RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Bell

Respondent: Cumbria County Council

HELD AT: Carlisle **ON:** 5-6 February 2018

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Miss Ahari, Counsel
Respondent: Mr Adeji, Counsel

Reserved Judgment

The Judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed. The claim is dismissed.

2. The claimant has paid fees in connection with this claim. In R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances I shall draw to the attention of HMCTS that this is a case in which fees have been paid and are therefore to be refunded to the claimant. The details of the repayment scheme are a matter for HMCTS.

REASONS

The Hearing

1.1 The hearing took place at Cumbria Magistrates Court on 5 and 6 February 2018. The claimant was represented by Ms Ahari of Counsel and the respondent by

Mr Adeji of Counsel. The claimant gave evidence on his own behalf and evidence was taken from Michelle Hughes, a member of the respondent's operational resource team. A third witness for the claimant, Keith Studholme was in attendance and a witness statement had been prepared for him. Mr Studholme was not called to give evidence since it was agreed with the claimant's representative that his evidence was not relevant to the issues in dispute. His statement was read but its content had no bearing upon the matters determined in the case so we make no further reference to it in this Judgment. The respondent's witnesses were Mr Steve Healey, Chief Fire Officer for Cumbria Fire and Rescue Service and Mr Nick O'Key, an Area Manager for Cumbria Fire and Rescue Service.

1.2 Evidence in chief was provided by way of written statements which were read by the tribunal. There was an agreed bundle of documents which extended to 335 pages. The evidence and submissions were concluded on 6 February 2018 and judgment was reserved.

The Issues:

2. The claims and issues were identified and agreed at the outset of the hearing as follows:

2.1 Whether the dismissal was for a potentially fair reason under Section 98 (1) and (2) Employment Rights Act 1996. The respondent relied upon conduct.

2.2 If the respondent was able to show that the dismissal was for a potentially fair reason the Tribunal would go on to assess whether the respondent acted reasonably under Section 98(4) having regard to:

2.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

2.2.2 whether the decision to dismiss was within the band of reasonable responses; and

2.2.3 whether a fair procedure was followed in accordance with the ACAS Code of Practice.

2.3 If unfair dismissal was established the Tribunal would go on to determine whether a Polkey reduction was relevant and whether any reduction should be made for contributory fault.

The Law

3.1 The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*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 sub-section (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."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (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 undertakings) 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."

3.2 The reason for dismissal is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. In a conduct case, the employer does not have to prove that the misconduct took place but has to show a genuine belief in the misconduct which it relied upon as the reason for dismissal.

3.3 In considering the case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

3.4 The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the Respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

3.5 The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [Employment Tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions when one reasonable employer would dismiss and others would not, the question is whether the dismissal is within the band of reasonable responses.

3.6 The band of reasonable responses test applies to the investigation and

procedural requirements as well as to the substantive considerations, see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA.

3.7 The tribunal must take in to account whether the employer adopted a fair procedure in dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the tribunal hold that the Respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to Polkey is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

3.8 On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal stated: "*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*"

3.9 If required the Tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to his own dismissal. If so, to what extent did he contribute to his dismissal to reduce the level of any compensation to which he would otherwise be entitled having regard to the principles in Nelson v BBC (No.2) [1979] IRLR 346, CA.

3.10 The tribunal were also referred to the cases of Davies v Sandwell MBC [2013] IRLR 374 and Wincanton Group PLC v Stone [2013] IRLR 178.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

4.1 The claimant commenced employment with Cumbria County Council ("the respondent") on 10 September 1987. He was employed as a firefighter with Cumbria Fire and Rescue Service. At the time of his dismissal he was a member of Green watch at Carlisle West fire station, one of four watches operated from that station. The four watches rotated shifts such that there was sufficient cover to crew one engine at all time from that station. Each watch consisted of five full-time firefighters, with a minimum crewing level of four firefighters. The crew manager for Carlisle West Green Watch was Mr Philipson who was on long-term sick leave, and in his absence the claimant and another firefighter, Mr Tallantire, acted up as crew managers.

