Case Number: 3200419/2017

mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr T Stafford**

Respondent: **D & C Glass Glazing Ltd**

Heard at: **East London Hearing Centre** **On: 7 September 2017**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: Ms L Millin (Counsel)

Respondent: Mr J McCracken (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) It is declared that the Claimant was unfairly dismissed.

(2) It is just and equitable to reduce the Compensatory award by 75% under section 123 of the Employment Rights Act 1996.

(3) It is just and equitable to reduce the Compensatory award by 100% under section 123(6) Employment Rights Act 1996 because of contributory fault.

(4) It is just and equitable to reduce the Basic award by 50% under section 122(2) Employment Rights Act 1996.

(5) The breach of contract claim is dismissed.

(6) The complaints of automatic unfair dismissal, unpaid holiday pay, and unlawful deduction from wages are dismissed on withdrawal by the Claimant.

REASONS

1 The Claimant was continuously employed by the Respondent (in a second spell with the Respondent) from 13 June 2005 until 14 February 2017.

2 By a claim presented on 12 April 2017, the Claimant brought complaints of automatic unfair dismissal, unfair dismissal under section 98 Employment Rights Act 1996 ("ERA 1996"), breach of contract, unlawful deduction from wages under section 13 ERA 1996, and unpaid holiday pay. The claim was presented after the Claimant had complied with the requirement for ACAS Early Conciliation.

Complaints and issues

3 On 6th September 2017, the Claimant withdrew the complaints at paragraphs 16-18 ET1 Claim of automatic unfair dismissal, unpaid holiday pay and unlawful deduction from wages. The remaining complaints were "ordinary" unfair dismissal under s.98 ERA 1996 and breach of contract (a claim for notice pay). Accordingly, the issues are as follows:-

3.1 What was the reason for dismissal?

3.2 Was it for a potentially fair reason?

3.3 Was the decision to dismiss procedurally fair?

3.4 If procedurally fair did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer?

3.5 If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?

3.6 Did the Respondent unreasonably fail to comply with the ACAS code?

3.7 Did the Claimant contribute to his dismissal? If so what percentage deduction is just and equitable?

3.8 Whether the Respondent has breached the contract of employment by failing to pay notice pay.

The evidence

4 There was an agreed bundle of documents (pages 1-215). In the course of my reading, I noted that the notes of the disciplinary hearing were missing; these were obtained and added at pages 194a to 194g. No objection was taken to this course. Page numbers in this set of reasons refer to pages in this bundle of documents.

5 I read statements for and heard oral evidence from the following witnesses:

5.1 Paul Wiltshire, former Health and Safety Manager of the Respondent;

5.2 Dennis Walker, Director;

5.3 John Linkson, Director;

5.4 The Claimant, whose role was as a glass cutter.

6 The parties agreed that paragraphs 6 and 7, the last sentence of paragraph 9, and paragraph 28 of the witness statement of the Claimant were inadmissible in the unfair dismissal claim, and agreed that those parts should be excised due to section 111A ERA 1996 and because of the rule that "without prejudice" correspondence is not admissible in evidence (that is, it was agreed that on both the unfair dismissal and breach of contract complaints, these passages were inadmissible).

7 I found none of the witnesses to be entirely reliable. As in many cases, a combination of strong feelings and lapse of time probably explains this. I found the Claimant to be someone whose emotions could get the better of his ability to reason and remember. For this reason I found him a less reliable witness than the Respondent's witnesses. I found his limited ability to control his emotions probably explained events which led to his dismissal.

Findings of Fact

8 The Respondent supplies laminated glass and toughened glass. It had two offices on the same site. Mr Walker looked after the laminated glass side. Mr Linkson dealt with the toughened glass side of the business.

9 The Respondent employed 60 workers, about 40% of whom were direct employees. It has a turnover of about £6m per annum, but no human resources officer. At this time, the human resources function was outsourced to employment consultants. Although Mr Wiltshire tried to give the impression he had a formal human resources role, I find it more likely that he acted as a go-between, between the Respondent and its consultants; he had no human resources training and very limited experience in this area.

