EMPLOYMENT TRIBUNALS

Claimant: **Mr R Barnes**

Respondent: **G & J Steele Plant Hire**

Heard at: **Ashford Hearing Centre** **On: 2 June 2017**

Before: **Employment Judge J Nash (sitting alone)**

Representation
Claimant: In Person
Respondent: Mr G Steele (Managing Director)

REASONS

The Hearing

1. The claim form in these proceedings was presented on 17 December 2016 and the notice of hearing sent out on 24 February 2017. The response was submitted on 11 January 2017. Employment Judge Baron gave full directions on 15 February 2017.

2. In respect of witnesses, the Tribunal heard from the Claimant on his own behalf. He provided a witness statement that was identical to the statement of claim in his originating application.

3. From the Respondent, the Tribunal heard from Mr Graham Steele, its Managing Director. The Respondent had not served statements prior to the hearing and attended the hearing with no intention of calling any witnesses. The Tribunal explained to the Respondent that, whilst a Tribunal is unable to advise parties as to how to run their case, if the Claimant gave evidence of fact which a person present at the hearing from the Respondent could gainsay, then there could be considerable prejudice to the Respondent if it did not lead oral evidence. Accordingly, Mr Steele chose to give evidence in chief. The Tribunal informed the parties that it was alive to the possible prejudice to the Claimant in he had not prior sight of any statement from Mr Steele, whereas the Respondent had sight of the Claimant's statement since it received the originating application. The Tribunal informed the Claimant that if he believed that this put him at a disadvantage during the hearing, he should ensure that this was brought to the attention of the Tribunal.

4. The Respondent also relied on a signed but undated statement by Mr Nick Cherrill. The Tribunal in line with its usual practice attached little weight to the statement of a witness neither present, cross-examined or on oath.

5. Both parties provided bundles that, contrary to directions, were not copied in sufficient numbers and were not paginated. This caused considerable delay at the hearing. The Tribunal in line with the over-riding objective, copied the relevant documents. It proved impractical to ask questions of witnesses without properly paginated bundles. The Tribunal accordingly took the parties through the pagination whereupon it transpired that the Respondent's bundles were inconsistent, requiring a further delay for further copying and pagination.

6. All references are to the Claimant or Respondent's bundles as finally paginated as appropriate unless otherwise stated.

7. The final preliminary matter was that the Claimant included what, on a brief perusal, appeared to without prejudice negotiations in his bundle. The Tribunal advised both parties that it could not consider without prejudice matters unless they both waived prejudice and that it was not expected that they should do so. Both parties confirmed that they wished to waive prejudice and accordingly the Tribunal considered all documents before it.

The Claims

8. The claims brought by the Claimant were for:

   8.1. Unfair dismissal;

   8.2. Wrongful dismissal (notice pay);

   8.3. Under Section 13 of the Employment Rights Act 1996 for an unauthorised deduction from wages in respect of the last salary payment on 19 August 2016; and

   8.4. Annual leave.

The Issues

9. The issues were agreed as follows.

10. In respect of unfair dismissal, the Respondent relied on conduct as a potentially fair reason - being the Claimant's leaving the workplace on 4 July and further and in the alternative, a lack of trust including but not limited to a Facebook post about moving on, a previous disciplinary and the Claimant's reaction to this and the fact that the Claimant had arranged to work for another employer whilst employed by the Respondent.

11. The first issue for the Tribunal was whether the dismissal was procedurally unfair. The Claimant relied on the fact that the investigation and the disciplinary meeting were held in his absence while he was off sick. The second issue was, if the Tribunal found the dismissal was procedurally unfair, whether there should be a so-called *Polkey* reduction, that is would and could the Respondent have dismissed the Claimant fairly, had it followed a fair procedure. The third issue

was that of sanction. The fourth issue was to what if any extent had the Claimant contributed to any unfair dismissal.

12. In respect of wrongful dismissal the issues were as follows. Did the Claimant fundamentally breach his contract of employment by leaving the workplace on 4 July?

13. In respect of unauthorised deductions from wages, the only issue was whether the Respondent had made unauthorised deductions from the Claimant's final salary payment on 19 August.