4.2 On 1 June 2015 the claimant received a final written warning for reporting for duty under the influence of illegal drugs (pages 105-107 of the bundle refer). That warning was not appealed and there was no argument before the tribunal to the effect that it was manifestly inappropriate. It is relevant only insofar as the final written warning was to remain on the claimant's record for 18 months from the date it was issued and it was therefore still live at the time of the disciplinary proceedings to which this case relates. The outcome letter in respect of that warning stated that, "…*any further misconduct in relation to this or any other matter will be subject to further disciplinary action and could ultimately result in your dismissal.*"

4.3 On 12 July 2016 George Samson, the Fire Service Station Manager at Carlisle West, received an anonymous note which stated, "[the claimant] *was unable to get Friday 1st + Saturday 2nd July off due to sickness + leave so he booked sick on these dates to attend a biking holiday abroad with other fire service personnel*" (page 130). It was not known who had sent that note, the claimant's evidence was that he suspected Mr Sansom had written the note himself but the tribunal did not accept that assertion. There was no evidence to substantiate it and it was not explained why Mr Sansom would send himself such a note: when he became aware of the allegation, or the facts which gave rise to it, he could presumably have commenced an investigation without the need to send an anonymous note to himself.

4.4 Following receipt of the note, Mr Sansom convened a meeting with the claimant which took place on 15 July. Mr Sansom informed the claimant of the existence and content of the note and asked him whether he had taken sick leave on 1 and 2 July due to not been able to get time off work. The claimant denied he taken sick leave for those reasons and said that he had suffered a bad back and muscle spasm caused by lifting floorboards at home on the morning of Friday 1 July and so was required to call in sick.

4.5 The claimant went on holiday on Saturday 2 July at 8:00am when he was due to work the night shift of Friday 1 July, which would have finished at 9:00am on Saturday 2 July, and was due to return to work at 6:00pm for a Saturday night shift which would have finished on Sunday morning. Mr Sansom asked the claimant how he could have worked those shifts when he had not applied for time off work. The claimant said that he had arranged cover since firefighter Mark Wightman had agreed to come in early on Saturday morning to cover for an hour before the start of his own shift and he had arranged for firefighter Rod Allen to work the night shift on Saturday evening/Sunday morning.

4.6 The respondent operates a computerised system referred to as 'Gartan' which records which firefighters are scheduled to work on any given shift. It was customary practice to book holidays and cover on the Gartan system. Mr Sansom asked the claimant whether he had completed paperwork or whether the stand-ins (meaning Mr Wightman and Mr Allen) had been entered on the Gartan system. The claimant said that the stand-ins were not booked on Gartan because the arrangement was made verbally with Mr Wightman and that he had sent a text message to Mr Allen from his mobile telephone to request that he stand-in for the Saturday night shift. The claimant showed Mr Sansom copies of texts, which were produced in the bundle at pages 146 to 147. The first text from the claimant was dated 15 June and said, "*Don't suppose you fancy a quiet Saturday night at West on 2 July Bud?*" The second text, dated 16 June, was the response from Mr Allen to the claimant and stated, "*Hi Tony stand in for you if you need me I will.*" Mr Sansom, on examining the claimant's texts said words to the effect of, "*that will be your get out of jail free card*" and he took photocopies of the texts.