10 On 12 January 2016 to 19 December 2016, the Claimant was suspended from work due to an incident at work. I make no finding about whether this incident amounted to misconduct. The Claimant was suspended on full pay after Mr Wiltshire alleged that the Claimant had deliberately started a fire using methylated spirits, whilst a health and safety consultant was in the workshop, apparently because the Claimant believed fumes from the methylated spirits were unsafe. In the course of his suspension, other allegations surfaced about him. The human resources advice received was that the evidence did not justify action beyond an informal warning.

11 By letter dated 16 December 2016, Mr Rolle, Managing Director, wrote to the Claimant as follows:

> "*I am writing further to our letter of 15/1/16 which confirmed that you were suspended from duty on contractual pay.*
>
> *You are expected to return to work on 19/12/16.*

We look forward to seeing you on the above date."

12 A decision was taken that the Claimant would return to work, with a clean slate and everyone should just move forward.

13 I find that the period leading up to Christmas was the busiest period for the Respondent's business. I preferred the Respondent's witness evidence on this, because I accepted, as Mr Linkson explained, that clients sought to get their orders before Christmas, because their commercial clients were moving into new offices between Christmas and New Year. I found that more credible than the Claimant's blank denial, given his unreliability in other areas.

14 In response to Mr Rolle's letter, the Claimant emailed as follows:

"*Thank you for your email, hopefully I will be seeing yourself Monday, so we can discuss about the two days pay I'm owed plus what is going to be done with the rest of my annual leave and I will be booking off two days annual leave 22 and 23 December. Many thanks and will see you Monday*."

15 The Claimant did not make any complaint that he was being asked to return to work at short notice, and for my part I could not see the relevance of this complaint at the hearing or how the Claimant could complain about it. Moreover, the Claimant's response was not a constructive piece of correspondence for parties making a fresh start in the circumstances.

16 Less than an hour later, Mr Rolle responded as follows:

"*I write further to your request for annual leave and writing to confirm that such leave is declined.*

The reason that we are unable to grant you this period of leave is that your request is in breach of our rules which require that notice must be given to avoid causing disruption to the business.

The purpose of this letter is therefore to formally notify that you are required to work during the period 22nd to 23rd for which you have requested leave.

For the avoidance of doubt this letter serves as a reasonable management instruction to you to work the required period."

17 The Claimant relied on his contract of employment at page 33 (which sets out his holiday entitlement) and on the Respondent's procedure (annual holiday entitlement and authorisation page 168) to allege that Mr Rolle was wrong to state that insufficient notice was given. This was contested by Mr Linkson, but in any event this demonstrated the tendency of the Claimant to let his feelings dictate how he responded. Had he read the policy more carefully he would have noticed:-

17.1 The request required a "minimum" of twice as many days notice to that of the number of holidays requested. The request here was received late on

a Friday. The first working day thereafter was Monday, of the week where the holidays were sought on Thursday and Friday. Thus Mr Rolle's calculation on that approach was quite understandable.

17.2 It is a "request" that must be made within the minimum period. There is no entitlement for an employee to book holidays when it suits him.

17.3 The policy states: "Holidays will not normally be granted during periods of high business activity". The 22 and 23 December were during high periods of business activity.

17.4 The policy also states that holidays are granted on a "first come, first served" basis. The Claimant was requesting these days late in any event.

18 The evidence I heard showed on balance that the business shut down was more likely to be between Christmas Eve and New Year.

19 On 19 December 2016, the Claimant returned to work. On that date, at about 09:45, Mr Linkson and Mr Walker had a meeting with the Claimant, in which he repeated his request for annual leave on 22 and 23 December 2016. The outcome of the meeting was that the request was refused.

20 The Claimant left the workplace around lunchtime on that day, stating that he had been sick. The Respondent did not contest this.

21 Also by letter dated 19 December 2016 (received 20 December 2016), the Claimant submitted a grievance. I find that this grievance letter shows that the Claimant believed the refusal of his request for annual leave on 22 and 23 December was a breach of contract.

22 On 20 December 2016, the Claimant's girlfriend telephoned the Respondent to inform them that the Claimant was ill, and would not be attending work. She called again with the same message on 21 December 2016.

