peacock had deleted this message, but recalled it contained '… *I won't beg him to give me the day off for my daughter's sports day*…'.

3.29. Mr Peacock told Mr Wendel the claimant had told him he was unhappy having to work such a long day on Thursday 21st July 2016 and therefore intended to take Friday 22nd July off. Mr Wendel says without this information," *I would have been oblivious to what had happened and may well have dealt with this issue completely differently*" .

3.30. Mr Wendel already had a meeting planned with Andrea Haughton that day about other issues. However, he reported his discussion with Mr Peacock and they decided to request short statements from him and Ms Barker confirming what had happened**.** It was agreed they would only focus on events of 22nd July 2016 and forget the 18th **. This makes no sense . Whoever was lying about 18th could be lying about 22nd and that could be Mr Peacock.** Mr Wendel received a short statement from Mr Peacock confirming what he had said. (Page 153) including about 18th July 2016, but this content was subsequently removed..

3.31. Mr Wendel also spoke to Ms Barker and asked her to forward the emails received from the claimant. (page 158 - 159.) Mandy Nalton also forwarded some emails (181 – 182).They are all totally innocuous. Ms Barker provided a short statement which did not include the e-mails on 24th so Mr Wendel asked her to revise it which she did. On 26th July 2016, he sent a copy to Ms Haughton (page 170) and asked her to call about Ms Nalton giving a statement. Later he sent Ms Haughton copies of all emails and statements he had gathered during what he calls "my preliminary investigation" .

3.32. Mr Wendel and Ms Haughton agreed the claimant should be suspended. Mr Wendel had seen the email referring to him as a "twat" (page 156). Ms Haughton's initial view was they should wait until the claimant returned from holiday before suspending him, but should cease contact with him. Ms Barker was therefore told not to respond to the claimant. That same day, Mr Wendel had received an email from the claimant chasing for a response to his request for holiday on 1st August 2016 and saying he had also been chasing Ms Barker. (Page169.). Mr Wendel was concerned the claimant would continue to contact him and others over the coming days and no-one would know how to respond, so he emailed Ms Haughton later that evening suggesting they inform the claimant he was suspended with effect from the following day.. She emailed the claimant on 27th July 2016 confirming he should not have no further contact with any colleagues or customers. (Page 189).

3.33. On 28th July the claimant returned home early from holiday because of the added stress of his suspension. He was signed unfit to work by his GP

3.34. Mr Wendel travelled to Teesside on 2nd August 2016 and remained there until 4th August 2016. to speak with other team members in the office.Ben Goddon had no relevant information to share. Mr Steve Jackson and Ms Nalton, both declined to produce statements saying they did not wish to get involved. Mr Jackson said he had no specific knowledge of the claimant's whereabouts on 22nd July, but there had been other occasions when the claimant's whereabouts were not exactly clear. Ms Nalton mentioned the claimant had contacted her via text to check if Ms Barker would "cover for" him, but the text I have seen does not say that . She thought the claimant was at home packing on 22 July. Mr Wendel and Ms Haughton knew they could insist on Mr Jackson and Ms Nalton giving a statement. Ms Haughton said they did not push them but could not explain why. I infer it was because Mr Wendel felt he had enough to "convict" and did not want to risk finding evidence which may help the claimant'.

3.35. Ms Haughton says it was standard procedure, for Mr Wendel to carry out the investigation as the immediate line manager **and as he was aware of the background** to the suspension she thought him suitable . That was the very reason he should not be involved . The respondent is part of a large group and could easily have found someone else of sufficient seniority. The claimant agreed to undertake the further investigation by video conference on 10th August 2016. as he just wanted the process to be over so he could return to work.

3.36. On 10th August 2016. Mr Wendel had Polly Omerod in attendance from HR (page 215-228). The claimant said Ms Barker had made a mistake on the weekly movement sheet and on his holiday request form which should have included 22nd July 2016.and he did not want to get Ms Barker into trouble for not including it. Mr Wendel recounted his conversation with Mr Peacock ,read out the email of 24th July to Ms Barker and asked for the claimant's response. The claimant replied Mr Wendel had been "on at him" for the past year, ,he knew something was wrong and suggested Mr Wendel was looking for an excuse to get rid of him. At this point any reasonable manager would have handed over the investigation to someone else. Mr Wendel did not, and specifically asked why the claimant had referred to him as "a twat". The claimant said he was angry when he wrote the email.