14. In respect of the claim for holiday pay, the only issue was if the Claimant was wrongfully dismissed, to how much, if any, holiday pay was he entitled?

The Facts

15. The Tribunal found the following facts.

16. The Respondent's business is that of plant hire and civil engineering. It employs about six staff, mainly office based, running tens of contractors who perform most of the actual work placements. The Claimant started work on 1 August 2016 and was promoted to Civils Manager. He worked at the Sheppey site, was paid £34,500 per annum and had a written contract of employment. He worked on civil engineering, mainly highways maintenance - for instance drainage problems. The great majority of his work was scheduled in advance. Following the appointment of a general manager, Mr Nick Cherrill, who was the most senior person on site, the Claimant reported to him. The directors, Mr Steele and his wife, Mrs Jackie Steele, were based off site.

17. The Respondent's business had grown in the time leading up to the dismissal. The Claimant's job was extremely busy and he, with his colleagues, was under very considerable pressure.

18. The Claimant received a first written warning on 9 June 2016 following a conflict with the new manager, Mr Cherrill. There was no process or procedure in respect of this warning, in that there was no hearing, no chance for the Claimant to put his case and no chance to appeal. (The Respondent said that it would very probably have dismissed the Claimant, even in the absence of this warning.) Following the warning, the Claimant sent a message to his family on his work phone referring to Mr Cherrill as a, "wanker".

19. The Tribunal now turns to the events of the material to the dismissal.

20. On 4 July 2016, there was an argument between the Claimant and Mr Steele in the morning. In the afternoon the Claimant walked off site suffering from stress. He attended the doctor that day, as shown by a doctor's certificate dated 25 July, which referred to the doctor seeing the Claimant on 4 July. The Tribunal had sight of texts between Mr Cherrill and the Claimant on 4 July in which the Claimant confirmed that he was off work. He was asked to speak to Mrs Steele, but did not do so.

21. On 4 July, the Claimant posted on Facebook that, "it's time for a move". What happened next was the subject of a conflict of evidence. According to the

Claimant, the next day Mr Cherrill rang and suggested that the Claimant take a week as paid leave. Mr Cherrill, according to the investigation notes, denied this and in his statement said he spoke to the Claimant on 6 July and again urged him to speak to the Respondent's management. The Claimant denied this conversation happened. The Tribunal considered this conflict of evidence and preferred the Claimant's version. The reason for this was that the Claimant's account was plausible and consistent. He was present before the Tribunal, on oath and subject to cross-examination whereas Mr Cherrill was not.

22. On 7 July 2016, Mrs Steele, the director, offered the Claimant one month's notice plus a redundancy payment as a termination settlement. The Claimant rejected this.

23. On 11 July, the Respondent texted the Claimant saying it wanted to know his plans, and it wanted him to return his work vehicle. On 11 July, the Claimant texted the Respondent's other employees to say that he had parted company with the Respondent.

24. On 21 July, the Claimant's health worsened and he was admitted to hospital.

25. On 22 July, the Respondent invited the Claimant to an investigatory meeting in respect of what was termed his unauthorised absence in the week of 4 July. The Claimant then informed the Respondent by way of a letter of 22 July that he was sick but did not yet provide a doctor's certificate. This was the first express mention of the Claimant's health. The Claimant also stated that he had thought that he and the Respondent had parted company.

26. On 29 July, the Claimant chased the Respondent in respect of his July salary and again stated he was on sick leave. The Respondent then learned that the Claimant had been looking to work elsewhere whilst off on sick leave. The Tribunal had sight of an email from a Mr Hatton (a Respondent employee) on 15 January 2017 saying that on 20 July the Claimant had attended to help with another job. The Claimant accepted that this had happened and said that the possible work - driving - was much less stressful than his duties for the Respondent. In the event he did not work and was not paid.

27. On 8 August 2016, Mrs Steele informed the Claimant the investigation would be completed in his absence and invited him to a disciplinary hearing on 12 August. The reason for the hearing was that the Claimant had left the site without authority on 4 July. The Claimant replied that he was unable to attend the hearing as he was signed off sick. In an email of 11 August he enclosed a sick certificate up to 9 September 2016. Accordingly, he was signed off sick again from 9 August to 9 September.