23 The Claimant did not attend work on 22 or 23 December 2016. It was common ground that neither the Claimant nor his girlfriend had called the Respondent on those days to explain his absence.

24 It was alleged by the Claimant in his evidence before me that his girlfriend had said the Claimant would not be coming in for the rest of the week when she rang in on 21 December. This fact was disputed; and it was disputed that this allegation had been made before this hearing.

25 Mr Wiltshire wrote to the Claimant on 23 December 2016 (page 92) stating that he was absent without leave and that there had been no communication from him for two days, warning the Claimant that if there was no communication from him or no medical certificate the Respondent would commence disciplinary action against him.

26 Following receipt of the Claimant's grievance a grievance hearing was arranged on 3 January 2017. It is unclear who directed this, but I find this task was given to Mr Wiltshire by one or more of the Directors.

27 Prior to the grievance hearing Mr Wiltshire gathered two very short statements from Mr Linkson and Mr Walker. The statements stated basically the same thing: at the meeting on 19 December 2016, the Claimant was told that he could not take the 22 and 23 December as holiday to which the Claimant replied that he would take them off anyway: see pages 87 and 88.

28 Surprisingly, and contrary to most human resources procedures that this Employment Tribunal sees, Mr Wiltshire did not interview the complainant or take a statement from him prior to the grievance hearing. Although Mr Williams originally denied it, having forgotten it, I find that the statement at page 157 is the written statement that Mr Wiltshire asked the Claimant to write at the grievance hearing. This states:

> "*Trevor Stafford*
>
> *Called in meeting at 10, spoke about my safety equipment etc…. stated for the 2nd time, 1st by email, that I would be booking Thurs/Fri off, then got told by John Linkson that I couldnt… I stated ive given you enough time, hence as in our contract, and Johns reply was "Its my choice your not having it off" I said thats a breach of contract, then John said, "so you wanna go down that route then" I said im having it off and that was pretty much it, apart from John saying to report to Dennis every morning!*"

29 The grievance was heard by Mr Wiltshire in the presence of Mr Aldred, another manager. The notes of hearing, which are an accurate but not verbatim record, are at pages 100 to 104. At the hearing, the Claimant alleged that the meeting on 19 December 2016, Mr Linkson had refused to give him the two days holiday requested because he did not want to. His evidence was that no other reason was given. From his evidence, it is clear that the Claimant's case is that he had "booked off" the 22 and 23 December, and was therefore entitled to take them as holiday.

30 In the grievance hearing evidence, the Claimant did not mention that he was sick on 22 and 23 December, nor that his girlfriend had told the Respondent on 21 December that he would be absent on those days: see page 101. In his grievance, the Claimant also complained that he had been underpaid.

31 The grievance was not upheld. This was because Mr Wiltshire believed the Claimant knew his application for leave had been refused and the reasons why, and that he had taken unauthorised absence despite knowing this.

32 The Claimant was informed of the grievance decision by letter dated 5 January 2017, which also explained the Respondent's view as to why he had been paid correctly. Within this, Mr Wiltshire explained the Respondent's case that the Claimant had failed to notify the Respondent as to why he was absent on 22 and 23 December 2016 and because his annual leave had been declined he was obliged to attend work.

33 The Claimant then submitted a grievance appeal: see pages 109 to 110. His appeal failed: see the grievance appeal decision 23 January 2017 pages 125 to 141.

34 On 3 January 2017, Mr Wiltshire had an informal meeting with the Claimant, who was complaining that he had not been paid his full wages; specifically that he had been underpaid and not paid for holiday. What happened at the end of the meeting is that the Claimant left the premises about lunchtime.

35 The Claimant's case throughout was that Mr Wiltshire had authorised this leave. Mr Wiltshire honestly believed he had not authorised this leave, and that he had advised the Claimant to wait for Aniscia Rolle's return to work (she was in charge of payroll matters); she was on holiday at the time. Mr Wiltshire's evidence was that the Claimant had said: "*I don't work for free and if I don't get my money I will just go*" and had then left the premises. I find as a fact that Mr Wiltshire had no power to authorise the Claimant to leave early, because this power sat with the Directors. Without any further investigation, and without any further discussion with the Claimant such as to explore why he acted as he did or what mitigation for his acts there might be, the Respondent arranged a disciplinary hearing. Although Mr Wiltshire stated he arranged it, it was not his idea. He failed to give any explanation as to why he went to arrange it. I infer that one or more of the directors directed him to arrange it.

