EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **MR P HOWELL** **CLAIMANT**

AND

THE CUPBOARD DOOR COMPANY LTD **RESPONDENT**

ON: **12TH FEBRUARY 2018**

Appearances

For the Claimant: **Mr R Brandley, friend**
For the Respondent: **Mr R Morton, solicitor**

REASONS

These written reasons following a request made by the Respondent on 3rd April 2018. Unfortunately, that email was not referred to the judge until 22nd May 2018.

1. In this case the Claimant Mr Peter Howell, was employed by the Respondent for 7 years as a sprayer. He was summarily dismissed by the Respondent on 8th May 2017 and now brings a complaint of unfair dismissal. The Response was presented on 30th November 2017 to the effect the Claimant was dismissed for gross misconduct.

Procedural history

2. A notice of hearing sent on 2nd November 2017, listing the case to be heard on 12th February 2018. The notice of hearing contained orders for the preparation of the case for hearing, including (i) an order for disclosure of documents by list and copy documents on 14th and 28th December 2017 respectively and (ii) an order for exchange of witness statements on 11th January 2018. The Respondent is represented by AvensureLimited, an organisation which provides HR and employment law advice.

3. At 5.30 pm on 7th February 2018 the Respondent applied for a postponement of the hearing on the basis that the dismissing officer, Ms Brent had given birth within the last 2 weeks and could not travel for 3 or 4 weeks. No explanation was provided as to why no application had been made before that time.

4. Regional Employment Judge Hildebrand refused the postponement request on the basis that no witness statement had been provided by any of the Respondents' witnesses and there was no medical evidence to support the application.

5. When the parties arrived at the Tribunal on 12th February Mr Morton arrived without a bundle, documents, witness statements or witnesses. He repeated his application for a postponement. He told the Tribunal that Ms Brent had given birth on 15th January 2018 and following a blood clot could not travel for 12 weeks. I was provided with a copy of document (a newborn hearing screening) showing that infant Brent had been born on 15th January 2018, a letter evidencing that Ms Brent had attended a diabetes clinic in November 2017 and the outcome of a 16-week fetal scan. None of those documents complied with the presidential guidance as to the medical evidence to be provided when seeking a postponement of a hearing.

6. The Claimant strongly opposed the application to postpone. The Respondent had not provided him with any disclosure or witness statements in breach of the tribunal order. No-one from the Respondent of their representatives had been in touch. Notwithstanding this he had had provided his witness statement to the Respondent direct on 11th January in compliance with the case management directions. (He had not been aware at that time that the Respondent was represented). The Claimant had prepared his own bundle of correspondence relevant to his case. Ms Brent must have known that she was pregnant. No application had been made until 2 working days before the hearing. Mr Brandley, for the Claimant, said that had the application been made in a timely way he might have agreed but there had been no attempt at any stage to contact him or his representative to seek a postponement and no sign that the Respondent had prepared for the hearing.

7. I asked Mr Morton why the appeal officer had not attended even if Ms Brent was unable to. They were aware that the postponement application had been refused. Mr Morton said that the Respondent took the view that the Tribunal would have no option but to postpone this hearing given Ms Brent's absence and that therefore it was not necessary for Mr Warren, the appeal officer to attend. If the Tribunal went ahead the Respondent would be severely prejudiced. A more timely application would have made no practical difference to the ultimate position, namely Ms Brent was unable to attend.

8. After an adjournment in which I asked Mr Morton to obtain further information as to Ms Brent's position, Mr Morton advised that he had

spoken again to Ms Brent who told him that she was unable to travel for 12 weeks but he was unable to provide any additional medical evidence or other documentation at this stage. He had no instructions as to the reasons for the failure to comply with Tribunal orders. Mr Brandley, on behalf of the Claimant continued to resist the application to postpone saying that the Claimant had this hanging over for some time and he wanted to have the case concluded today.

9. There had been a complete failure by the Respondent to comply with Tribunal orders. I determined to hear the case on the basis of such information as I had before me, including the response and the bundle prepared by the Claimant, but that I would defer issues of remedy, including any issues of Polkey and contributory fault to a remedy hearing to be fixed on a date when Ms Brent could attend. The documentation provided by the Claimant was not in dispute. It was the Respondent's case that the Claimant was dismissed for serious insubordination and violent and aggressive behaviour towards Ms Brent during the disciplinary hearing.