4.7 Following that conversation, Mr Sansom did some further investigation and established that Crew Manager Philipson was on long-term sick leave and that the watch was depleted to only four firefighters. On the night shift of Friday 1 July, the claimant, Mr Bulman, Mr Monkhouse, and Mr Tallentire were rostered for duty. On the night shift of Saturday 2 July only the claimant and Mr Bulman were rostered for duty since Mr Monkhouse and Mr Tallentire were rostered for holiday leave. Mr

Sansom therefore noted that there were no opportunities for leave on those night shifts. The claimant was rostered for holiday from Sunday onwards and it was noted that, having booked himself sick on Friday 1 July his wife had booked him fit for work on Sunday 3 July. By this time the claimant was on holiday, a biking holiday which he had pre-booked several months earlier and which involved the claimant and some of his colleagues partaking in a mountain bike race in the South France. The claimant's journey to the South of France commenced on the morning of Saturday 1 July 2016. Due to the claimant booking sick his shift had to be covered by a manager at short notice.

4.8 Mr Sansom checked Gartan and established that there were no stand-ins recorded on Gartan for Mr Allen or Mr Wightman to work the times stated by the claimant. Instead, Mr Allen was scheduled to work at Penrith fire station for the night shift of 2 July and on Sunday 3 July he was scheduled to work overtime at Carlisle West on day shift. This did not fit with the claimant's explanation that he had arranged for Mr Allen to cover for him at Carlisle West. Following that initial investigation (the notes of which are at pages 131-134) a decision was taken to suspend the claimant on full pay with effect from 28 July 2016.

4.9 On 19 August 2016 the claimant attended a formal investigation meeting with Adrian Holme, the Fire Services Temporary Group Manager (pages 135-159). Four allegations were put to the claimant at the outset of that meeting:

- On Saturday, 2 July 2016 he went on holiday without having authorised leave or authorised agreed alternative cover recorded on Gartan to cover the morning of Saturday 2 July.

- On Saturday 2 July he went on holiday without having authorised leave or authorised agreed alternative cover recorded on Gartan to cover the nightshift of Saturday 2 July 2016.

- He failed to follow the sickness management procedure, specifically "*when you…are well enough to book fit you are required to telephone the sickness absence contact number*". [It was instead done by his wife].

- He falsely reported himself unfit for work from Friday 1 July up until Sunday 3 July 2016.

4.10 The claimant's explanation for not booking on Gartan or taking any other formal steps to arrange cover was, in essence, that while the bike race in France been planned for about a year, the dates were not "*set in stone*" and he had only put in holidays for the days which followed after the Saturday night shift since "*it was not definite if we were leaving on Saturday or Sunday and that is why nothing was on Gartan.*" When it was decided that he would be leaving early on the Saturday, which was a week or two prior to departure, he said that he arranged for Mark Wightman to come in to cover for him at 7:00am on the Saturday morning and, in respect of Saturday night, he said, "*I had arranged for Rod [Allen] to stand in for me, I also had a second option of Neil Monkhouse. Neil had a [holiday] booked for the Saturday night and if he did not need it he would come in and allow me to have the night off. He would have let me know on Friday if he needed it. I had an off the record conversation with central crewing as to how I could use the [leave] that Neil had and effectively it would have been a stand-in by him. He was not able to confirm it until*

the Friday night, if he still wanted it and he would have let me know." Essentially, his explanation was that he had informal arrangements in place for Mr Allen to cover the shift, with Mr Monkhouse on standby (if he did not want to take the Saturday night as leave) but Mr Allen was the first choice. It was put to the claimant that Mr Allen had already accepted an overtime shift at another station so could not stand in for the claimant to which the claimant replied, "*He had not let me know that.*"

4.11 The claimant confirmed that he proceeded with his holiday despite reporting a back injury and he was asked whether he had mountain biked whilst on holiday. He answered that he did not initially mountain biked and said, "*we were away for a week and I did nothing for the first three days. I spent two days in the sauna and pool and on Tuesday I got gingerly on the bike after my muscles had eased somewhat. It was not until the Wednesday afternoon that I could ride properly.*"

4.12 It was put to the claimant that he had booked himself fit on the Sunday afternoon and he confirmed that was correct and said that, because he was out of the country, he had contacted his wife and asked her to call in to book him as fit on his behalf. He was asked why he booked himself fit on Sunday when he was not, on his own account, fit until Wednesday to which he said that he did not want to record any "*unnecessary sick days*" and, "*I knew I would be okay before I came back to work*."