36 Mr Wiltshire asserted that he did "*the investigation leading up to the disciplinary hearing*". In fact, he did no investigation over and above what had been done for the grievance.

37 The disciplinary hearing took place on 14 February 2017. It appears to have consisted of Mr Wiltshire, Mr Linkson, and Mr Rolle (on one side of a table) with the Claimant present on the other side of the table. Insofar as the meeting had a chairman, this appeared to be Mr. Wiltshire, although he did not take part in the decision-making.

38 Prior to the commencement of the hearing there was no separate "charge letter". The Respondent relied on the grievance decision letter of 5 January 2017. This letter does not identify the period 22 to 23 December as the subject period when the Claimant was absent from work without leave. It identifies the period since the 3 January 2017, a day on which the Claimant left work without authority on the Respondent's case.

39 The disciplinary hearing began (page 194a) with Mr Wiltshire identifying that the meeting was to talk about the Claimant's absence on 22 and 23 December and leaving the workplace without authorisation on 3 January 2017. The Claimant's case in respect of the latter charge was that Mr Wiltshire had authorised him to leave work on 3 January 2017. At the meeting, the evidence of Mr Wiltshire was that he did not give the Claimant authority to leave on 3 January, and that he had no such authority.

40 Mr Rolle adduced evidence that the Claimant told Mr Walker the next day that: "*it won't happen again*". The Claimant's case in respect of 22 and 23 December was that he had to look after his child because there was no-one else to do it. When asked by Mr Rolle: "*so it took you two days*", the Claimant stated that the Respondent was not busy, and that he had given enough notice. Later the Claimant stated: "*I booked them days off previous, gave enough notice*" (page 194C).

41 The Claimant did not deny that he had told Mr Linkson that he was still taking the two days holiday. The Claimant replied: "*Cos I had family commitments*".

42 Mr Linkson replied that the Claimant had not stated that at the time. The Claimant was asked who he had said it to. The Claimant replied: "*I dunno whoever I spoke to*".

43 Mr Wiltshire stated at the disciplinary hearing that parental leave was not mentioned to anyone. The Claimant provided no particulars in response stating: "*You must of forgot then cos it was*".

44 The Claimant proceeded to state that the Respondent was not busy when his holiday was refused, and that his treatment was due to the previous year of suspension.

45 Mr Linkson's evidence at the hearing (page 194G) was that the Claimant was told he was refused the two days absence and that the Claimant had not mentioned parental leave at that time.

46 Mr Wiltshire finished the meeting by stating that Mr Linkson and Mr Rolle were going to make a decision.

47 The Respondent dismissed the Claimant on 14 February 2017 for gross misconduct. The Claimant was informed of this on the same day as the hearing. The dismissal letter states that the Claimant was dismissed because (a) he was absent from work without authorisation on 22 and 23 December 2016 and (b) left the place of work without proper authority on 3 January 2017. It continued:

> "*These offences are regarded as gross misconduct and are not tolerated within the organisation*".

48 I note that the second of these allegations, in respect of 3 January 2017, was not part of any earlier grievance or other investigation.

49 The letter is signed by Mr Rolle. It does not explain who made the decision. Mr Wiltshire stated Mr Linkson made it. Although the evidence on this is confused, it is probable that Mr Linkson was adamant that the Claimant must be dismissed, and that Mr Rolle agreed with him. Having seen Mr Linkson give evidence, I have no doubt that he honestly believed the Claimant was guilty of the offences before the meeting began. In this sense, the Claimant did not have a fair hearing in front of an impartial tribunal. I find that Mr Linkson had made his mind up before the hearing, largely because he had been a witness to key events and because Mr Linkson and probably Mr Rolle took into account other factors in reaching their decision to dismiss, which were never put to the Claimant, including:-

49.1 The Claimant had not worked a full week since coming back from suspension on 19 December 2016, having taken various days of absence due to either sickness or holiday.

