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# THE EMPLOYMENT TRIBUNALS

**Claimant** Mr D Smith  
**Respondent** Charles Pugh (Windscreens) Ltd  
trading as National Windscreens

**Heard at:** East London Hearing Centre

**On:** 28<sup>th</sup> September 2018

**Before:** Employment Judge Reid

## Appearances

**For the Claimant:** did not attend  
**For the Respondent:** Ms Moore (HR)

## RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was not unfairly dismissed by the Respondent contrary to s94 Employment Rights Act 1996 and his claim is therefore dismissed.

## REASONS

### Background and issues

1. The Claimant was employed by the Respondent as a technician until 22<sup>nd</sup> February 2018 when he was dismissed for poor attendance. He brought a claim for unfair dismissal presented on 2<sup>nd</sup> May 2018.
2. The basis on which the Claimant claimed his dismissal was unfair (page 7) was firstly because he considered he had not been liked and that therefore the reason given (his absences from work) was not the real reason for dismissal, secondly because he was dismissed at the time he was going through a relationship breakdown and had not been given any support by the Respondent when he was mentally not in a good place and thirdly because he had in fact complied with the Respondent's absence reporting procedures. He did not claim that the dismissal procedure undertaken by the Respondent had been unfair in any way.

3. The Respondent's defence (pages 20-23) was that it had been justified in dismissing the Claimant because of his persistent absences, he had received three warnings prior to dismissal including a final written warning, a fair procedure had been followed and the Claimant had not appealed his dismissal.
4. The issues were therefore:
  - 4.1 whether the reason for dismissal given by the Respondent was the real reason for dismissal
  - 4.2 what the sole or principal reason for dismissal was and was it a fair one within s98(1) and (2) Employment Rights Act 1996
  - 4.3 whether the Respondent acted reasonably in treating that reason as a sufficient reason for dismissing the Claimant under s98(4) Employment Rights Act 1996.

#### The hearing

5. The Claimant did not attend the hearing. In accordance with Rule 47 of the Tribunal Rules he was called (at 10am) on the number given in his claim form which was that of his representative Ms Terri Smith who did not know anything about the Claimant attending or not. She provided the clerk with a number for the Claimant himself which the clerk telephoned but to which there was no response and it was not possible to leave a message. A subsequent call back to Ms Smith at 10.30 am was not picked up. I noted from the Tribunal file that the Claimant had taken no part in the progress of his claim after presenting it in May 2018. I therefore decided to proceed in the absence of the Claimant under Rule 47 taking into account the overriding objective in Rule 2, in particular the need to avoid delay and save expense.
6. Ms Moore (HR) of the Respondent attended with one witness Mr Liddard who took the decision to dismiss. There was a one file bundle (to page 137) which had been sent to the Claimant. I heard oral evidence from Mr Liddard (Regional Operations Manager) and Ms Moore made submissions on behalf of the Respondent at the end of the hearing.

#### Findings of fact

7. The Claimant was employed by the Respondent as a technician until his dismissal on 22nd February 2018. His continuous employment start date was 1<sup>st</sup> September 2012 being the date he commenced employment with his previous employer APS Windscreens & Sunroofs Ltd, prior to a TUPE transfer to the Respondent on 3<sup>rd</sup> October 2016. The Claimant gave a different original start date in his claim form of 3<sup>rd</sup> April 2013 but I find based on Mr Liddard's oral evidence that the 1<sup>st</sup> September 2012 original start date was the correct one as that is the start date the transferor had provided to the Respondent.
8. I find based on Mr Liddard's witness statement and his oral evidence that the Respondent needed to have a clear and reliable picture of the technicians it is going to have at work each day because the nature of the business is such that

customers pre-book their cars in for repairs and the work is then allocated accordingly; if a technician is then not at work that day the job has to be covered by another technician working late (who already has his own allocated pre-booked jobs) or may need to be rescheduled with the customer who may themselves have taken time off work to have their repair done. I find therefore that a technician not attending for work or the Respondent not being kept updated about any non-attendance has a business impact on the Respondent in terms of possibly having to let customers down (and thus possibly losing that business) or putting other technicians under increased pressure as they have to try to also fit in the extra work, which is disruptive.