4.13 The claimant was invited to a disciplinary hearing (pages 225-226). Prior to that hearing investigation interviews took place with Mr Wightman, Mr Monkhouse, and Mr Allen (pages 140-145). Mr Wightman confirmed that he had been asked by the claimant to come in early on 2 July to cover the last hour or so of the claimant's shift and had agreed to do so. Mr Monkhouse said that he was available on the Saturday and *"[the claimant] could have said to me on the Thursday or Friday that he wanted it and I would have been happy with that*." Mr Allen's version of events differed from the claimant since he said that, having initially indicated that he would cover the claimant's shift he later received a text from the claimant on about 24 or 25 June saying that the claimant no longer needed him. He said that he had deleted that text.

4.14 The disciplinary hearing took place on 28 November 2016 (pages 236-244) and was chaired by Nick O'Key, the Fire Services Area Manager. At the hearing the claimant produced a text message which he said he had sent to Mr Allen on 26 June 2016 stating in effect that Mr Allen was no longer needed to cover the nightshift of Saturday, 2 July 2016 since Mr Monkhouse was covering it. The text read, "*Alright Rod. Don't need next Saturday Bud. Monkhouse doesn't need his banker so I got it. Cheers anyway you['re] a star.*"

4.15 Mr Healey, who dealt with the appeal, doubted the veracity of that text at the appeal stage for reasons which we shall briefly outline, and a good portion of the evidence before the tribunal focussed upon the texts. Up to the point of the disciplinary hearing, the claimant had relied upon Mr Allen as his arranged stand-in for the night shift of 1 July, both at the initial meeting with Mr Sansom and at the subsequent investigation meeting with Mr Holmes at which he said that Mr Allen was the first choice as stand-in and Mr Monkhouse was his second option. At that investigation meeting the claimant was informed that in fact Mr Allen was already pre-booked to work overtime elsewhere, and it was only after receiving that information that the claimant produced the text which stated that Mr Allen was no

longer required since Mr Monkhouse was covering the shift. These matters were relevant to the appeal rather than disciplinary stage where they did not heavily feature.

4.16 The four allegations addressed at the disciplinary hearing were the same as those outlined to the claimant at the investigation stage. It was accepted by the claimant that Gartan was not updated by him or by any other manager at his request. He relied on his informal arrangements with Mr Monkhouse and Mr Wightman. The claimant called Stuart Adams as a witness at the hearing who gave evidence as to the claimant's state of health whilst on holiday, he said that the claimant wasn't in his "*normal fit state wasn't walking well and had issues with his back*". He confirmed that the claimant did ride his bike later in the week said that it "*must have been Tuesday or Wednesday a bit unsure*". The claimant did not deny that he travelled from Cumbria to the South of France on Saturday and Sunday and that he took part in a mountain bike race the following Friday, which involved high speed racing down a glacier.

4.17 The gist of the claimant's case, which was presented by his union representative, was that he was legitimately signed off sick and therefore whether or not he had cover in place was irrelevant since it was management's responsibility to put cover in place when a firefighter was absent through sickness. The problem with this defence was that it missed the essential point of the main allegation against the claimant which was that he was aware he was due to be absent on holiday but took no proper steps to arrange cover and instead called in sick.

4.18 Mr O'Key did not uphold allegations 1, 3 or 4. He found that an informal arrangement was in place for Mr Wightman to cover the last hour or so of the claimant's shift on the Saturday morning and, while formal arrangements should have been made, it was for a "*very short period*" and he made an allowance for that. In respect of allegation 2, he accepted that the claimant was out of the country at the relevant time and therefore it was not unreasonable for the claimant not to call in to "*book off sick*" but to delegate that to his wife. In respect of the sickness absence, Mr O'Key found the claimant's evidence relating his back injury to be "*light*" but said, "*I felt that I didn't have the proof to demonstrate that the Claimant had definitely lied about his sickness*" so he did not uphold that allegation.