49.2 The misconduct set out in paragraph 27 of Mr Linkson's witness statement (damage to expensive glass) which he and other directors believed the Claimant was responsible for.

50 Furthermore Mr Linkson believed the fact that gross misconduct had been committed (in the sense of absence without leave) meant that summary dismissal was automatic. I do not accept that Mr Linkson or Mr Rolle considered mitigation, nor did they have any investigation evidence or a statement or notes of an investigation interview with the Claimant to help them with this aspect.

51 Doing the best that I can, I infer that Mr Linkson and Mr Rolle did reach the decision to dismiss together, and at that time they both had an honest belief, based on reasonable grounds, that the Claimant was guilty of the gross misconduct alleged, irrespective of when this belief was formulated. They went to consult Mr Walker before communicating their proposed decision simply because he was a director and they were used to taking key decisions collectively. This was not a reasonable step: Mr Walker had not seen the Claimant give evidence at the hearing and could not (given his absence) have been persuaded by any of the Claimant's submissions or the evidence. Mr Walker could only act on what he was told by Mr Linkson and Mr Rolle.

52 Moreover, I find that this decision-making process included consideration of factors which were not relevant. Mr Walker explained when asked if it was reasonable to dismiss for the first offence, even if it was gross misconduct:

> "*catalogue of things at time. Before he came back all fine, glass cut. After he came back things happening, glass and machine got damaged. Could be coincidence.*
>
> *Q. Need to investigate?*
>
> *A. Would denial; we not have CCTV*
>
> *Q. Unfair to lay at C's door and take into consideration*
>
> *A. To a degree we are agreeing in that department. HR not our thing. Doing best for company*."

53 I accept Mr Wiltshire's evidence that the letter at page 147a dated 9 February 2017 was about an incident on 9 January 2017, because it refers to his informal discussion with the Claimant about pay on 8 January 2017. It was probably sent in or about January 2017, but was mis-dated.

Findings of fact in respect of breach of contract and contributory fault

54 On 19 December 2016, during the morning meeting with Mr Linkson, Mr Walker and the Claimant, Mr Linkson refused the request for annual leave and explained that this was because it was the Respondent's busiest time of year, when leave was not granted. I am satisfied the Claimant gave no reason for his request during that meeting, and did not mention childcare. Insofar as there is inconsistency between the Claimant's account of that meeting and the account of Mr Linkson, I preferred Mr Linkson's and Mr Walker's evidence, partly because of the statements they made

shortly after as part of the grievance process which tended to corroborate their account.

55 Having had his request refused, I find that the Claimant did reply with the following words, or the gist of them:

> "*Well, I'm taking them off anyway*."

In evidence the Claimant admitted stating this. Mr Linkson told the Claimant that he expected him to be at work on those days and walked out. Having seen him give evidence, he was irritated and frustrated with the Claimant at this point.

56 As I have explained, it was alleged by the Claimant in his evidence that on 21 December his girlfriend had told the Respondent that the Claimant would not be coming in for the rest of the week, but I reject this evidence as wishful thinking. This is because:-

56.1 I prefer the clear evidence of Mr Linkson on this point.

56.2 There is no reference in his claim form to the Claimant being ill on 22 or 23 December 2016.

56.3 The Claimant's witness statement does not state his girlfriend told the Respondent that he would be off sick on 22 and 23 December. The statement merely states: "*She also stated that she expected me to be off for a while on the last call*" (page 196).

57 Moreover, the Claimant's case that he was off sick on these two days is inconsistent with his original claim which states that he requested he:

> "*needed the 27th and 28 December off as annual leave as he needed to look after his children, as there was no one else to do so in the family …*
>
> *In the alternative it was essentially a request for compassionate leave. The Respondent declined the request and the Claimant simply could not attend work on those days and so called in sick.*"

58 I am well aware that pleadings in an Employment Tribunal claim are not viewed with the same forensic analysis as in the Chancery Division, but they do stand as the statements of case of each party, which is what a fair hearing requires. I conclude that the Claimant was not sick on 22 and 23 December 2016; he took those days off because he was angry at what he perceived to be unfairness by management in refusing those days as annual leave.