9. The Respondent's requirements for reporting absence (page 48) was that the employee was to inform their manager by telephone by 9am on the day and then daily thereafter unless the absence was for more than a week and was certified sickness absence in which case weekly reporting was required.
10. I find based on Mr Liddard's oral evidence that he reviewed absence rates from 2016 at the beginning of 2017 and identified that a number of technicians in the branch had high absence rates the previous year. For the Claimant the rate of absence was at 8.92% (page 20), adjusted to discount the certified sick leave the Claimant had taken due to depression in 2016. I find that the company-wide absence rate was around 2% so even when adjusted the Claimant's absence rate was considerably higher. These employees were issued with a letter of concern about their absence rates (page 86). I therefore find that the Claimant was not being singled out because he was not liked by his branch manager Mr Walton or not liked by Mr Liddard but was one of a number of employees whose absence rate was considered too high.
11. I find that the period when the Claimant's relationship was breaking down and he was having family problems was around the end of 2016/ beginning of 2017, when he was signed off for depression (page 55-56) in December 2016 and January 2017. I therefore find that the Claimant is not correct to imply he was dismissed because of absences at this time (page 12); he was dismissed around a year later after multiple further absences including for other reasons. In any event Mr Liddard discounted these absences when considering the Claimant's absence rate. I find that the Respondent supported him at this time (and subsequently – see below) with a suggestion from Mr Liddard that mediation might be worth exploring to help resolve his family problems. He conducted a return to work interview with the Claimant in January 2017 (page 63).
12. On 15<sup>th</sup> March 2017 Mr Liddard met with the Claimant (page 87, 91) for a formal disciplinary meeting because the Claimant's absence rate had not improved (page 93,65,66,67) including a failure to report the absence on 11<sup>th</sup> March until 13<sup>th</sup> March 2017 (page 67). He had been sent his 2016 and 2017 attendance records in advance (page 87). I find that the Claimant accepted that the absences would affect the Respondent's business (page 93). The Claimant was then issued with a 6 month first written warning (page 95) for poor attendance which stated that significant and sustained improvement in attendance was needed. The Claimant did not appeal this warning.

13. I find based on his oral evidence that Mr Liddard had some discussions in early 2017 with the Claimant and with other employees who had transferred in October 2016, as to whether they wanted to transfer over onto the Respondent's terms, rather than remaining on the transferor's terms. I find that the Claimant had complained about his working hours when at the transferor so Mr Liddard offered him the Respondent's terms instead because it was fewer hours per week (43 instead of 46.5 ) and spread over 5 days (rather than 5.5 days). The Claimant did not come back to the Respondent about accepting the new terms as regards hours until the summer of 2017, signing up to the new terms in August 2017 (page 35). Mr Liddard also discussed with the Claimant his involvement in the out of hours rota, agreeing that if the Claimant could get a colleague to cover his hours for him then the Respondent would not require him in practice to do any work on that rota, which arrangement was then in place until the Claimant was dismissed. I therefore find that the Respondent was trying to assist the Claimant in managing his working hours and was not unsympathetic about the Claimant's family commitments.
14. I find that the Claimant's attendance did not improve sufficiently over the following 6 months (including a failure to return to work on 22<sup>nd</sup> August 2017 after the end of his holiday without explanation (witness statement page 3, pages 56,69-78)) and accordingly he was invited to a second disciplinary hearing on 22<sup>nd</sup> September 2017 (page 97) to discuss his continued poor attendance. He was sent his 2017 attendance records in advance (page 98). I find based on his oral evidence that Mr Liddard moved the date of that meeting because Mr Liddard had to attend his father's funeral but was aware that the effect of moving the meeting date meant that the 15<sup>th</sup> March 2017 warning would have expired by the time of the meeting. I find that he could have found another manager to deal with the matter a week earlier but did not do so, consistent with in fact wanting to keep the Claimant rather than wanting him to leave (ie by not having the second disciplinary meeting within the 6 months of the previous March 2017 warning). The Claimant agreed that there needed to be improvement (page 100) and that the new contract was helping him. He was then issued with a second 6 month first written warning (page 102). The Claimant did not appeal the second warning.
15. The Claimant's attendance did not improve (witness statement pages 3-4, page 56,79-85) and he failed to report daily after being absent on 29<sup>th</sup> November 2017 until he returned to work on 6<sup>th</sup> December 2017 (page 56), which was unexplained absence. He was invited to a third disciplinary meeting on 14<sup>th</sup> December 2017 (page 108) regarding continued poor attendance but now also including the specific recent absence, a failure to communicate and follow the absence reporting procedure, loss of trust and confidence, failure to follow procedures and failure to follow a reasonable request ( being a reference to a failure by the Claimant to work beyond 5pm to complete a job on a Range Rover on a day when he had come into work an hour late, and which he had been asked to complete). He was provided with his attendance record in advance (page 109). At the meeting the Claimant accepted that he had not called in daily in accordance with the procedure in the recent absence after the first two days (page 112) and accepted that the absence rate was terrible (page 114). The Claimant was then issued with a 12 month final written warning (page 123) for unsatisfactory attendance, failure to follow reporting procedures, failure to

