EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121822/2018

Held in Dundee on 28, 29 and 30 May 2019

Employment Judge M Robison

Mr F Mohammad	**Claimant** **Represented by** **Mrs A Fox** **Solicitor**
HM Custom and Revenue	**Respondent** **Represented by** **Ms P Macaulay** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal does not succeed and is therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 18 October 2018, claiming unfair dismissal. The respondent entered a response resisting the claim.

2. The Tribunal heard evidence for the respondent from Mr Gary Burns, investigating officer, Mrs Leigh-Jayne Robertson (formerly Marr), dismissing officer, and Mr Paul Ness, appointed appeal chair. The Tribunal then heard evidence from the claimant.

3. The Tribunal was referred by the parties to a number of productions from a joint file of productions. These documents are referred to by page number.

Findings in Fact

4. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

5. The claimant commenced employment with the respondent on 18 May 2015 as a customer service consultant (page 37), administrative officer grade. He was located in their contact centre at Sidlaw House, Dundee, where around 300 other staff are engaged to take calls to assist the public, including enquiries relating to tax credits and the construction industry.

Relevant employer policies and practices

6. The respondent has a national framework Flexible Working Hours (FWH) policy (HR35001) (page 63) which is adapted for the local context. The claimant had access to this through the intranet.

7. The national policy sets out the responsibilities of the jobholder, which is to "keep your records up-to-date and available to your manager at all times; record your times accurately; completing your flexi record daily, including: the time you start and finish work, the time you start and finish your meal break, any authorised absence flexi-credits, and daily net hours (hours worked plus hours credited); operate within the requirements of your FWH scheme; agree with your manager in advance whether you will be able to take time off" (page 68).

8. The national policy also sets out a managers' checklist, which includes the requirement to "4. monitor and authorise as necessary: credit and debit limits,

flexi-leave, flexi-credits, overtime; 5. review and endorse each jobholder's FWH records at the end of each accounting period….7. if a jobholder is abusing the scheme: establish the nature of the abuse, discuss the abuse with the jobholder, if you decide it is necessary discuss with your own manager what action to take, for example withdraw FWH, consider disciplinary action and inform the jobholder of your decision" (page 69).

9. At page 74 of the national guidelines, it is stated that "both you and your manager have shared responsibility for calculating and managing your leave".

10. The national policy sets out the credit and debit limits, that is up to three days at the end of a four week accounting period (proportionately more if the accounting period is longer than four weeks) (page 65).

11. The relevant local scheme is dated April 2008 (page 75). It states that the credit and debit limits are 22 hours and 12 minutes (i.e. three days) for full time staff. A daily accounting period is operated (page 81). The local scheme states that "the maximum credit/debit must not be exceeded at any time….managers will regularly check flexi records as part of normal management check" (page 81). Under "guidance for managers" the local scheme states, under "abuse of flexibility working arrangements", that "failure to operate within the requirements of the CC scheme may result in the removal from the scheme and the possibility of disciplinary proceedings. Flexible working can be withdrawn at any time if there is evidence that the system is being abused" (page 87).

12. To record flexi time, employees are required to record their start and end times together with any lunch breaks/absences on an excel spreadsheet, noting any flexi-time, annual leave and time of in lieu of bank holidays taken. There is a notes/comments section.

13. Employees apply for time off using a time off recording tool (TORT). When making an application, employees are prompted to confirm their understanding of the policies, including that they should check with a manger before requesting time

off and that it was their responsibility to check that the flexi sheet was accurate (page 202).

14. Time off, other than sick leave, is recorded on an employee personal attendance tool (PAT).

15. Employee sign on and sign of times (SOSO) (when logging in and out of computers) are recorded and published in a report and commonly used to complete flexi sheets to ensure accurate times are used.

16. Employees usually submit flexi records on a four weekly basis. When viewed on screen, the flex sheets state the maximum allowable deficit and credit, and individual deficits and credits show up as red or green respectively.