4.19 In respect of the absence of any formal cover for the shift of Saturday night, Mr O'Key took a different view. The Claimant's explanations in relation to making informal arrangements for cover did not satisfy Mr O'Key. He was not convinced on the evidence that the claimant was intending to rely upon Mr Monkhouse to cover the shift and it was established that the claimant had not made any formal arrangements to cover the shift, either through Gartan or through completing a memo which was to be submitted to management for them to do so. He therefore took the decision to dismiss the claimant which was communicated to the claimant following a recess. The reasons were confirmed in writing on 2 December 2016 (249-251). Mr O'Key regarded the offence as misconduct rather than gross misconduct but stated that, "*this misconduct together with the final written warning is sufficient to merit dismissal*".

4.20 On 5 December 2016 the claimant appealed against his dismissal (page 252). The appeal was on the grounds that there was a defect in the procedure, the "*issue was not proven on the balance of probabilities*", and "*the disciplinary sanction was*

too severe". Fuller grounds of appeal were later set out in writing (reproduced at pages 262-269).

4.21 The appeal was heard by Mr Steve Healey, at that time the Deputy Chief Fire Officer, who chose to deal with the matter as a full re-hearing. There were some objections to this approach made by the claimant's union representative who argued that the appeal should be dealt with as a review rather than a re-hearing. Mr Healey however took the reasonable view that the four allegations were all intrinsically linked and decided to re-visit all of the evidence and allegations which were before the disciplinary hearing.

4.22 The appeal hearing took place on 16 February 2017 (278-288) and was adjourned to enable further investigation. Mr Healey then interviewed Mr Allen, Mr Tallentire and Mr Monkhouse. Mr Allen and Mr Monkhouse gave evidence which was broadly supportive of the claimant's version of events but Mr Monkhouse said that discussions were "*vague*" and he did not confirm that the claimant had made a firm arrangement that he would work in place of the claimant on the Saturday night shift. Mr Healey scrutinised the text messages which the claimant had relied upon and discovered some discrepancies between those texts sent between the claimant and Mr Allen which the claimant relied upon at the investigation stage and the one which the claimant sought to rely upon at the disciplinary hearing as evidence that Mr Monkhouse was due to stand in for him. In brief, the latter text had some different symbols and some other symbols which were aligned differently, a 24-hour clock was displayed rather than a 12-hour clock, and there was a different number of characters per line of text. Mr Healey did some online research which disclosed that texts could be readily created or "faked" using a computer programme and he took the view that the claimant was faking evidence to support his case, including faking a telephone bill. He concluded that the claimant had not arranged cover and that he had no intention of doing so, but had taken sick leave to cover his trip to the South of France. Further, absent any medical evidence, he formed the view that the claimant's sick leave was not genuine. He did not believe that the claimant could not attend work on Saturday 2 July but at the same time was well enough to travel to the South of France in a Campervan on Saturday 2 and Sunday 3 July 2016. Mr Healey also took the view that it was significant that the claimant's version of events was that he injured his back early on the morning of 1 July but he did not call in that morning and only reported sick when he received a call from the respondent later that afternoon enquiring whether he could work overtime.

4.23 The appeal hearing was reconvened on 3 March 2017 (pages 309-315) when the claimant was informed that the decision to dismiss was upheld. This was confirmed in writing on 16 March 2017 (316-325). Mr Healey upheld allegations 2 and 4, finding in essence that the claimant had failed to arrange cover and had falsely reported himself as unfit to work on 1 and 2 July 2016 so that he could attend a cycling competition in France. He took account of the impact of a dismissal upon the claimant and the role that he had played for the fire service over the years but, taking account of the existing final written warning, he upheld the decision to dismiss with notice.