10. Accordingly I heard evidence from the Claimant who was cross-examined by Mr Morton. The Claimant had provided a small bundle of documents. Where relevant I have referred to the page number in the Claimant's bundle of documents.

Relevant facts

11. The Claimant began employment with the Respondent on 18th September 2010 as a sprayer. He was summarily dismissed on 8th May 2017. At that time he was 67. He told the tribunal that at the time of his dismissal he had worked for the Respondent for 6 and half years and that there were no previous disciplinary issues. He worked long hours, was a keyholder and opened up on Saturday morning.

12. After work on Friday 5th May 2017 the Claimant broke his denture. He needed an urgent repair and arranged with the dentist to take the broken denture in for repair as soon as the dental practice opened at 8 on Monday morning. On 8th May the Claimant began work at 7 a.m. and initially there were no managers on site. He clocked out at 7.44 a.m. to go to the dentist. As he was going out he saw Mr Middleton, one of the shop floor managers, who was just arriving for work and said that he was "just popping out". The Claimant returned to work and clocked in at 8.02 a.m.. He was absent for 18 minutes. The Claimant accepts that the normal procedure would be to apply for prior authorization if leaving the premises during working hours but states that there were no managers around. He needed the denture repaired urgently.

13. At 13.30 the same day he was given a letter (10) signed by Ms Brent requiring his attendance at a disciplinary hearing at 14.30 for "Gross Misconduct: leaving the premises during working hours without authorization". The letter advised that "The possible consequences arising

from this meeting may result in: Dismissal". No other possible consequences were referred to. The Claimant was told that he was entitled to be accompanied by another work colleague or a trade union official.

14. The Claimant attended a meeting with Ms Brent at 14.30. Mr Hewson was there to take notes. I was not provided with those notes. The Claimant was not sent the notes.

15. Shortly afterwards the Claimant was given a letter (11) from Ms Brent stating that he was dismissed with immediate effect for gross misconduct. No further details were given. He was asked to leave the premises immediately and told that he had a right of appeal within 7 days.

16. The following day, 9th May 2017, the Claimant received a further letter from Ms Brent as follows:

> *"On 8th May 2017 you were informed that the Cupboard Door Company Ltd was considering dismissing you. This was discussed in meeting on 8th May 2017. At this meeting, it was decided that: your conduct was still unsatisfactory and that you be dismissed with immediate effect and asked to leave the premises. The reasons for your dismissal are as follows; gross misconduct with regard to serious insubordination (defiance of authority, refusal to obey orders) aggressive behaviour towards senior management witnessed by several members of staff*."

17. It was put to the Claimant in cross examination that he had been violent and aggressive during the disciplinary hearing. The Claimant did not accept that he had been violent and aggressive. He did accept that he was angry to have received a letter suggesting that he was guilty of gross misconduct for an 18-minute absence and that he said to Ms Brent "What the hell is the meaning of this?"

18. Since Ms Brent is not in attendance and since it is apparent that there is a dispute of fact between the parties as to exactly what occurred at that meeting I make no findings of fact about what transpired. Full findings of fact as to what occurred during the short disciplinary meeting will be made at the remedy hearing when issues of Polkey and contribution are to be considered. For reasons set out below, even if (and as I say I make no findings either way) the Claimant behaved aggressively or otherwise unacceptably during this meeting, the dismissal was unfair.

19. The Claimant telephoned Miss Brent on 10th May 2017 (13) asking that she reconsider her dismissal, but this request was refused. Later that day he wrote a letter to the Respondent stating that (i) the correct procedures for dismissal had not been followed and he had no alternative but to take the matter further and (ii) that he had always tried to put the company first, to work overtime, that he had never had time off sick and that on the day in question he had spoken to Mr Middleton saying that he was just popping out.

20. He received no response to that letter. On 29th May 2017 he wrote to Ms Brent reminding her that he had appealed and that the sanction imposed was too severe.