17. Permission to take flexi leave must be obtained from the employee's line manager and thereafter approval must be given by the local resourcing team (LRT) to ensure that absence is justified for business needs.

18. The respondent also has a disciplinary policy (page 47) which inter alia states that an employee has the right to appeal any penalty within 10 working days from the date of receipt of the decision (page 56).

Background to the claim

19. Along with a team of around 10 new starts, the claimant commenced induction and on the job training which lasted around three to four weeks. During this time he was introduced to the flexible working policy.

20. The claimant's team did not initially have a permanent manager, but John Shields was appointed as the team's manager towards the end of 2015. He was periodically absent from work for health reasons, which resulted in the claimant (and his team) being managed by different temporary managers, including Natalie Mitchell and Justine Davie.

21. The claimant has a number of health issues, and in particular psoriasis and psoriatic arthritis, which involve him attending many medical appointments, and admissions to hospital, for which he could be entitled to "flex credits".

22. On 27 June 2017, the claimant was issued with a final written warning for an unrelated matter (page 99), to remain on his personal HR file for 12 months from 27 June 2017 to 26 June 2018. The letter stated that if he committed another act of misconduct in that time, he was likely to be dismissed.

23. During 2017, he was put on a personal improvement plan (PIP) and his performance was monitored.

Completion of flex sheets to July 2017

24. In or around June 2017, when John Shields was absent, and the claimant was being managed by Natalie Mitchell, she noted that he was in deficit on his flexi beyond the accepted maximum. Arrangements were made for him to be assisted in bringing his flex sheets up to date by another manager, Sonia Pringle, who had significant experience of working with the flexible working system, having worked in the LRT.

25. The claimant's flexi sheets were brought up to date to 2 July 2017. At that point the claimant had a deficit of 35.02 hours. Natalie Mitchell advised the claimant that he was not to take any more flexi leave. He was advised that a meeting would take place with his manager, and that arrangements would be made for him to repay the flex credit. This was to be undertaken by John Shields who had returned to work by July 2017 (page 107).

26. The meeting with John Shields did not take place and he took no steps to deal with this issue and no repayment action plan was put in place. Nor did John Shields ask the claimant for his flex sheets, as he ought to have done. Indeed John Shields continued to facilitate the claimant taking time off, for medical appointments or other forms of leave. The claimant did not however thereafter continue to complete his flex sheets as required, and he did not raise any concerns with John Shields or any other manager.

27. In or around November 2017, when John Shields was again absent, the claimant and his team were managed by Justine Davie. She asked all of the team for their up to date flex sheets, but when the claimant did not forward his, she sent him an e-mail dated 20 November 2017 (page 187). In that e-mail she asked for his flexi sheet for the previous period 25/9/17-21/10/17 to be sent before the end of his shift the next day. She also stated, "If you are behind with your sheet then please let me know and I'll help you get up to date".

Flex deficit as at April 2018

28. During March/April 2018, when John Shields was again absent, the claimant was again managed by Natalie Mitchell.

29. On 28 March 2018, Natalie Mitchell undertook a sixth review meeting with the claimant of his PIP objectives (page 101). At the end of that meeting, she raised the matter of the completion of flex sheets, and the claimant advised that he had not completed any flex sheets since the last one was done for him in July 2017. He advised that John Shields had never given him time to get this up to date. She advised that flexi was his responsibility and asked him to send her his last flex sheet to determine the outstanding balance.

30. He did not hand in a flex sheet as requested, as he had not completed them since July 2017. He said that he found it was too difficult particularly given the number of medical appointments which he attended. He said that he had asked for assistance with the completion of the sheets.

