EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Vladimir Demjan	AND	Berensden Healthcare Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 24 January 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person (Assisted by Polish Interpreter)**
For the Respondent: **Mr N Moore of Counsel**

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim for unfair dismissal is dismissed; and

2. The claimant succeeds in his claim for breach of contract. The respondent is ordered to pay the claimant the gross sum of £751.68 less £150.00 already paid towards this liability.

RESERVED REASONS

1. In this case the claimant Mr Vladimir Demjan claims that he has been unfairly dismissed, and brings a claim for breach of contract in respect of underpaid holiday pay. The respondent contends that the reason for the dismissal was misconduct, that the dismissal was fair, and denies the majority of the remaining claim.
2. I have heard from the claimant, who is of Polish national origin, and the Tribunal was assisted by a Polish Interpreter. I have heard from Mr Joshua Pearson, Mr Leo Rendell, Mrs Samantha Ferguson, and Mr Darryl Sheldon on behalf of the respondent.

3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company operates an industrial laundry based in Newton Abbot, Devon. The claimant Mr Vladimir Demjan was employed as a Production Supervisor from 19 March 2007. He was dismissed on notice by reason of misconduct with effect from 5 March 2018.
5. The claimant had been issued with a written statement of the terms and conditions of his employment, which incorporated by reference an Employee Handbook. This in turn included a written disciplinary procedure. The non-exhaustive list of examples of gross misconduct which might result in dismissal included "(j) Any wilful conduct which is detrimental to the maintenance of discipline and/or property amongst employees of the Company". The examples of misconduct included "(b) Conduct likely to give offence to customers, local residents, members of the public, suppliers, visitors or employees of the Company."
6. The claimant was originally employed as a laundry operative. Clause 4.2 of his terms and conditions of employment at that time provided: "For Employees on permanent and temporary contracts all time worked on the designated customary holidays will be paid at double time plus a day off in lieu. The customary holidays were the normal bank holidays which employees could be required to work, except for the three days of Christmas Day Boxing Day and New Year's Day. The claimant was subsequently promoted to Production Supervisor, and signed amended terms and conditions of employment on 17 November 2014. These news terms provided that if he worked on any one of these customary holidays then he would be paid at his normal rate of pay, rather than the earlier more generous provision. I find that that was the contractual provision which was agreed and which applied from 17 November 2014.
7. It seems that the respondent had for some reason historically failed to pay the higher additional rate for hours worked on the customary holidays. The claimant was one of a number of employees who subsequently raised a formal grievance seeking the additional pay for the customary holidays which they had worked. The grievance was unsuccessful because of the subsequent change in the respondent's terms and conditions and the conclusion by the respondent that any historical claims were time-barred. Nonetheless, a number of employees including the claimant were each paid £150.00 as a goodwill gesture towards any historical liability.
8. The claimant brings a claim for breach of contract from 2007 until the end of 2014 when his contractual terms changed. He claims the additional pay for the hours worked on the customary holidays. He calculates the amount due to him for the last three years of 2012, 2013 and 2014 at £693.12. The respondent's payroll records suggest a slightly more generous figure is due for those three years in the sum of £751.68.
9. Although the claimant was recognised to be a very hard worker, he had a history of some difficulties during his employment. At some stage earlier in July 2012 the claimant had been dismissed for health and safety breaches and aggressive behaviour. He successfully appealed against his dismissal and was reinstated with a final written warning. The respondent's witnesses also suggested that the claimant could be aggressive to fellow employees on occasions although no further formal action was taken until the two instances below which ultimately led to the claimant's dismissal.
10. Towards the end of October 2017 the respondent received allegations of foul language and aggressive behaviour on the part of the claimant towards a fellow employee. The claimant was suspended on full pay. On 3 November 2017 Mr Pearson the Production Manager wrote to the claimant requiring him to attend an investigation meeting to consider: "Reports of misconduct and foul abusive language being used towards another employee". Mr Pearson also interviewed Mr Northcott, Mr Sheldon and Mr Rendell and they completed witness statements. The confrontation was between the claimant and Mr Northcott following an issue about the number of pillowcases which had been deallocated from an order. The claimant was said to have told Chris Northcott to "Fuck Off" repeatedly and in

an aggressive manner. Mr Sheldon had not heard any swearing but had witnessed the incident and describe the claimant as “abrupt” and “intimidating”. Mr Rendell confirmed that the claimant had raised his voice and used offensive language in an aggressive manner towards Mr Northcott and stormed out of the office. The claimant also admitted that he had told Mr Northcott to “Fuck Off”. Mr Pearson prepared an Investigation Report recommended that the matter proceeded to a disciplinary hearing.