21. On 9th June 2017 the Respondent wrote to the Claimant informing him that Mr Warren would hear the appeal on 16th June. The Claimant wrote to the Respondent on 13th June 2017 asking for a copy of the disciplinary procedure and the investigation report and any documents on his personal file which related to performance or disciplinary matters. He asked if he could attend the appeal hearing with Mr Brandley, a family friend.

22. Mr Warren responded in an undated letter saying that Mr Brandley could not attend and the Claimant could only be accompanied by a trade union representative or a colleague. He enclosed a copy of "the investigation statement", the record of his unauthorised absence and the disciplinary procedure. None of those had been given to the Claimant prior to his dismissal.

23. The investigation statement (said to have been prepared by a Mr Hewson) records that the Respondent's clocking system indicated that on Monday 8th May 2017 the Claimant had left site without authorisation, that the Claimant clocked out at 7.44 a.m. and returned at 8.02 a.m. . It also records that the Claimant told Mr Middleton that he was "popping out" but that Mr Middleton did not have time to ask the Claimant where he was going. The Claimant had left site without adhering to the procedure for obtaining authorisation. (This document was not provided to the Claimant prior to the disciplinary hearing, but in any event, he does not dispute those facts.)

24. The Claimant attended the appeal hearing on 16th June. He gave Mr Warren a letter (21) which recorded the matters he wished to raise at the appeal. In particular, the Claimant said no disciplinary hearing had been convened to deal with allegations of insubordination and aggressive behaviour. Mr Warren read the letter and the meeting was short.

25. The Claimant chased an outcome on 28th June. Mr Warren responded the same day confirming that the original decision to dismiss was confirmed because

> "On 8th May 2017 you left your place of work without authority, displayed serious insubordination, and violent and aggressive behaviour towards Katie Brent causing her to become alarmed and distressed and fearing for her safety. Your actions represented a gross breach of a duty of care to provide a safe working environment for all our employees. What causes me great concern is that even now you appear not to appreciate how appalling your conduct was on 8th May 2017. Your actions have shattered the trust and confidence which must exist between employer and employee and have made further working relationship impossible."

The letter did not respond or answer the points which the Claimant had raised in his letter of 16th June.

The law

26. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is reason which may be found to be a potentially fair reason for dismissal. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged but the employer's belief in that misconduct must be based on reasonable grounds following such investigations as are reasonable in the circumstances. (*British Home Stores v Burchell* [1980] ICR 303.) The burden of proof at this stage is neutral

27. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

28. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The issue for the Tribunal is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what we would have done in the circumstances. (see *Post Office v Foley* 2000 IRLR 827).

29. A dismissal will be unfair if the employee is not given a fair hearing and a chance to state his case and to say what he wants to in explanation or mitigation. The ACAS Code of Practice on disciplinary and grievance procedures provides guidance which tribunals must take into account in deciding whether a dismissal is fair or unfair. It also sets out six steps that employers should normally follow when handling disciplinary matters. These are to

    a. Establish the facts of each case

b. Inform the employee of the problem
c. Hold a meeting with the employee to discuss the problem
d. Allow the employee to be accompanied
e. Decide on appropriate action
f. Provide the employee the opportunity to appeal.

30. A failure to follow the code is relevant to the reasonableness of the decision to dismiss and will trigger an uplift in the compensation payable if the employee is successful (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Submissions

31. The Claimant does not challenge that the dismissal was for "conduct" but says that he is not clear which was the conduct for which he was dismissed. The documentation was confused and confusing. Either way the sanction was too severe and the procedure was unfair.

32. Mr Morton submits that the Respondent never had any intention to dismiss the Claimant for his brief absence. He was dismissed because of his behaviour during the disciplinary process. I have not heard from Ms Brent as to her reasons for dismissal, but, either way, her decision was unfair for the reasons set out below.

Conclusions

33. In my view this is as plain an unfair dismissal as there could be. This was a decision taken at speed and without a fair procedure.