31. At the seventh PIP review meeting which took place on 3 April 2018 (Page 103) with Natalie Mitchell, this issue was again raised. Natalie Mitchell had calculated using a spreadsheet that he was in deficit of over 60 hours (pages 131 – 137), by reference to: his last sheet dated 2 July 2017; a "sign-on/sign off" (SOSO) records print out (showing the dates and times when the claimant had logged on and off his computer for the purpose of taking calls) (pages 121 – 129); a print out of his "Personal Attendance Tool" (not lodged); and a print out record of "all shifts and leave requests" for the claimant (pages 113 – 120). Given the level of deficit, she

advised him in the meeting that she was going to take advice from CSHR (civil service human resources) casework and possibly IG (internal governance) regarding what steps to take next (page 104).

Investigation of potential misconduct

32. On 4 April 2018, Natalie Mitchell completed a discipline checklist manager's review setting out potential misconduct (page 105). She was advised by CSHR casework that as the deficit was over 37 hours it would be treated as gross misconduct (page 112). The matter was referred to the internal governance investigations team. Leigh-Jayne Marr (now Robertson), operations manager at the Dundee contact centre, was appointed decision-maker.

33. On 5 April 2018, the claimant e-mailed Natalie Mitchell requesting retrospective unpaid leave in respect of 21.5 hours of flexi absences from 10 January 2018 to 8 March 2018 (page 185). As that was not actioned, the claimant forwarded the e-mail to John Shields on 18 May 2018 (page 186).

34. By letter dated 15 May 2018, the claimant was advised that Gary Burns had been appointed to investigate concerns regarding the misuse of the flexible working hours and frequent exceeding of the end of period deficit. As the deficit was in excess of five working days, he was advised that this could constitute gross misconduct (page 138).

35. By letter dated 22 May 2018, the claimant was advised by Gary Burns that he had been appointed to investigate the alleged misuse of the flexible working hours system and that an investigation meeting would take place on 20 May 2018 (page 1400.

36. Prior to the investigation meeting, Gary Burns advised the claimant to complete the relevant flex sheets. He instructed his line manager John Shields to assist him with that task. These were completed by both the claimant and John Shields working together over a one to two day period (page 141 – 152).

37. Between 22 May and 31 May, when the flexi sheet were being completed by the claimant and John Shields, a number of entries relating to time off which were recorded as flexi credits by Natalie Mitchell for her calculations were converted retrospectively to alternative forms of leave, and in particular "emergency annual leave", unpaid leave and special leave. Gary Burns noted for example that over 36.5 hours of paid and unpaid special leave were approved between 12 February and 11 March 2018 (page 164). John Shields was entitled to authorise the retrospective conversion of flexi leave for certain types of leave and up to certain limits but beyond that a more senior manager required to give authorisation. In respect of some at least of these conversions a more senior manager had given authorisation for retrospectives change in the status of certain leave entries. The up-to-date position was accepted by the respondent as legitimate conversions. These were now recorded on an up-to-date and amended PAT record (pages 153-155).

38. The investigation meeting subsequently took place on 31 May 2018. The claimant was accompanied by his trade union rep, Colin Oakley, and Jan Brown was also in attendance as a notetaker (page 163-165).

39. At the interview the claimant accepted that there was a deficit in excess of the permitted number of hours; that he had not made efforts to address the flexi deficit built up; and that he had not submitted his flex sheets to his manager. His position what that he was not taught how to complete the forms and was confused about how to record absences such as DAL and annual leave. He said he had no discussions with management regarding paying it back; he found it difficult to reduce the deficit due to his medical conditions; that his manager only rarely pressed him to complete and hand in flex sheets; and that he complained about a lack of support from his manager.

40. Gary Brown also interviewed Natalie Mitchell on 20 June 2018, after her return from holiday, and took notes (page 166-167).

41. Gary Brown did not interview Sonja Pringle because she had left the employment of the respondent by that time. Nor did he interview John Shields because he was

absent on leave. As he himself was by then leaving the employment of the respondent, he decided that he did not want to delay completion of the investigation or to pass it to another manager.