3.37. The Claimant repeated everyone knew where he was on Friday 22nd July 2016 and he had made many calls that day and participated in the conference call. The claimant said the statement from Ms Barker was "a load of rubbish", suggesting he would not gain anything because he still had holidays to take. He said he had given the date 22nd July to Ms Barker but he added he would cover for any of his team and would not blame them for a mistake . The claimant then said it had been a clerical error **on his side.** Mr Wendel asked about Mr Peacock's statement the claimant had said he did not plan on working on Friday, as he had worked a long day on Thursday and Ms Barker's statement the Claimant had asked her to **amend** his form. The claimant responded "*So is that what they're saying. Right ok.*"

3.38. The claimant was not being open at this stage , and would continue to be during the disciplinary and appeal hearings. His approach at times seemed dismissive of the allegations . There may be some truth in what was being said by Mr Peacock but, if given context, what the claimant said could have been innocuous . I asked Mr Wendel **what if** the claimant had said his arrangements for that week went wrong and he had asked to have a day or half day to get packed at home , what his answer would have been . He replied he would have said yes. I

doubt that but, if he had, he would have taken pleasure in rebuking the claimant for his disregard of procedures. The claimant was trying to paint himself as having done nothing wrong when, if he had made errors it would have been better to admit them and explain why they happened. Maybe he had made no errors. In that event the allegations of dishonesty and/or deliberate flouting of lawful instruction depended on the evidence of Mr Peacock and Ms Barker , neither of whom the claimant asked to challenge face to face.

3.39 Mr Wendel recommended disciplinary action and Ms Haughton told Mr White he would be the person to decide it . She wrote to the claimant on 22nd August 2016 (page 233) including minutes from the investigatory meeting and documentation gathered during the investigation. Mr White was provided with a pack of information and spent time reading it. On Tuesday 6th September 2016, the disciplinary hearing proceeded. The typed notes are pages 274-277. The letter to the claimant contained the allegations as
(1) That on Friday 22nd July, in breach of the Respondent's disciplinary policy and procedure, you took unauthorised leave from work
(2) Having done so, in breach of the Respondent's disciplinary policy and procedure, you attempted to falsify documentation to cover your absence and you attempted to involve your work colleagues in the process
(3) That on Monday 25th July, in breach of the Respondent's disciplinary policy and procedure, you sent an email to a work colleague making a derogatory comment about your Manager Derek Wendel
(4) That you have, without reasonable and proper cause, acted in a manner calculated or likely to destroy or seriously damage the relationship of confidence between you and the Respondent such that the relationship can no longer continue.

3.40. On Tuesday 6 September 2016 the claimant attended with a colleague, Kevin Farricker. Although Ms Haughton had explained to Mr White the importance of following the ACAS Code of Practice he had little or no recent training in it and had never done a disciplinary hearing before. Polly Ormerod of HR took notes but offered no HR support .

3.41. On the first and second allegations, Mr White noted Ms Barker's comments in her note that the claimant's whereabouts on 22nd July 2016 was unclear (page 237), Mr Peacock's statement (page 236), the claimant had told him on 21st July 2016 he did not intend to work on Friday as he was unhappy about having worked a long day on Thursday; Ms Nalton saying she had thought he was at home packing (page 236) that Mr Wendel said he had not been aware the claimant was on holiday on 22nd July and the email from Ms Barker to Mr Wendel on 14th July (only one week before the date in question) made no mention of 22nd July being taken as holiday (page 240). He took the view it was far from clear from the evidence available where the claimant was supposed to be on 22nd July and this uncertainty had suited the claimant who wanted "*others to think he was somewhere else*" If he means the claimant wanted Mr Wendel to think he was in the office it makes no sense the claimant openly use his mobile to take and make calls , especially with the sound of seagulls in the background.