34. The Claimant was reasonably confused as to the reason for his dismissal and the documents sent to him were confusing. The first letter of dismissal which he received provided no reason other than "gross misconduct". The 2nd letter of dismissal referred to "insubordination and aggressive behaviour". Mr Warren in his appeal outcome referred to his behaviour towards Ms Brent but also to the fact that the Claimant had left his place of work without authority.

35. If the dismissal was for leaving his place of work without authority that dismissal was outside the band of reasonable responses. The Respondent sought to characterise this as "gross misconduct", but an 18 minute absence could not, on any measure, be said to be conduct which fundamentally undermined the employment contract or even conduct which was so serious that it would justify dismissal for a first offence. If it was for insubordination, the Claimant was never given a chance to know the charge against him or to respond to it.

36. Where there has been alleged misconduct, the ACAS code of practice provides that the disciplinary meeting should be held "without unreasonable delay whilst allowing the employee reasonable time to prepare their case". Following the Claimant's 18 minutes absence from work, it was unreasonable to give him one hour's notice of a disciplinary

meeting at which he had been informed that a possible outcome was dismissal. It was unreasonable not to provide a copy of the Investigation Report prepared by Mr Hewson to the Claimant before that disciplinary hearing. It was unreasonable to suggest that an 18 minute unauthorised absence from work after 6 ½ years of service amounted to conduct sufficiently serious to justify dismissal. It was unreasonable to call the Claimant to a disciplinary hearing without having sought an explanation from the Claimant as to the possible reasons for his absence.

37. I have not heard from Ms Brent but accept that the response submitted by the Respondent states that the conduct for which the Claimant was dismissed was "serious insubordination and violent and aggressive behaviour" towards Ms Brent during the disciplinary hearing. If, as the Respondent suggests, the real reason for the Claimant's dismissal was not his absence but his behaviour during the hearing then the Claimant was dismissed without a fair process. Paragraph 9 of the ACAS Code of Practice provides that if there is a disciplinary case to answer the employee should be notified of this in writing and should be given enough information about the alleged misconduct to enable him to prepare a defence. This was not done. The Respondent also failed to hold any disciplinary hearing which dealt with the Claimant's alleged aggressive behaviour. The Claimant was given no opportunity to deny or admit the conduct (and if the latter put forward his explanation or mitigation).

38. Mr Morton also submits that the process was short because the dismissing officer did not feel able to see the Claimant again in the light of his violent and aggressive behaviour. As I say I have not heard from Ms Brent but, if that was the case, then it was incumbent upon the Respondent to appoint a different manager to hear the allegations against the Claimant. On enquiry I was told that he Respondent employed 18-20 people "including family" and another manager could have been available.

39. As for the appeal this could not cure the defect since the information provided to the Claimant about the conduct with which he was charged and the reasons for his dismissal remained unclear and confusing. The brevity of the outcome letter and slowness of the Respondent to respond to the Claimant's appeal, suggest the appeal was no more than a question of going through the motions.

<u>Remedy hearing.</u>

40. Following the oral judgment delivered on the day

    a. A remedy hearing was fixed for 1st May 2018.
    b. The Respondent was ordered:
        i. no later than 20th February 201, to send to the Claimant a copy of any documents to be relied on for the remedy hearing not already contained in the documents provided by the Claimant and send to the Tribunal and the Claimant,

ii. no later than 28th February 2018 to send a copy of medical evidence to support the Respondent's assertion that Ms Brent would be unable to travel for 12 weeks from the 15th January.

41. The remedy hearing has now been postponed on the application of the Respondent. A med 3 certificate, or "fit note" in respect of Ms Brent stating that she was not fit to work until 15th July 2018 has been provided although there has been no compliance with the Order that I made which was to provide medical evidence that that Ms Brent was unable to travel for 15 weeks from the date of the hearing.

42. The remedy hearing will now take place on **24th July 2018** at 10 a.m. Orders have previously been made for the preparation and exchange of witness statements for the remedy hearing. It is hoped that these have now been complied with. Disclosure should also have taken place. The Respondent is to prepare a consolidated bundle of copy documents for the remedy hearing and send a copy to the Claimant no later than 10th July 2018 and bring further copies to the Tribunal for the use of the Tribunal and the witnesses.

Employment Judge F Spencer
Date: 18th June 2018