59 In respect of the incident on 3 January 2017, I prefer the oral evidence of Mr Wiltshire. I find the Claimant well knew by 3 January 2017 that if he wanted leave he had to seek the authority from one of the directors. I find the Claimant was so emotional about the injustice he perceived in respect of his pay, that he acted on impulse in going home on that day. This was a further example of his feelings getting the better of him, and, to an extent, they coloured his recollection.

60 In conclusion, the Claimant was absent without leave on 22 and 23 December 2016 and on 3 January 2017. In respect of his absence on 22 and 23 December 2016, I find that the Claimant had wilfully failed to follow a reasonable and clear management instruction to attend work.

The Law

Gross misconduct

61 Gross misconduct is conduct which is so serious that it goes to the root of the contract. It must be conduct so serious as to amount to repudiatory breach. By its very nature, it is conduct which would justify summary dismissal, even for a first offence.

Unfair Dismissal

62 In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s. ERA 1996.

63 A potentially fair reason is one which relates to conduct: s.98(2)(b) ERA 1996.

Reasonableness: s.98(4) ERA 1996

64 I directed myself to section 98(4), which I will not repeat here. The burden of proof on the issue of fairness is neutral.

65 In conduct cases, in considering the fairness of a dismissal, the classic questions for a Tribunal to consider are:

65.1 Did the employer have an honest belief that the employee was guilty of misconduct?

65.2 Was that belief based on reasonable grounds?

65.3 Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See *BHS v Burchell* [1980] ICR 303)

66 The principles which the Tribunal must apply when applying section 98(4) are as follows:

66.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

66.2 On the issue of liability of the unfair dismissal the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

66.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

67 The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see *Sainsbury plc v Hitt* [2003] ICR 111. I directed myself to the following passage in *Hitt*, with emphasis added by me, which I found to be relevant to this case:

> "The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. **The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.** The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out."

68 Reading *Hitt* and *Foley* together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer, in this case, a small to medium-sized employer with about 60 workers.

69 Section 98(4) ERA 1996 focuses on the need for an employer to act reasonably in all the circumstances.

Section 123(1) ERA 1996: Polkey

70 Applying section 123(1) ERA 1996, if a Tribunal finds a dismissal unfair on procedural grounds, but the employer can show that it might have dismissed an employee if a fair procedure had been followed, the Tribunal may make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed: see **Polkey v AE Dayton Services** [1988] ICR 142.

Contributory fault

71 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: section 123(6) ERA.

72 If a finding of unfair dismissal is made, the proper approach to deductions in respect of contributory fault is set out in *Optikinetics v Whooley* [1999] ICR 984, 989. Where a Tribunal finds that the dismissal was caused or contributed to by any action of the complainant, it must reduce the compensatory award by such proportion as it considers just and equitable: see s.123(6) ERA 1996.

73 Mr. McCracken referred me to *Parsons v Airplus International* UKEAT/0023/16, but this reference is erroneous: this authority is about an entirely different set of facts and does not involve contributory fault (and Simler P did not preside).

74 The Basic award may also be reduced where "the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent": s.122(2) ERA 1996.

75 A Tribunal is not bound to make the same reduction to both Basic and Compensatory awards where there is proven misconduct. In exceptional cases, different deductions for misconduct may be made: see *RSPCA v Cruden* [1986] ICR 205.

Separate and graded fact-finding

76 I reminded myself that the Tribunal is required to make findings of fact about the Claimant's conduct for the purpose of deciding the extent to which the Claimant's conduct contributed to her dismissal. I reminded myself of the guidance provided by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 261:

> *"44. I agree with the EAT that the ET was bound to make findings of fact about Mr Small's conduct for the purpose of deciding the extent to which Mr Small's conduct contributed to his dismissal. That was a different issues from whether the Trust unfairly dismissed Mr Small for misconduct. Contributory fault only arose for decision, if it was established that the dismissal was unfair. The contributory fault decision was one for the ET to make on the evidence that it had heard. It was never a decision for the Trust to make. That makes it different from the decision to dismiss, which was for the Trust to make. It was not the role of the ET to conduct a re-hearing of the facts which formed the basis of the Trust's decision to dismiss. The ET's proper role was objectively to review the fairness of Mr Small's decision by the Trust.*
>
> *45. I am unable to agree with the EAT that the ET kept the issues and the relevant facts separate or that it avoided the error of substituting its own judgment about dismissal. Although the ET rightly warned itself against substitution and thought that it was not falling into that error, my reading of the*