3.42. Mr White queried the reasons for calling Ms Barker on 22nd July 2016. His explanation remained it had not been to request her to add the date, but only to check she had already put it through as holiday. Mr White took what Ms Barker stated in her note (page 237). that the

claimant had asked her to add (his emphasis) 22nd July as proven fact . As for the email on Sunday 24th July 2016 *"I don't want him saying I've taken another day off without asking, il just say tell him I forgot to add last Friday when you sent my updated request, if I've got a job when I get back that is!"* he viewed it, in his words, as "*as an indication of mea culpa*" to Ms Barker, which suggested " *he was rehearsing what would be his excuse for having not obtained authorisation for the holiday on 22 July 2016 and that would make everything alright*".

3.43. Mr White also took what Mr Peacock had said in his statement (page 236) as proven fact Had the claimant genuinely asked Ms Barker. to check whether she had confirmation of the holidays (as opposed to asking her to "add" 22 July 2016), he did not believe it would have been necessary for her to call Mr Peacock. He concludes

Considered as a whole therefore and balancing the evidence in front of me with the account the Claimant sought to give, my view was that the Claimant knew full well he had not booked 22 July 2016 as holiday and that his absence on that day had not been authorised. The weight of the evidence, as I assessed it, was that he had intended to deceive and that he had sought to persuade others, notably Ms Barker (a less senior employee), to adjust the relevant paperwork after the event to cover up his wrongdoing.

That there had been no suggestion at the time, either to Mr Wendel or to Ms Barker, that the Claimant had made an error for which he wished to apologise, underlined my view that the Claimant's steps had been deliberate.

His attempts to blame his conduct on what he saw as flaws in the holiday booking system were not something I agreed with. On the contrary, inadequacies in the holiday booking system had, in part at least, provided the Claimant with the opportunity to exploit the system.

It was disappointing for me that, as a senior manager of the Respondent, the Claimant had done nothing to persuade me that his holiday had been authorised and in the circumstances, subject to reflection and sharing my views with Human Resources, I felt I had no alternative but to uphold the first and second allegations against the Claimant.

On the third allegation he accepted it was not intended to be malicious and dismissed it He regarded the fourth allegation as being dependent upon the conclusions he reached on the first two allegations.

3.44. The meeting lasted from 1.05 to 1.40. Mr White adjourned to check some procedural points with Ms Haughton, who was in a separate office, and reconvened to give his decision at 1.55. His decision was to dismiss summarily for gross misconduct. He asked Ms Haughton to prepare a draft dismissal letter for his approval , which he gave and it was despatched to the claimant on 14th September 2016. (pages 279 to 285).

3.45. The claimant appealed by letter dated 16th September 2016 (page 289 – 291). Ms Haughton said in answer to me the respondent at about this time **took legal advice .** Mr Andrew Bellamy, Managing Director, was appointed to hear the appeal. Whether it was the result of the legal advice or due to Mr Bellamy's greater experience of conducting disciplinary

procedures, the difference between the earlier stages and the appeal, in terms of thoroughness and impartiality, is striking.

3.46. Mr Bellamy asked Ms Haughton to carry out further investigations including interviewing and re-interviewing a number of witnesses. She asked Mr Wendel to prepare a full statement of events on 22nd July (page 297 – 299). She conducted interviews on the following dates 18 October - Mr Wendel (page 304 – 307 and Mr White(page 308);19 October – Ms Barker (page 309 – 311), Ms Nalton (page 312 – 314), Mr Jackson (page 315), Mr Peacock (page 316 – 317) and Mr Jeff Kay by telephone (page 318).Following the interviews, she sent typed copies of her notes to each person interviewed, which they all signed and returned.

3.47. By email Mr Bellamy asked her to check the claimant's work email and work phone for any relevant correspondence / messages from around 22nd July 2016 The respondent's IT team gave access to the emails and checked the phone for messages. She discovered in addition to messages to Ms Barker and Mr Peacock shortly after 22nd July, the claimant had exchanged messages with. Jeff Kay pages 154 – 155; Ms Nalton pages 160, 161 and 166; and Mr Jackson – page 168.

3.48. The claimant also kept a paper diary which showed him off sick on Monday 18th and the morning of 19th July, in London on 21st July, but there was no entry for 22nd July ..