28. On 16 August, the Respondent invited the Claimant to a reconvened disciplinary hearing on 18 August. The Claimant texted to say that he would not attend, as not enough notice had been provided.

29. The Tribunal had sight of the minutes of the disciplinary hearing on 18 August. In the minutes, the Respondent stated that it had not received the sick

note until there was a formal investigation and that the trust had broken down between it and the Claimant.

30. By way of a letter of 19 August, the Respondent dismissed the Claimant. The letter gave the Claimant five days to appeal. All parties agree that the Claimant did not know of the dismissal until he received this letter, which was very probably on 20 August. Accordingly, the effective date of termination of the Claimant's contract was 20 August.

31. The Claimant wrote to the Respondent on 5 September asking the Respondent to reconsider its decision although he did not say in terms that he wished to appeal. On 9 September, he texted the Respondent in respect of why he had not been paid his full salary up to 18 August.

32. The Respondent wrote to the Claimant on 12 September to say that he was no longer its employee so it would not consider any further correspondence. There was no express reference to an appeal. The Claimant wrote once again to the Respondent on 16 September but there was no further action.

The Applicable Law

33. The applicable law in respect of unfair dismissal is found at Section 98 of the Employment Rights Act 1996 ("ERA"), as follows: -

> **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—
>
> ...
>
> (b)relates to the conduct of the employee,
>
> **...**
>
> (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 case.

34. The applicable law in respect of unauthorised deductions from wages is found at Section 13 ERA:-

> **Right not to suffer unauthorised deductions**
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction...
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

35. The applicable law in respect of holiday pay is found in the Working Time Regulations as follows:-

> **Compensation related to entitlement to leave**
>
> **14.**—(1) This regulation applies where—
>
> (a)a worker's employment is terminated during the course of his leave year, and
>
> (b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.
>
> (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
>
> (3) The payment due under paragraph (2) shall be—
>
> ...
>
> (b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
>
> [redacted]
>
> where—
>
> **A** is the period of leave to which the worker is entitled under regulation 13(1);
>
> **B** is the proportion of the worker's leave year which expired before the termination date, and
>
> **C** is the period of leave taken by the worker between the start of the leave year and the termination date.

36. The employment tribunal has jurisdiction over claims for breach of contract existing on termination by virtue of the Employment Tribunals Extension of

Jurisdiction of Order (England and Wales) 1994. The question for the Tribunal in a wrongful dismissal case is whether there has been a fundamental breach of the employee's contract of employment by the employee.

Submissions

37. Both parties made very brief oral submissions.

Applying the Law to the Facts

38. The Tribunal firstly considered wrongful dismissal. The Tribunal asked whether the Claimant's conduct relied upon by the Respondent constituted a fundamental breach of the contract of employment. The Tribunal noted that the Claimant's written contract gave specific but non-exhaustive examples of gross misconduct, including violence, theft and gross negligence. The Tribunal took the view that this was a helpful guide to the seriousness and type of conduct that amounted to a fundamental breach of this employment contract.

39. The Tribunal reminded itself of the law on wrongful dismissal. If an employee is guilty of conduct which is a significant breach going to the root of the contract of employment which shows that he no longer intends to be bound by one or more of the essential terms of the contract, then the employer is entitled to dismiss without notice.

40. The Tribunal found that the Claimant's conduct was not sufficiently serious to amount to gross misconduct. The Respondent specifically relied on the Claimant's leaving work. The Tribunal noted that although the Claimant did leave work, he informed his employer and was signed off sick, albeit there was a delay in informing his employer of this. Further, the Claimant's line manager did not object and indeed proposed that the Claimant take leave. For the avoidance of doubt, and in light of the fact that the Respondent was unrepresented, the Tribunal considered the fact that the Claimant had arranged to work for another employer whilst on sick leave, even if in the event this did not come to pass. The Tribunal took into account the particular facts of this case. The employer and employee were in negotiations about the employee's future and the Claimant had expressly informed his employer that he was not entirely sure of his employment status. Taking into account all these factors, the Tribunal found that the Claimant was not in fundamental breach of his contract of employment and the Respondent therefore was in breach in failing to pay notice pay. The Claimant was wrongfully dismissed.