42. Gary Burns completed the investigation template (page 168) on 22 June 2018. In response to the question, "Do you believe there is sufficient evidence to support the allegation and that there is a case to answer?", he stated "No…the final total due by Feroz as of 06-05-2018 was minus 27:13. This figure is just under 8hrs less than the minus deficit from July 2017 and nowhere near the minus 60:58 figure…..my recommendation would be that a meeting is held with Feroz immediately and a repayment plan is set up to repay the full balance to 0:00 within 6 months and that Feroz is suspended from flexible working hours system for 12 months".

Disciplinary hearing

43. That report was forwarded to Leigh-Jane Robertson (then Marr), who considered that, on the basis of that report and all of the evidence gathered during the investigation, there was a case to answer (page 172-173). She stated that after a thorough audit of flexi and leave records, flex deficit [maximum] was determined to be [exceeded by] 5:01, and that this should be considered serious misconduct. She noted that the claimant was on a live written warning for serious misconduct. Having taken advice from CSHR casework (Victoria Jobson) she concluded that exceeding the flexi deficit by 5:01 was a further act of misconduct and should be considered repeated misconduct. If the case for repeated misconduct was to be proven, then the potential penalties were dismissal with notice, where further misconduct takes place while the final written warning is current. Exceptionally the final written warning could be extended to 24 months.

44. In the section "what are the risks and how did you mitigate them" (page 174), she stated "There have been failings in management of the jobholder and insufficient checking of the jobholder's flexi records. This could be considered a risk in taking an action against the jobholder. However the jobholder has himself failed in his responsibilities to: keep records up-to-date and available to manager; record

times accurately, completing flexi records daily; operate within the requirements of FWH scheme; agree with manager in advance whether able to take time off. To not take action against the jobholder for failing in his responsibilities, due to the failings of management, would absolve him of accountability for his own actions and there is a risk of further misconduct".

45. By letter dated 28 June 2018, the claimant was advised that he was required to attend a formal disciplinary meeting. The allegations were stated to be that between 3 July 2017 and 8 April 2018, he had: misused the flexible working hours system by frequently exceeding the maximum flexi deficit: failed to keep records accurate, up-to-date and available to manager/s at all times; and failed to obtain prior permission from his manager about taking time off (page 175). She advised that as he was presently under a final written warning, the outcome of the allegations could result in dismissal.

46. The disciplinary hearing took place on 17 July 2018. The claimant was accompanied by his trade union rep and the notetaker was George McGregor.

47. Leigh-Jayne Marr noted that the claimant did not accept that he had failed in his responsibilities as he was never made aware of what these were; that he complained about a lack of assistance and had his manager done so, this situation would not have occurred.

48. Following that meeting, in regard to the claimant's assertion that he had not himself taken flexi prior to February 2018, but rather it was processed by John Shields, Leigh-Jayne Marr obtained a report which confirmed that it was the claimant who had made 23 requests for flexi leave between 5 January 2016 and 12 April 2017 (page 188). She also followed up the claimant's assertion about the lack of support from management by getting confirmation that he had been offered help in November 2017 from Justine Davie (page 187).

49. On 23 July 2018, Leigh-Jayne Marr completed a report of her deliberations and decision (pages 190-196). She recognised management failings and

subsequently recommended that disciplinary action should be taken against John Shields.

50. By letter dated 24 July 2018, the claimant was advised that he was dismissed for repeated misconduct. The claimant was placed on the Cabinet Office Internal Fraud Register due to the nature of the misconduct (which he had been advised was a possibility). He was advised of his right to appeal in writing within 10 working days of receipt of that letter to Paul Ness.

Right of Appeal

51. The claimant sought advice from his trade union rep who assisted him in drafting the letter of appeal. The claimant understood from his trade union rep (wrongly) that he required to hand the appeal directly to Paul Ness. On 7 August 2018, the claimant contacted a former colleague to ascertain if Paul Ness was in the office that day. He was advised (wrongly) by text that he was not. Consequently, the claimant attended the office the next day with a view to handing in his letter of appeal. Paul Ness advised that as it was one day late he did not believe that he required to accept it. He gave further consideration to his position, and advised the claimant by letter dated 14 August 2018 that as the appeal was being submitted outside the 10 working days he would not hear it.