3.49. She wrote to the claimant on 15th November 2016 (page 342 - 398 to make final arrangements for the appeal and sent him copies of all additional statements, emails and documents gathered during her further investigation. The IT department had been unable to retrieve the claimant's text messages, but a firm of forensic IT consultants would try

3.50. The appeal hearing was arranged for 21st November 2016 The claimant was advised he could be accompanied by a representative but he decided to attend alone On the actual day, some text messages received from the forensic IT consultants (Page 418) After the hearing, Mr Bellamy viewed them, felt they appeared to support Mr Peacock's version of 18th July and suggested the claimant knew he had not requested 22nd July as holiday (pages 416 to 418). Mr Bellamy instructed Ms Haughton to write to give the claimant 4 days to send any comments. He did not reply.

3.51. Mr Bellamy read everything thoroughly. He took account of Mr Peacock's statement, about 18th July 2016 and Daisy's sports day (page 360 Whilst he knew this was not one of the allegations put to the claimant, he asked him about it during the appeal, as he , rightly in my view, felt it would help establish who was telling the truth.

3.52. The claimant began by explaining he had forfeited some earlier holiday and was due to go on holiday on the 23rd July which he subsequently had to change to 22nd July. He said he had spoken to Ms Barker to ask her to change this. He had also spoken to Mr White and Mr Wendel prior to the roundtable event in London about flying back on Thursday night, 21st July, as he was picking his daughter up on the Friday. Mr Bellamy said his holiday form suggested he had booked holiday for only 25 – 29 July The claimant replied the form " "*didn't work as we all know it and his holiday had been booked a long time ago*" .

3.53. He told Mr Bellamy he did not need to look at the form and did not keep his diary up to date. However, Mr Bellamy noted he had included other entries in the same week, including his sickness earlier that week, and he had entered his holiday dates of 23 – 29 July 2016 (pages 396 – 397). Mr Bellamy was not satisfied with the claimant's response, as he appeared to be unable to explain clearly the inconsistencies. He told the claimant the holiday form seemed to work for everyone else (page 412).

3.54. Mr Bellamy put it to the claimant Mr Wendel, was unsure of his whereabouts on 22nd July and Ms Barker was adamant the claimant had not booked it as holiday and only asked her to change his form on 22nd July. The claimant replied it was her word against his. (page 412.) Mr Bellamy asked why she would lie, but the claimant could not offer any explanation (page 412.) As for 18th July 2016 the claimant said he did not trust anything Mr Peacock said and his daughter's sports day was on 6th June 2016. Mr Bellamy said he would make a note of that look into it after the appeal.. It was on 18th July.

3.55. The claimant insisted the decision to dismiss him was a conspiracy and Mr Wendel should not have done the investigation because he was not impartial and wanted to rid of him.

3.56. On the first allegation Mr Bellamy felt there was clear evidence the claimant took unauthorised leave on 22nd July knowing he had not requested it as holiday. This included statements from Ms Barker, MsNalton and Mr Peacock together with emails and text messages sent at the time. Mr Bellamy did not accept the claimant's explanation it was Ms Barker fault and he was trying to protect her so she did not get into trouble.

3.57. On the second allegation Mr Bellamy thought the claimant offered no explanation as to why Ms Barker had contacted Mr Peacock saying she was concerned about what the claimant had asked her to do. Mr Bellamy did not accept the claimant's case.

3,58. Mr Bellamy thought the final allegation was the most important given the claimant's senior role and his responsibility to set an example to others in the Teesside office. He concluded the claimant knew he had not booked 22nd July but decided to take it anyway and he **had been caught out.** He then had attempted to cover up his actions and even tried to implicate another employee. The claimant appeared to "*dig himself deeper*" by blaming Ms Barker and suggesting she had made a mistake and he was trying to protect her. The claimant said Mr Peacock could not be trusted and suggested he and Ms Barker had both lied . However the text messages sent on 18th July, appeared to support Mr Peacock's account of events surrounding the sports day. Whilst this was not a stand alone allegation, it did cause Mr Bellamy to distrust the claimant's veracity.

3.59 He disagreed with the view it was not appropriate for Mr Wendel to conduct the investigation. That conclusion is the only flaw I find in Mr Bellamy's otherwise methodical and well considered decision That said although Mr Wendel undertook what I find was a one sided investigation and reached a conclusion which he relished , he did not have any influence over the appeal outcome which was solely determined by Mr Bellamy . He deliberately did not speak to Mr Wendel at all about the appeal process. Mr Wendel's only contact was with Ms Haughton when she asked him some further questions. .