communicate, failure to follow a reasonable request, all resulting in a loss of trust and confidence. I therefore find that in the Respondent's view matters had shifted from just being a poor attendance issue (as per the previous two warnings) to also now being more specifically about complying with reporting absence procedures and that the situation was by now such that the Respondent was losing confidence in the Claimant because it did not know whether the Claimant would come to work or not. I find the loss of confidence to be because the disruption caused by the Claimant's intermittent and sometimes unexplained absences was such that the Respondent was unable to rely on the Claimant attending for work or at the least keeping the Respondent informed if not attending, rather than leaving the Respondent in the dark as to whether he was coming in or not (page 113). The Claimant said he appreciated he was being given a chance (page 122) from which I find that he was again saying, as he had before, that he recognised the problem and the need to improve. The Claimant did not appeal this third warning. The warning advised him that dismissal was possible if he did not improve (page 124). I find that Mr Liddard had taken into account that the Claimant was good at his job (page 122) consistent with his oral evidence that he thought the Claimant was a good technician and that he was trying to keep him.

16. After the December 2017 final written warning was issued (witness statement page 4) the Claimant asked the Respondent for a loan. Mr Liddard authorised a loan of £500 from which I find it was not the situation as claimed, that the Claimant was dismissed because he was not liked because he was being made a loan at a time when he had just received a final written warning and which the Respondent was under no obligation to make. It also shows that the Respondent was not unsupportive of the Claimant as claimed if he was at this time still having family difficulties.
17. There were then a series of absences in January 2018 (witness statement page 4, page 57). On 31<sup>st</sup> January 2018 the Claimant did not attend for work and did not contact the Respondent as required under the procedure. When contacted by the Respondent he said he had a bad back but then failed to contact the Respondent daily thereafter. He was invited to a fourth disciplinary meeting on 7<sup>th</sup> February 2018 (page 125) regarding unsatisfactory attendance, failing to communicate during the recent absence and follow procedures, lateness and loss of trust and confidence. He was sent the 2017 and 2018 attendance records (page 126). The recent absences were gone through with him (page 127) but he said he had nothing further to say (page 128). He said that the recent absence was due to his back and that he had told Mr Walton but did not explain the failure to report daily as required. Mr Liddard identified that there had not been an improvement (page 129) and dismissed the Claimant with 5 weeks' notice (page 129-130) for the continued unsatisfactory attendance, failure to follow reporting procedures and continued lateness, all leading to a breach of mutual trust and confidence. He had in front of him the absence records at pages 55-57 when he took the decision to dismiss. I find based on his oral evidence that for Mr Liddard it was a situation where the Respondent could no longer cope with the Claimant's unreliability, despite having given him several opportunities to improve, and the consequent impact on the Respondent's business and on the Claimant's colleagues. I also find based on his oral evidence that the Claimant's absence rate was considerably higher than the average across the business, in 2017

being 2.4% (the Claimant's being 8.33%) and with an absence rate in January and February 2018 of 32.14%. I also find based on his oral evidence that Mr Liddard felt he had done his best to help the Claimant improve and to keep him employed but had exhausted every avenue, with the Claimant saying over a long period of time he would improve but then not doing so. The Claimant was told he had a right of appeal but did not do so.