Relevant law

52. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

53. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

54. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief, and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

55. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (*Boys and Girls –v- McDonald* [1996] IRLR 129, *Crabtree –v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

56. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

57. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any

procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

Respondent's submissions

58. Ms Macaulay for the respondent lodged written submissions which she supplemented with oral submissions. She set out the issues, proposed agreed facts and disputed facts. Mrs Fox was able to confirm that a number of proposed disputed facts were not disputed, and accepted the proposed agreed facts with a number of caveats.

59. Ms Macaulay then set out the relevant law, by reference to the Employment Rights Act and the Burchell guidelines, each element of which she addressed.

60. With regard to the first two questions, Mrs Fox did not contest that the employer had a reasonable belief in misconduct or that there were reasonable grounds for that belief.

61. Relying on *Sainsbury's Supermarket Ltd v Hitt* 2003 IRLR 23, Ms Macaulay argued that the respondent had conducted a reasonable investigation. Taking account of the fact that Sonia Pringle had left HMRC, John Shields was on leave, Gary Burns investigation, which spanned over a month (when Natalie Mitchell was on holiday) was reasonable.

62. Relying on *Iceland Frozen Foods Ltd v Jones* 1982 ICR 17, she argued that the decision to dismiss was within the band of reasonable responses. The claimant was dismissed for repeated misconduct, the alleged misconduct coming to light when there was a live warning in place for serious misconduct. While Gary Burns reached a different conclusion, that does not diminish that Leigh-Jane Robertson's decision was reasonable. While the respondent took informal action when an apparent abuse of flexi came to light in 2017, the claimant was given the benefit of the doubt and steps were taken to assist him. It was clear to him then that he was in deficit and that he would need to make repayment and that he had to take accurate records. The evidence before Leigh-Jane Robertson was that it was in the claimant's interests to keep quiet about it because he would not have

to repay it or work extra; and in her assessment he was offered help and did not utilise it. He only took action to address it when he was "found out" in March 2018. There was nothing to stop him, despite his misgivings, from filling in the forms and the notes box. While the management failings were accepted by Leigh-Jayne Robertson, the claimant also has to take responsibility to seek assistance if he intended to take advantage of the benefits of the scheme.

63. Relying on the respondent's policy and the ACAS Code of Practice, she argued that dismissal was procedurally fair. While it is accepted that the appeal was not considered, the respondent relies on established guidelines which specifies 10 days to appeal with no provision for accepting a late appeal. Paul Ness said that he would consider late acceptance in exceptional circumstances, but there were none here. The claimant gave no compelling reason why it was lodged late and the respondent should not be punished for the claimant's failings. Having taken advice from Mr Oakley which suggested he should hand it to Mr Ness, the risk lay with the claimant. This again points to a failure on the part of the claimant to take responsibility. Ms Macaulay referred to a decision of the Employment Tribunal in *Simpson v HMRC* S/4109283/2018 which also dealt with a late appeal.

64. Ms Macaulay also argued that *Polkey* applied such that compensation should be reduced by 100%. She argued that the claimant had not made sufficient efforts to mitigate his loss, particularly given the ongoing differential. She set out the ways in which the claimant was at fault and argued that any award should be reduced by 100%.

Claimant's submissions

65. Mrs Fox lodged written submissions which she supplemented with oral submissions. She set out the facts, made reference to the law, and made submissions on the witnesses.

66. She submitted that the respondent had failed to carry out a reasonable investigation. The claimant's position was that he had advised that although he had been spoken to by Natalie Mitchell, he was never spoken to by John Shields,

despite approaching him for assistance on a number of occasions; and asking colleagues for advice. Although Sonia Pringle helped him with his flexi sheets in 2017, she did not show him how to do it, but just completed the forms, while he was on the phones. Sonia Pringle was not asked for an explanation, and John Shields was not interviewed.