11. The respondent’s Logistics Manager is Mrs Samantha Ferguson from whom I have heard. By letter dated 16 November 2017 she required the claimant to attend the disciplinary hearing to answer allegations of possible gross misconduct and/or misconduct. The claimant was provided with copies of the various statements and the appropriate procedures and warned that the outcome could be a written warning, a final written warning, or dismissal.
12. The hearing was postponed in order to allow the claimant to prepare, and it took place on 22 November 2017. The claimant did not request the attendance of a fellow employee or representative. Given that the claimant had admitted swearing at Mr Northcott, which had been confirmed by witnesses, Mrs Ferguson was satisfied that the claimant had sworn and been aggressive. She concluded that the claimant seemed to have a problem controlling his temper, and discussed with the claimant the possibility of him undertaking a new role of Packing Supervisor would ought to be less stressful and enable him to meet the standards of behaviour which the respondent expected. Mrs Ferguson decided to issue a final written warning which was confirmed by letter dated 30 November 2017. It explained that “The standards expected from you are to remain professional at all times and refrain from communicating with colleagues using inappropriate language.”. The letter also confirmed that the final written warning would remain live for 12 months and that “any further incidents of this nature may lead to further disciplinary action becoming necessary, which may include dismissal.”
13. The claimant was notified of his right of appeal, and did appeal by letter dated 8 December 2017. The appeal was heard by Mr Craig Nicol the respondent’s General Manager, and he dismissed the appeal. He repeated that the key expectation of supervisors and managers was to set good examples of behaviour and standards to fellow employees and that it was appropriate of the respondent to confirm that message by way of the final written warning. He also rejected the allegation that the change of role was some form of punishment, because it had been agreed, and the claimant remained as a supervisor on the same rate of pay.
14. There was then a further incident on 22 January 2018 when a fellow employee Mr De’ath had complained that the claimant had lost his temper and pushed laundry cages around aggressively, and had shouted and sworn at him very aggressively. A fellow employee Mr Darke described the claimant as “ranting and raving” and “shoving” cages around aggressively. Another employee Jana Rumpichova described the claimant as screaming at Mr De’ath and kicking the cages. She also translated the Slovakian words which he had used which were clearly very abusive. Despite the claimant’s denials of aggressive behaviour, Mr Rendell considered that he had sufficient information to form a picture of what had happened, and to recommend that the matter should proceed to a further disciplinary hearing. He saw no need to review any CCTV footage, which was not requested at that time by the claimant.
15. Mrs Ferguson invited the claimant to a formal disciplinary hearing by letter dated 20 February 2018. The letter made it clear that the hearing would investigate an allegation that the claimant had used bad language in an aggressive manner to another member of staff. The claimant was advised that the matter might be considered to be one of gross misconduct and/or further misconduct and that it might result in a final written warning, dismissal with notice, or dismissal without notice. The claimant was invited to be accompanied by a trade union representative or fellow employee. The claimant requested further time to prepare and the meeting took place on 26 February 2018. The claimant was accompanied by his chosen representative.
16. Mrs Ferguson felt that the final written warning which he had given to the claimant had made it clear to him both personally and in writing exactly what standard of behaviour was

expected and required. She found that the claimant had committed further misconduct that it was unacceptable for an employee to speak to his colleagues in such an intimidating and aggressive manner. Given the terms of the live final written warning Mrs Ferguson decided to dismiss the claimant. Mrs Ferguson decided that the claimant had committed further misconduct, rather than gross misconduct, and the claimant was dismissed on notice. When Mrs Ferguson informed the claimant this he became aggressive and confrontational which is consistent with the complaints of the members of staff had raised. Mrs Ferguson confirmed her decision by letter dated 27 February 2018.