41. The Tribunal went on to consider unfair dismissal.

42. Firstly, the Tribunal considered whether dismissal was procedurally unfair. In misconduct dismissals the Tribunal must follow the well-known case of **British Home Stores v Burchell** [1978] IRLR 379. It must consider whether the Respondent dismissed the Claimant holding a reasonable and genuine belief in his culpability following a reasonable investigation. The Tribunal may not substitute its view for that of the employer as to what is a reasonable investigation. The question is whether the Respondent's investigation came within a range available to a reasonable employer in the circumstances.

43. The Tribunal asked whether it was outside of a reasonable range of procedures for the Respondent to hold the investigation, and the dismissal hearing whilst it knew that the Claimant was off sick. The Tribunal also noted that the Claimant was not afforded an appeal, although the Claimant himself did not rely on this.

44. The Claimant was signed off sick during both the investigation and the disciplinary hearings. The Respondent had not rushed into an investigation or dismissal. It had waited three weeks before starting any procedure and delayed the dismissal hearing on one occasion. Nevertheless, the Tribunal found that this procedure did not fall within a range of procedures available to a reasonable employer in the circumstances.

45. This employer knew that the Claimant suffered from stress. He had been signed off with anxiety and depression earlier in the year. It was aware that there was a lot of pressure in the business at the time. It knew that the Claimant was signed off sick with stress. The Tribunal was particularly concerned that an employer who was, in part, relying on loss of trust in its employee, did not hold an effective hearing. This case turns on its facts - had the delay caused by the Claimant's sickness gone on longer, the Tribunal's decision may have been different. Although the Tribunal did not find the dismissal was unfair procedurally because of the lack of an appeal, the failure to address the Claimant's concerns after termination provides corroboration for the Tribunal's view that the Respondent was not entirely open-minded about whether the Claimant should stay in his job

46. The Tribunal, having found that the dismissal was procedurally unfair, went on to consider whether there should be a so-called *Polkey* reduction. That is, if the Respondent had waited a reasonable time for the Claimant to come to an investigatory and dismissal meeting, would it and could it have dismissed the Claimant fairly in any event?

47. The Tribunal was aware that it is to some extent afloat on a sea of speculation at this point. According to the case of **Software 2000 Ltd v Andrews** [2007] UKEAT 0533_06_2601, the question is not whether the Tribunal can predict with confidence all that would have occurred, rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.

48. The Tribunal considered what would have happened if the Claimant had been afforded the ability to attend a hearing; either because he was given a reasonable time to recover from sickness or – the employer having waited a reasonable time – he had attended whilst still sick. The Tribunal found that the Claimant would have attended the hearings based on the fact that the Claimant felt strongly enough about his dismissal to bring an Employment Tribunal compliant and the fact that he wrote two letters after termination concerning his employment.

49. The Tribunal is also of the opinion that the Claimant would have been dismissed, had he attended the hearings - Mr Steele had made up his mind to dismiss the Claimant and would have done so whatever occurred at the hearing.

This conclusion was based on the Respondent's failure to consider further correspondence from the Claimant following the termination and the clear and forthright manner of Mr Steele in giving evidence, even allowing for the fact that attitudes may have hardened due to the passage of time.

50. This brings the Tribunal to the question of sanction in *Polkey* - would such a dismissal have been fair? The Tribunal reminded itself that, when deciding on the fairness of the sanction, it may not substitute its view of what is an appropriate sanction for that of the employer. The question is whether the employer's decision to dismiss came within the range of possible decisions available to a reasonable employer in the circumstances.

51. The Tribunal considered the facts. The Claimant did leave his workplace on 4 July without permission. However, we now know that he was signed off sick that day. Further, his manager agreed and encouraged him to stay off work, following his walking out. The Tribunal also noted the context – the Claimant was under considerable pressure at work and was ill with stress.