67. Gary Burns was not recommending dismissal or even any disciplinary action, so he saw no need to investigate further. However given that Leigh Jane Robertson was contemplating dismissal, a reasonable investigation required further action, including interviewing John Shields, and the other three managers whose evidence was relied upon. However Leigh Jane Robertson agreed that their intervention was limited to July 2017, November 2017 and March 2018; and the failings of management were identified and agreed.

68. It was not fair to criticise the claimant for taking action only when he was required to do so by Natalie Mitchell. The claimant's position remained the same throughout the process, that he was aware of the flexi deficit and that he had asked for help. Although he gave further details in evidence, these were not recorded in the minutes which, she argued, did not contain all the details and were not necessarily accurate eg in respect of the point about his knowledge and acceptance of the deficit. Leigh Jane Robertson made the decision on the basis of the same information that was available to Gary Burns; the decision on the evidence was unfair, whether or not the claimant had provided further details.

69. She submitted that the respondent had failed to: attach sufficient weight to the claimant's consistent requests for help; take into consideration their own guidance on the managers' responsibility to review and endorse flexi records and monitor or authorize credit and debit limit; take into consideration the findings of the investigation manager namely that no action was to be taken; and to take account of the fact that the respondent failed in their duties as the employer to actively manage the situation.

70. She submitted no reasonable employer would have made the leap to dismissal for being 27 hours down on flexi when 8 months earlier, when he was 35 hours

down, the decision was made not to discipline him but give him the opportunity to pay back the flexi and train him how to do this. Gary Burns concluded that it was not fair to deal with the claimant any other way given the failings of management after the first occasion in July 2017 and the subsequent failings of management to assist the claimant in rectifying the situation. Although responsibility is shared, by dismissing the claimant the respondent put all the responsibility on the claimant, despite their admission of the clear failings of the claimant's manager and management.

71. She submitted that there should be no Polkey reduction; no reduction for contributory conduct and that the claimant had not failed to mitigate his losses. She lodged a schedule of loss, and Ms Macaulay confirmed that the figures and methods of calculation were accepted.

72. With regard to the appeal, the claimant accepted that he was one day late, and that the respondent was entitled to refuse to consider the appeal; but she argued that there was a failure to exercise discretion in this case; while not exceptional circumstances, it would not have been prejudicial to the respondent and discretion was not appropriately exercised and to that extent there was procedural unfairness.

Tribunal's deliberations and decision

Observations on the witnesses and the evidence

73. The Tribunal found the three respondent's witnesses to be credible and reliable. They all gave their evidence in a clear and straightforward manner.

74. The claimant was less clear and less certain in the way that he gave his evidence, much of which I put down to a lack of understanding. However I found at the very least that he sought to embellish his evidence to present a stronger defence when presented with the facts during the hearing. In particular, he claimed that he had sought help from his trade union rep and from colleagues prior to matters coming to a head, but the fact that this is not recorded as having been mentioned during the disciplinary meeting casts doubt on his credibility. Mrs Fox's position was that

this simply was not noted and indeed I did note that the notes were not a verbatim report of what attendees said. Given however the lack of clarity around some of the claimant's evidence, at the very least I did not find his evidence to be reliable.

75. Consequently where there was a conflict on the facts, I preferred the evidence of the respondent.

Reason for dismissal

76. Turning to the substantive case, the first issue to consider was whether the respondent had shown that the claimant had been dismissed and that the reason for the dismissal was misconduct.

77. The first limb of the Burchell test requires the employer to show that they believed that the employee was guilty of misconduct.

78. Mrs Fox accepted that there was an allegation of misconduct, and I accepted that the respondent had proved that they were relying on this potentially fair reason for dismissal.