Conclusions

5.1 The tribunal was satisfied that the reason for the dismissal was conduct within section 98 (2) Employment Rights Act 1996. No alternative reason was advanced

with any credibility or conviction.

5.2 The Tribunal held that the respondent conducted a thorough investigation. Several employees were interviewed during the initial investigation and again at the appeal stage. One gap in the investigation was that the claimant said at the investigatory stage that he had sought advice from the central crewing station upon arranging cover from Mr Monkhouse. This did not form part of the respondent investigation. However, the claimant did not specify during the investigation or disciplinary stage that he had requested that central crewing station book the leave or cover for him. Nor did he request that Ms Hughes be contacted to give her version of what occurred. It was not unreasonable therefore for the respondent to not interview Ms Hughes and the tribunal held that, in so far as it was an oversight, it did not render the investigation outside the band of reasonable responses. In any event, Ms Hughes in her evidence before the tribunal did not give any indication that the claimant had instructed her to formally book leave so it would have made no difference to the outcome. There were no other significant flaws in the investigation.

5.3 It was submitted that it was a breach of the principles of natural justice that the respondent re-opened, at the appeal, the allegation that the sick leave was not genuine, which was deemed "*unproven*" at the disciplinary stage. The tribunal did not accept that submission. Although the allegations were broken down in to four constituent parts the central allegation covered all four points: the claimant had failed to arrange cover for a period of holiday and therefore had fraudulently called in sick. In those circumstances, it was reasonable for the respondent to treat the appeal as a complete rehearing and to view the events as a whole. The appeal officer was entitled to investigate the matter further and to reach a different conclusion to that of the dismissing officer.

5.4 As to whether the respondent had a reasonable belief in misconduct based upon that investigation, it was suggested in submissions that Mr Healey had a preconceived view that the claimant's sickness was not genuine. The bare facts of the case were: the claimant had a pre-booked holiday which was due to commence on Sunday 3 July, a week or two prior to those dates he made a decision to travel down to the South of France on the morning of Saturday 2 July; on 1 July he booked himself sick with a bad back at a time when he had no formal arrangements in place for cover for the following day; he said that his back had "*gone in to spasm*" and that it rendered him unable to work on 1 July yet on that same date he travelled from Cumbria to the South of France in a campervan; he then had his wife call the respondent on Sunday 3 July to say that he was now fit for work and at that same point he commenced his pre-booked holiday leave; by his own admission he was riding a bike by Tuesday 5 July and by the Friday 8 July he was racing down a glacier in a competitive mountain bike race; there was no medical evidence. In view of those facts it was not surprising that the respondent was highly suspicious as to whether the claimant's sick leave was genuine. Any reasonable employer was entitled to take a sceptical view.

5.5 Nevertheless, the tribunal were satisfied that both Mr O'Key and Mr Healey approached the matter in a reasonable manner and did not have closed minds. The claimant was given a full opportunity to put his case, he was allowed to call a witness at the disciplinary hearing and evidence was taken from other witnesses who supported, at least to an extent, his version of events. Their evidence was not

sufficient to save the claimant however since the respondent found their evidence to be either vague or, in the case of Mr Allen, unconvincing. Mr Healey said that he believed Mr Allen was covering for his colleague which he said was not uncommon since there is a culture among firefighters such that they back each other up in difficult circumstances, a necessary culture since these are men and women who are trained to risk their lives for each other. There were significant discrepancies in the claimant's version of events not least with regard to the cover which he had in place, initially claiming that it was Mr Allen who was due to cover for him and subsequently changing his position to claim that in fact Mr Monkhouse was his first choice for cover; and his change in position only coming after it was put to him that Mr Allen had already arranged to work overtime at another station.