52. The Tribunal considered the Respondent's concern that it had lost trust. Mr Steele told the Tribunal that the warning made little difference – he would have dismissed in any event. The Tribunal accepted this and made a finding that the employer would have dismissed even if this warning had not happened. But for the avoidance of doubt, the Tribunal found that an employee being rude in private to their family about a manager who has just given them a warning, even on a work phone, is unlikely to be a fair reason for dismissal.

53. The Tribunal considered the Facebook post, *"it's time for a move"*. The Tribunal found that the employer might legitimately be concerned about such a comment, but this was not a reason to dismiss.

54. In the Tribunal's opinion, the most serious matter was the Claimant's arranging to work elsewhere whilst on sick leave. The Tribunal did note that no work was done. Further, more significantly, the Claimant and Respondent were not in a conventional employment situation; the Claimant had asked the Respondent if he was still employed. Accordingly, the Tribunal although wary of substituting its view for that of the employer, found that the decision to dismiss did fall outside the reasonable range. Therefore, the Tribunal found that, had the Respondent followed a fair procedure, it would have unfairly dismissed the Claimant.

55. The Tribunal then went on to consider whether the Claimant had contributed to his dismissal. There are two tests. In Section 122 Employment Rights Act 1996 - in respect of the basic award – if any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall reduce that amount accordingly. In respect of the compensatory award, the test is found at Section 123(6) of the same Act; where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

56. The case law tells us that in both situations the Tribunal must consider whether there was culpable or blameworthy conduct on the Claimant's part. The

Tribunal noted that the Claimant had failed to provide a sick note promptly. The Tribunal was mindful that the Claimant was ill with stress but by their very nature sick notes are only generated when an employee is off sick and incapacitated to some extent. This employer could not be certain why its employee was absent leading to a lack of clarity for both parties. Further, and more seriously, it was blameworthy of the Claimant that he had arranged to work for another employer whilst off sick and without permission, albeit in circumstances where his employment circumstances were not clear.

57. Accordingly the Tribunal found it just and equitable to reduce both basic and compensatory awards by 25% in respect of his contributory conduct.

Remedy

58. The parties were notably unprepared for remedy; in particular the Respondent had almost no information as to the Claimant's salary and benefits. The Claimant provided his payslips but did not entirely understand them. The parties were, nevertheless, very much of the view that they did not want to return to the Tribunal for a separate remedy hearing. The Tribunal was mindful of the avoiding costs and dealing with this case expeditiously, in line with the over-riding objective.

59. The parties agreed that the Claimant's annual basic gross salary was £37,999.92. Accordingly, the Tribunal made a finding that the Claimant's basic gross monthly salary was £3,166.66.

60. The Tribunal made an award of compensation for unfair dismissal as follows.

61. The basic award was calculated as the multiplier (4.5) x the capped gross weekly pay (£479) giving a basic award of £2,155.50. This was then subject to a 25% contribution giving a net basic award of £1,616.63.

62. The parties agreed between themselves that the compensation award would be £3,500 net of the 25% contribution.

63. In respect of notice pay the Tribunal awarded £3,166.66.

64. The Respondent had stated at the beginning of the hearing that it was entirely willing to pay the Claimant any outstanding wages. The Tribunal awarded £1,531.15 together with £224 being a total of £1,755.15 net for deductions of wages. This was the difference between the payments made in respect of the Claimant's final salary in August 2016 and the wages contractually due to him, including the fact that the Tribunal had found that his effective date of termination was 20 August, a day later than the Respondent had understood.

65. The Claimant's holiday year ran from 1 January to 31 December. The Tribunal calculated the amount due to the Claimant as a payment in lieu of leave under regulation 14 Working Time Regulations. The Tribunal awarded the sum of £1,900 being the payment due in respect of accrued but untaken annual leave at the effective date of termination calculated according to regulation 14(3)(b).

66. The Claimant informed the Tribunal that he had paid £1,270 in Tribunal fees. As his claims had been successful, the Tribunal awarded the Claimant £1,270 under Rule 76(4) of the 2013 Employment Tribunal Rules of Procedure.

67. Accordingly the total payment due from the Respondent to the Claimant under the judgment is £13,208.44

Employment Judge **J** Nash

Date 20 June 2017