Reasonableness of decision to dismiss

79. The key question is of course whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct, and not whether this Tribunal would have dismissed the claimant in these circumstances. Rather, the question is whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

Reasonable grounds for belief

80. In considering whether or not dismissal was reasonable in all the circumstances, I considered the second limb of the Burchell test, that is whether or not the

respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

81. Mrs Fox did not dispute that the respondent had reasonable grounds on which to sustain their belief, because it was not contested that the claimant was in flexi deficit. However, the claimant admitted that he did not keep up to date records; and that that he did not seek authority for time off (despite warnings on screen).

82. Given these facts, I accept that the respondent had a genuine belief that the claimant was guilty of misconduct.

The investigation

83. Mrs Fox argued that there had been insufficient investigation in this case to justify dismissal in the circumstances. This of course relates to the third limb of the Burchell test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of misconduct justifying dismissal, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal.

84. The investigation was carried out by Gary Burns. He interviewed only the claimant and Natalie Mitchell. He did not interview Sonja Pringle, because she was no longer working for the respondent. Nor did he interview John Shields because he was absent and "very difficult to pin him down". Further there were time constraints because he then knew he was leaving and thought it would be unfair to pass it to another manager at that stage.

85. Mrs Fox pointed out that while that extent of investigation may well have been sufficient when Gary Burns had decided that the claimant should not be disciplined, it was insufficient when it came to the disciplinary stage when dismissal was in contemplation (not least given the live final written warning). In particular Mrs Fox argued that the respondent could have interviewed Julie Davies, Sonja Pringle and John Shields.

86. I gave consideration to whether or not this level of investigation was within the range of reasonable responses, and whether or not the failure to interview the other managers involved meant that the investigation unreasonable.

87. With regard to Justine Davies, although the claimant said that he could not recall her having offered him help, Ms Robertson followed up that point after the disciplinary hearing by obtaining a copy of the e-mail which Justine Davies had written to the claimant offering assistance, but which the claimant accepted he had not taken advantage of.

88. With regard to the failure to interview Sonja Pringle, there was the practical difficulty that she was no longer working for the respondent. However, the claimant asserted in the disciplinary hearing that Ms Pringle had completed the sheets but not shown him how to complete them himself, and I accepted that may well have been the case.

89. However, by this point, that is July 2017, it was made clear to the claimant if it had not been before, that he did require to complete the forms, and he failed thereafter to take any steps to do so. It was this failure which was relied on by Ms Robertson and this was a matter of admission.

90. With regard to the failure to interview John Shields, again this was attributed to the fact that he was, at the time, absent on leave, and Gary Burns was himself about to leave the service of the respondent. It was however accepted both by Gary Burns and by Leigh-Jayne Marr that there had been failings on the part of management, and in particular that there had been no follow up meeting arranged by John Shields and that he had not pressed the claimant to complete flex sheets as he ought to have one. That was a matter which was therefore accepted and taken into account in the context of the investigation and disciplinary hearing.

91. However and of particular relevance to the question of the adequacy of the investigation, this was a case where the claimant had admitted the misconduct alleged, to the extent at least of the failure to get leave approved by a line manager, having flex deficits beyond the maximum, and failing to complete flex

sheets. Any further investigation might relate to the claimant's explanation for the situation, but not to the question whether the misconduct occurred.

92. I accepted that this extent of investigation, particularly given the follow-up by Leigh-Jayne Marr, in the particular circumstances, fell within the range of reasonable responses open the respondent.

Reasonableness of the sanction of dismissal

93. I then turned to consider whether the sanction of dismissal was reasonable in all the circumstances, having regard to equity and the merits of the case.