3.60. Mr Bellamy decided to reject the appeal and asked Ms Haughton to assist in preparing a letter setting out his reasons. He approved and signed the letter which was sent to the claimant on 9th December (pages 430 – 438) together with the minutes from the appeal hearing (pages 411 – 414).

3.61. I asked Mr Bellamy whether, if the claimant had said " *I thought I had asked Christine to book 22nd July but I now realise I didn't*" , and not blamed others and called them liars, when the texts etc showed it was the claimant who was more likely to be lying, would he have dismissed? He said probably not . For him this was fundamentally a trust issue , he found the claimant's actions serious. and his responses at the hearing evasive and unbelievable.

3.62. The claimant says no reference is made in the appeal outcome to several points raised during the further appeal investigation which he lists. They are minor points and Mr Bellamy's failure to mention them does not mean he did not consider them . Just as I in writing these reasons have not recounted all the evidence , it does not mean I have not considered it.

4 Conclusions

4.1. On every working day an employee should be devoting his time and attention to work other than when he is on some form of permitted "leave". A senior employee does not have anyone who "checks up on" whether he is working , so is trusted to be. If he **knowingly** uses such a day as if it were leave , that is does no work, such act is **probably** dishonest and would amount to gross misconduct for which dismissal would be a lawful and fair sanction .

4.2. The respondent says the beliefs held by the dismissing and appeal officers which constituted the reason for dismissal were that the claimant **intentionally, not by mistake,** took unauthorised leave on 22nd July 2016 and attempted to **make** a junior employee falsify records to show he had authorisation. I accept that was their genuine belief.

4.3. Mr Wendel was not an appropriate person to do the initial investigation as he had a bad relationship with the claimant and was a "witness " himself. His investigation was one sided. Mr White accepted the results of that investigation too hastily and without question. Had matters rested there, I may well have found he did not satisfy the Burchell test. However, Mr Bellamy's appeal was impeccable and, substantively and procedurally, he did satisfy that test and his decision was within the band of reasonable responses . Overall, the dismissal was fair.

4.4. There are two reasons why I find the dismissal wrongful . First , the claimant's statement at paragraph 73 says "***I assume now that I either forgot to include the holiday of 22nd July*** *on the holiday form or I have not noticed it missing on the sheet. I truly believed that the holiday had been authorised when I went on holiday as I never heard anything to the contrary*". At the internal hearings the claimant was evasive and came across as lying . Before me, he has not just blamed others and called then liars . What he says in para 73 could well be right and though direct evidence from Ms Barker and Mr Peacock may persuade me he had been dishonest and/or wilfully failed to obey lawful and reasonable instructions I have not even a signed statement from either of them . The respondent has not discharged the burden of proof of showing he was guilty of gross misconduct as defined in Laws –v-London Chronicle.

4.5. My second , and very much subsidiary, reason is that even if the claimant did know he had not had his leave authorised in the form insisted upon by Mr Wendel, and even on the versions given by Ms Barker and Mr Peacock , the facts are that the claimant worked all waking hours, far in excess of his contracted 37 hours, from the afternoon of Tuesday 19th to midnight on 21st July. Then , on 22nd , albeit from home, attended two telephone calls on work related matters. I believe ordinary people would not regard what he did as dishonest and he certainly did not. He did not in that respect act in a way which showed he was breaching the employer/employee contract and relationship he had with the respondent as an organisation.. He was a hard working man who found, as do I, the instruction that even impromptu leave had to be authorised in writing by a man who often did not bother to reply to leave requests , neither lawful nor reasonable. . The position taken by Mr Wendel that he thought the claimant could conceivably work at the Wilton office until 3.30 pm on 22nd July and still get his daughter to Stansted for a flight " *in the evening*" is fanciful. Even if the claimant did ask Ms Barker to **add** to his holiday request, he did so only to try to show he had complied with unreasonable rules imposed by Mr Wendel, because he knew Mr Wendel was " out to get him" .

4.6. I therefore find the claimant was not guilty of gross misconduct . Remedy for the wrongful dismissal was agreed .

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 26th APRIL 2017

JUDGMENT SENT TO THE PARTIES ON

27 April 2017

G Palmer
FOR THE TRIBUNAL