> *reasons is that its findings of fact about Mr Small's conduct seeped into its reasoning about the unfairness of the dismissal.*
>
> *46. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for the ET to keep its findings on that particular issue separate from its findings on disputed facts that are relevant to other issues, such as contributory fault, constructive dismissal and, increasingly, discrimination and victimisation claims. Of course, some facts will be relevant to more than one issue, but the legal elements of the different issues, the role of the ET and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."*

77 I directed myself that I also needed to make findings of fact to determine the breach of contract issues.

Submissions

78 I heard submissions from both Counsel. The Respondent had also prepared a short skeleton argument. Ms Millin reminded me that even if the Respondent had an honest belief on reasonable grounds that the Claimant was guilty of gross misconduct, dismissal was not the only sanction available, and argued that dismissal was outside the band of reasonable responses.

Conclusions

79 Applying the above findings of fact and principles of law to the issues outlined in the list of issues, I reach the following conclusions. I should add that the Claimant introduced in evidence the fact that he has epilepsy, but I did not find that this was relevant to the issues before me.

Issues 1 and 2: reason for dismissal

80 The reason for dismissal was that Mr Linkson, Mr Rolle and Mr Walker had an honest belief that the Claimant was guilty of misconduct; this was a potentially fair reason for dismissal.

81 The requirement for the Claimant to work on 22 and 23 December was honestly believed by them to be a reasonable management instruction. I consider that this belief was reasonable given the terms of the correspondence and the oral instruction that the Claimant had received from the Respondent.

Issue 3: procedural fairness

82 The decision to dismiss was procedurally unfair for several reasons. I have taken into account the guidance in *Hitt*, but I am satisfied that the procedure in this case was well outside the band of reasonable responses open to an employer of this size with the resources and the external HR resource available to it. As I pointed out, this was not a market stall but a small to medium size business.

83 In particular I would identify the unfairness in procedure as follows having considered the relevant ACAS code of practice on disciplinary proceedings:-

83.1 There was inadequate investigation. In particular:

83.1.1 there was no real investigation into the incident on 3 January 2017, by an impartial investigator. There were other managers such as Mr Aldred who could have done this;

83.1.2 there was no investigation in respect of what explanation or mitigation the Claimant might have for his being absent without leave on the dates in question. Any exculpatory evidence should have been investigated.

83.2 There was no comprehensive set of charges provided at the disciplinary hearing.

83.3 It was practicable in this case for different people to carry out the investigation and the disciplinary hearing. This was not done, with Mr Wiltshire the investigator, part of the disciplinary panel, and witness at the disciplinary hearing (in respect of 3 January 2017).

83.4 The disciplinary hearing itself contained elements of unfairness with the Respondent could have removed with minimal adjustment, in particular:-

83.4.1 Mr Linkson was both a witness and a decision-maker;

83.4.2 Mr Walker was a decision-maker but was not present when the evidence and submissions were made;

83.4.3 Mr Linkson had made the decision to dismiss in advance of the hearing. It was not a fair hearing.

These could have been cured by Mr Rolle being the decision-maker alone.

83.5 The decision itself was reached in an unfair way. In particular:-

(a) Mr Linkson considered the dismissal was the only sanction for the gross misconduct. I did not accept that the Respondent had considered the full range of sanctions.

(b) Both Mr Linkson and Mr Walker took into account irrelevant matters in reaching the decision to dismiss, namely misconduct they blamed on the Claimant which were not put to him and when no investigation had been carried out into those matters.

83.6 The allegation put to the Claimant was absence without leave. The actual finding, and the main reason for his dismissal, was the belief that the

Claimant had committed what amounted to insubordination in disobeying a reasonable management instruction that he could not take the 22 and 23 December as annual leave.

84 Having so concluded, the decision to dismiss was outside the band of reasonableness on procedural grounds, I do not need to consider issue 4.