### Relevant law

18. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal). I was referred by Ms Moore to *Burchell v BHS Stores* but if the reason or principal reason for dismissal was not the Claimant's conduct but some other substantial reason justifying his dismissal then the *Burchell* test for misconduct dismissals was not relevant.
19. If a claimant says that the reason given by the employer for dismissal is not the real reason, then the claimant must produce some supporting evidence to show what the real reason was ( *Associated Society of Locomotive Engineers v Brady [2006] IRLR 576* and *London Borough of Brent v Finch EAT 0418/11*). The Claimant did not attend and had not provided any evidence that the reason given was not the real reason.
20. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* applied.
21. The ACAS Code of Practice (2015) applied because the Respondent in effect started a misconduct procedure, even though ultimately the dismissal was for some other substantial reason (*Lund V St Edmunds School [2013] ICR D26*) – see below.
22. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.

### Reasons

23. Taking into account the above findings of fact, the principal reason for the Claimant's dismissal was his continuing intermittent absence for a variety of reasons since he transferred to the Respondent in October 2016 and his failures to keep the Respondent informed when he was going to be absent, and keeping in touch daily thereafter. Whilst there was also a conduct element to it (failure to comply with company procedures and lateness) I find that the principal reason in Mr Liddard's mind when he took the decision to dismiss was the Respondent's inability to cope with the Claimant's unreliability. This was some other substantial reason justifying the dismissal of the Claimant in the position he held because the needs of the business were such that the Respondent needed its technicians to be reliable. Whilst the letter of dismissal said he was being dismissed for 'unsatisfactory conduct' this label led to no unfairness for the Claimant because the matters being put to him were clear and had been over a period of time including in prior warnings, such that the mis-labelling of the reason for dismissal

as conduct (when it was in fact more because the Respondent could no longer rely on the Claimant ie its references to a loss of confidence / breach of trust and confidence) did not lead to any unfairness for the Claimant. Based on the above findings of fact the Claimant had not as asserted complied with absence reporting procedures.

24. Whether or not the individual reasons for each absence were justified or not was not the issue because the issue was unreliability and poor attendance, whatever the reason behind each absence.
25. The real reason for dismissal was that given by the Respondent and dismissal was not for the alternative reason put forward by the Claimant, that he was not liked.
26. Taking into account the findings of fact set out above I find that the Respondent followed a fair procedure with the Claimant, giving him three prior warnings with opportunities to improve over a year, holding a disciplinary meeting at which he had the right to be accompanied (which he declined) and he was given the opportunity to say anything he wanted to be taken into account and given the right of appeal (which he did not exercise). The Claimant made no criticism in his claim of the procedure followed by the Respondent. The procedure followed by the Respondent in any event complied with the minimum requirements in the ACAS Code of Practice taking into account it was ultimately a some other substantial reason dismissal.
27. The Claimant's case was that he was dismissed at a time when his relationship was breaking down but this was around the end of 2016/beginning of 2017 and the Respondent did not dismiss him at this time but over a year later after multiple further absences for a variety of reasons. The Respondent did not take into account the certified absences due to depression in assessing his absence rate and even when under a final written warning helped the Claimant out with a loan. He was therefore supported by the Respondent who also gave him several opportunities over an extended period to improve.
28. In all the circumstances the dismissal of the Claimant fell within the band or range of reasonable responses and was fair within s98(4) Employment Rights Act 1996.

Employment Judge Reid

2<sup>nd</sup> October 2018