5.6 The tribunal did not form any view upon whether the text message relied upon by the claimant at the disciplinary stage was fake or genuine. The claimant's representative made some submissions which provided an alternative explanation for the discrepancies between the text messages; explanations which relate to the formatting of mobile telephones and which suggested there was an innocent reason for the variations between the text messages. It was not the role of the tribunal to investigate that matter or to substitute its view on the evidence for that of the respondent. The tribunal was satisfied that Mr Healey approached the matter in a reasonable manner and, given the fact that the claimant had changed his position and not disclosed the relevant text until late in the proceedings, he viewed the discrepancies between the text messages with some suspicion. The conclusion he reached that the text had been fraudulently prepared was not an unreasonable one and he was entitled to reach it on the facts before him.

5.7 There was one area in which the respondent attracts some criticism and that was the lack of a clear policy or procedure relating to the use of the Gartan system. The respondent was unable to point the tribunal to any clear written policy outlining how the Gartan system was supposed to be used, for example when bookings were to be made on it and by whom and what the consequence of failing to follow the system would mean for any employee in breach. Given that this computerised system was used to arranged rosters for an emergency service the tribunal would have expected a clear and unambiguous policy to be in place, one which was communicated to staff and with evidence available that all staff had been properly trained in its use. This was something which the respondent stated in evidence it was taking steps to address.

5.8 The lack of a clear policy however did not assist the claimant. The respondent did not accept the claimant's assertion that he was unaware he needed to put cover arrangements on the system or that he did not know how to use Gartan, that assertion was neither plausible nor consistent with his later evidence at the appeal stage. The use of the Gartan system was established custom and practice and other firefighters confirmed they knew the system for authorising stand-ins. The claimant was aware of the need to book cover about two weeks prior to 1 July and that he needed to take some formal steps, either by use of Gartan or by sending a memo to a manager, to ensure he had cover in place for his night shift of 2 July. The respondent reached a reasonable conclusion that the claimant did not have such cover in place and he therefore took a decision to call in sick.

5.9 The tribunal held that the investigation and the procedure as a whole, having regard to the principles in Taylor v OCS Group Limited [2006] IRLR 613 and applying Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA was within the band of reasonable response of a reasonable employer.

5.10 The tribunal held that the decision to dismiss was also within the band of reasonable responses. Having found that the claimant falsely claimed sick leave to cover for a holiday trip, another employer may well have concluded that the actions of the claimant amounted to gross misconduct and, in those circumstances, it was a reasonable decision for the respondent to dismiss the claimant for misconduct relying upon the earlier final written warning. The effect of that decision (as opposed to a gross misconduct dismissal) was that the claimant received his notice pay and, it appears to have later transpired, his pension.

5.11 The claimant had 30 years of good service and he was well regarded by management and colleagues. In 2015 he made a serious mistake, which he admitted and for which he was issued a final written warning. Thereafter, as a senior firefighter it would be expected that the claimant would have been extra careful to ensure that there were no further incidents of misconduct which might jeopardise his future employment. The main explanation which the claimant relied upon before the tribunal for not for booking cover before 1 July was, in essence, that it was difficult to get time off at short notice and so he left it as late as possible because he "*didn't want management coming back with an unjustified refusal*". Essentially, he was 'playing the system' by booking holiday cover as late as possible so that his request for leave was not refused. This hardly qualified as a good explanation, even if the sick leave was genuine (upon which we are not required to make a finding) it did not seem to occur to him that management might decline his leave for a *justified* reason. The claimant's deliberate delay in booking cover until immediately before he was due to depart for holiday was not assisting his employer. If management were to refuse a holiday request then there might well have been a good operational reason for it. The claimant's attempt to 'play the system' in this manner may well have been grounds for a warning in itself which would have resulted in a dismissal on notice in any event.

5.12 In all the circumstances of the case, the tribunal were satisfied that the respondent acted reasonably pursuant to section 98(4) Employment Rights Act 1996.

5.13 The claim of unfair dismissal is therefore dismissed.

Employment Judge Humble

Date: 24th February 2018

JUDGMENT SENT TO THE PARTIES ON

5 March 2018

FOR THE TRIBUNAL OFFICE