94. Mrs Fox submitted no reasonable employer would have dismissed in these circumstances where the claimant was only 5 hours about the maximum limit, when only months earlier he had been 12 hours over the maximum and that a decision was made not to discipline him but to give him the opportunity to repay the flex and train him how to complete the forms. This was particularly since the investigating officer recommended a similar course of action because of the failure of management to rectify the situation following July 2017. While there is a shared responsibility between manager and jobholder when dealing with leave, by dismissing the claimant, HMRC put all the responsibility on the claimant.

95. I did not accept that submission. In this case, the misconduct had been established, even on the claimant's own admission. Further the claimant was dismissed for repeated misconduct, when a live warning was in place. I accepted Ms Macaulay's submission that the fact that Gary Burns took a different view of what action should be taken does not of itself render dismissal unreasonable, and indeed he said in evidence that he had not taken account of the fact that the claimant had a live written warning on file. This would not, in any event, be the role of an investigator assessing whether there was a case to answer in respect of the specific allegations. Nor does the fact that on a previous occasion disciplinary action had not been taken when the deficit was higher. On the contrary, the claimant had been given an opportunity to address the matter, had been given offers of help, but had failed to take up the offers. I did not accept the claimant's evidence that he had sought help from others previously, including

colleagues and his trade union rep, because if he had done so, then it is likely that the matter could have been sorted out before it came to a head.

96. I have found as a matter of fact that the flexible hours system was discussed at induction. While equally it may well be that the claimant had forgotten what he was told, there was subsequently every opportunity for the claimant to familiarise himself with the system. I accept too that the flexi system is a matter of common discussion among staff where such a system operates. I should add that I did accept the evidence of Gary Burns that the flex system could be complicated, especially in the circumstances of the claimant where he had frequent medical appointments. The claimant did not however take the opportunity given to him when Sonja Pringle completed his sheets to keep up to date thereafter, or even when he was again offered help in the November. Any difficulties were likely to be compounded by his failure to keep flex up to date on a daily or even weekly basis, which was all the more a reason for the claimant to ensure that he did not have a backlog in recording his absences through his flex sheets.

97. Although there were failings on the part of management in this case, which were indeed serious, I accepted Ms Robertson's evidence that the claimant had himself failed, despite opportunities, warnings and offers of help, to take responsibility himself. Ms Macaulay relied on that in her submissions, and indeed it is clear that the claimant simply buried his head in the sand about the issue, which was a very risky strategy given that he was on a live written warning.

98. In all the circumstances, and in particular given the fact that the misconduct was established given the claimant's admissions, and the fact that there was a live warning in place, I considered that dismissal was in the range of reasonable responses open to the respondent.

Procedural fairness

99. I went on to consider whether the dismissal was nevertheless unfair on procedural grounds. The question was whether in all the circumstances a fair procedure was

followed, and the band of reasonable responses test applies not only to the decision to dismiss but also to the procedure relating to dismissal.

100. Beyond concerns that there would have been no prejudice to the respondent to consider the appeal one day late, it was not entirely clear to me the extent to which Mrs Fox was relying on procedural unfairness.

101. Given the wording of the policy, given the evidence that had there been exceptional circumstances discretion would have been exercised, given the fact that the claimant was aware of the 10 day rule and was getting advice from an experienced trade union rep, I concluded that it could not be said that such a response was not a reasonable one, falling within the range of reasonable responses.

102. In any event Mrs Fox did not argue with any force that the way that the appeal was dealt with could be said to be procedurally unfair, accepting as she did that the circumstances could not be said to be exceptional.

103. In all the circumstances, I consider that the procedure followed by the respondent fell within the band of reasonable responses and therefore that the procedure followed could not be said to render the dismissal unfair.

Conclusion

104. I therefore concluded, in all the circumstances, that dismissal for repeated misconduct was within the range of reasonable responses open to the respondent, and therefore that the dismissal was not unfair. The claim is therefore dismissed.

105. I am grateful to the parties' representatives for their diligence and professionalism in their presentation of this case.

Employment Judge: **Muriel Robison**

Date of Judgment: **11 June 2019**

Date Sent to Parties: **12 June 2019**