17. The claimant was afforded the right of appeal and submitted an appeal to the effect that the witness statements against him were incorrect, and that certain facts had been overlooked in reaching the decision. He also complained that the sanction was too severe. Mr Sheldon, the respondent's general manager from whom we have heard, heard the appeal on 22 March 2018. The claimant suggested that his colleagues made up their statements and that they were lying and that his colleagues had ganged up on him. For this reason Mr Sheldon decided to postpone the appeal hearing and to check the veracity of the witness evidence. Mr Sheldon re-interviewed Mr De'ath, Mr Darke and Ms Rumpachova. These witnesses confirmed their statements that the claimant had acted angrily and aggressively and had also used foul language, and although some of the swearing was in Slovakian, Mr De'ath knew the meaning of some of the words, and more generally objected to the aggressive manner of the tirade against him. Given the existence of the final written warning Mr Sheldon rejected the appeal, but confirmed to the claimant that the dismissal was on notice and that he would instruct the payroll department to make the appropriate notice payment.
18. Having established the above facts, I now apply the law.
19. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
20. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
21. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
22. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment. However, there is a six-year limitation period for breach of contract claims.
23. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Coletta v Bath Hill Court (Bournemouth) Property Management Ltd [2018] IRLR 886 EAT; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
24. I deal first with the claim for unfair dismissal. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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 the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

25. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
26. The dismissal in this case relied upon a live final written warning. I find that this warning was entirely reasonable in the face of the statements and allegations against the claimant, who had on that occasion admitted swearing at a colleague. The terms of the warning were quite clear to the effect that any further instances of aggressive or abusive behaviour within a 12 month period of the final written warning might well result in the claimant's dismissal.
27. As for the events which led to the second disciplinary hearing and the decision to dismiss the claimant, the respondent carried out a full and fair investigation following the complaint raised by Mr De'ath. The witnesses were interviewed and confirmed their evidence by way of signed statements. That evidence was consistent. Although the claimant denied the allegations, it was clearly open to the respondent to believe the three consistent witnesses rather than to believe the claimant's version, on the basis that it was more likely that the allegations were indeed true. Whereas there may well have been normal industrial language and some swearing at the respondent's workplace, the allegation specifically related to aggressive and abusive behaviour towards other employees, rather than general swearing.
28. The claimant was afforded the right of appeal as a result of which Mr Sheldon decided to re-interview the witnesses to ensure that their evidence was reliable and consistent. He determined that it was, and he was entitled to do so, and to conclude their consistent version was more likely than that given by the claimant.
29. I find that the respondent genuinely believed that the claimant had committed gross misconduct, and that that belief was based on reasonable grounds. As mentioned above, it followed a full and fair investigation.
30. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. There is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. I find that in this case, given the existence of a final written warning which was very recent and for the same misconduct, dismissal of the claimant for misconduct on notice was within the band of responses reasonably open to the respondent.
31. Accordingly, I find that even bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant's unfair dismissal case.
32. Secondly, I deal with the claim for breach of contract in respect of the historically underpaid days worked on the customary holidays. I find that the claim was not entitled to this payment after November 2014 when he was promoted and his terms and conditions of employment change. He succeeds in his claim in connection with these underpayments before 2014. The claim is presented as one of breach of contract, and not unlawful deduction from wages (which would have been out of time). However. there is a limitation period of six years for breach of contract claims, and I find therefore that the claimant's claims going back before 2012 (six years before these proceedings were issued) are time barred.
33. The claimant therefore succeeds in his claim for breach of contract in respect of the underpayments made in 2012, 2013 and 2014. I apply the respondent's more generous

calculation and conclude that the claimant was underpaid by the sum of £751.68. He succeeds in his claim for breach of contract for this amount, which is a gross sum and which will need to be subject to the normal payroll deductions. In addition, the respondent is given credit for the sum of £150.00 which has already been paid towards this liability.

34. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 17; a concise identification of the relevant law is at paragraphs 19 to 25; how that law has been applied to those findings in order to decide the issues is at paragraphs 26 to 32; and the calculation of the breach of contract damages is at paragraph 33.

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Employment Judge N J Roper
Dated 25 January 2019