Issue 5: section 123 Employment Rights Act 1996: Polkey deduction?

85 I consider that despite these procedural breaches there was a high chance that the Claimant would have been dismissed in any event, had a fair procedure been adopted. I assess this chance at 75%.

86 I reach this conclusion because there was strong evidence that the Claimant had been absent without leave, and that he had ignored a reasonable management instruction in so doing. This evidence came from credible witnesses, who were directors, and it would have been before any disciplinary panel. Moreover, from the evidence I heard from the Claimant, I consider that further investigation would have produced no exculpatory evidence. It was unlikely that his explanation in respect of taking off the 22 and 23 December would have been accepted and, as I have said, the Claimant misunderstood his contractual rights and his emotions were influencing his responses.

Issue 6: breaches of the ACAS Code

87 As I have explained the Respondent did unreasonably fail to comply with the ACAS Code. I identify that paragraphs 5, 6 and 9 were breached.

Issue 7: contributory fault

88 The Claimant did contribute to his dismissal. He acted in a blameworthy way, for all the reasons set out in my findings of fact.

89 In particular:-

89.1 The Claimant was absent without leave on 22 and 23 December 2016. He was not sick, and he did not need those days off for childcare. He took them as a result of his emotional response to being refused annual leave. His actions were a wilful refusal to follow a reasonable management instruction.

89.2 The Claimant was absent without leave on 3 January 2017. He was given no authority by Mr Wiltshire to go home that day.

89.3 The Claimant did not admit these charges at the disciplinary hearing. He contested them and did not give a true account of events. This made any outcome other than dismissal impossible, in a scenario where one charge was the result of him ignoring a specific direction from the directors that leave was refused. It is unlikely that any employer would have put their trust in the Claimant after what had occurred.

90 I conclude that the Claimant was wholly responsible for his dismissal. Turning to the question of what deduction is just and equitable under section 123(6) ERA 1996, I conclude that 100% deduction to the compensatory award is just and equitable in the circumstances of this case. The Claimant is responsible for his actions. There was no mitigation for them. He wrongly interpreted his contractual right to leave and could not control his emotions thereafter, probably in part due to his belief about the pay due to him. These matters probably influenced his decision-making. From what I saw and heard, it was not the Respondent that failed to wipe the slate clean after the period of suspension, but the Claimant.

91 Turning to whether there should be any deduction in the Basic award under section 122(2) ERA 1996, I recognise that the statutory language is different and that the Employment Tribunal has a wide discretion under section 122(2). In my view, this is an exceptional case. I considered that 50% deduction to the Basic award should be made. My reasons are as follows:-

91.1 The Claimant's length of service, which in today's labour market is unusual given the age of the Claimant. Although I heard about alleged misconduct in 2015, this was never dealt with in a disciplinary process and I heard no evidence that the Claimant was an unsatisfactory employee before this. Indeed the Respondent had re-employed him in 2005 after a first spell with the company.

91.2 I consider it would not be just and equitable to reduce the Basic award by the same amount as the Compensatory award, given the unfair procedure used by the Respondent, which included depriving the Claimant of a fair hearing.

Breach of contract

92 The Claimant did breach his contract of employment as I have explained by committing the gross misconduct alleged. The requirement for the Claimant to work on 22 and 23 December was a reasonable management instruction. Mr Rolle was entitled to require him to work this first week back after the investigatory suspension. I conclude that the Claimant was not entitled to any notice pay. The claim for breach of contract fails.

Consideration of Remedy

93 In the light of the above conclusions, it does not appear cost-effective for a Remedy hearing to take place. The parties can calculate for themselves 50% of the Basic award. The parties are directed to notify the Tribunal in writing within 14 days of promulgation of this Judgment whether a Remedy hearing is required, stating the reason and providing dates to avoid. There is no need for the same Counsel to appear given the findings and conclusions above; the matter will be listed before me on the Employment Tribunal's first available date if the parties fail to co-operate with this direction.

94 If settlement is achieved in respect of agreement over the Basic award, the Employment Tribunal must be informed within 7 days of such settlement.

Employment Judge Ross

21 September 2017