EMPLOYMENT TRIBUNALS

Claimant: **Mr M James**

Respondent: **Leekes Retail**

Heard at: **Cardiff** **On: 20 May 2019**

Before: **Employment Judge S Moore**

Representation:
Claimant: In Person
Respondent: Mr P Martin, HR Director

JUDGMENT having been sent to the parties on 22 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. This is a claim presented in an ET1 on 11 October 2018 claiming unfair dismissal, company sick pay and notice pay. The hearing took place on 20 May 2019. I heard evidence from the claimant and Bev Sulston, Group HR Manager and Peter Martin, Group HR Director for the respondent. There was an agreed bundle of 93 pages. Judgment was given orally on 20 May 2019 with a written record following on 22 May 2019.

The issues

2. The issues before the Tribunal were explained to the parties and were as follows:-

a) Was the claimant dismissed by the respondent and if so, what was the effective date of termination? The respondent denied that they had dismissed the claimant and asserted the contract had been frustrated. When I explored this with Mr Martin he explained he meant that they inferred a resignation by the claimant on account of his conduct in failing to attend work or report sick. I referred the parties to the case of **London Transport Executive v Clarke [1981] ICR 355, CA.**

b) If there was a dismissal:

Unfair Dismissal – S98 Employment Rights Act 1996

c) Has the respondent shown the reason for dismissal?

d) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

e) Was the dismissal within the range of reasonable responses?

f) Was there a failure to comply with the ACAS code?

g) Did the claimant contribute to his own dismissal? **In Steen v ASP Packaging Ltd [2014]** ICR 56 (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Wrongful dismissal

h) Was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

Sick Pay

i) Was the claimant entitled to receive company sick pay under the terms and conditions of his contract?

Findings of fact

I made the following findings of fact on the balance of probabilities.

3. The claimant was employed from 12 January 2015 as a Regional Retail Sales Manager with the respondent who is a large leading retailer with 7 stores.

4. Until July 2018 there were no issues in respect of the claimant's employment and I find that he had a good working relationship with the respondent and in particular with his line manager Mr Martin.

5. When the claimant was appointed he was given a contract of employment with an addendum which the claimant accepted that he had received and he was bound by. In that contract of employment, in the addendum, it dealt with absence reporting procedures and also his entitlement to company sick pay.

6. The relevant terms of the contract and addendum are as follows. Under "Absence" the claimant was required to telephone his manager on the first day of work. Text messaging was not acceptable although I find from previous periods of absence that the claimant had used text messaging and not been challenged. Thereafter he was required to contact the manager each day and after one week agree with the manager how often to keep in touch.

7. In respect of the entitlement to company sick pay, this was entirely at the discretion of the company and could be withdrawn at any time. Company sick pay would not be paid if the absence commenced during a notice period pending resignation from the company.

8. I turn now to the events in July 2018. The claimant had secured alternative new employment and on 2 July 2018 had discussion with his line manager, Mr Martin, in which he informed him that he was resigning. They agreed an end date of 4 August 2018 which was slightly longer than the 4 weeks contractual notice the claimant was required to provide in order to accommodate holiday that Mr Martin had already arranged.

9. The claimant raised the issue of bonus at the meeting and Mr Martin promised to go away and talk to Mrs Sulston (Group HR Manager) to clarify whether or not he would be so entitled. Mr Martin, following discussion with Mrs Sulston confirmed to the claimant that he would not be entitled to the

company bonus as he had to be in employment at the time it was due to be paid which was not until April 2019.

10. On 3 July 2018 the claimant had a subsequent conversation with Mrs Sulston about this issue and told her that he was 'rethinking his notice' due to the bonus, this was also confirmed by him in an email to Mr Martin on the same date. The claimant told Mr Martin that due to financial commitments and the bonus not being pro-rata he may need to review the notice period in line with his service.

11. On 6 July 2018 the claimant was due to attend a meeting with a manager of one of the respondent's stores but he did not attend work or the meeting. The claimant was unable to remember why he had not done so. On Monday 9 July 2018 the claimant text Mr Martin and told him that he was feeling unwell. He did not mention in that email that he was suffering from anxiety or stress. He informed Mr Martin that he had been 'up all night due to sickness' and implied that his children were also unwell. Mr Martin acknowledged receipt of that text and suggested that he take a further day to get better as there was a meeting that Mr Martin felt was not worth the claimant attending on the Tuesday.

12. The claimant text again on Tuesday 10 July 2018 and informed Mr Martin that he would not be in. He then had annual leave booked for 11, 12 and 13 July 2018. On Monday 16 July 2018 the respondent were expecting the claimant back at work, but they received no contact from him. The claimant says that he telephoned reception and left a message. The claimant's evidence about this was vague, but he candidly accepted that he was hoping that neither Mr Martin or Mrs Sulston would be available as he had developed, or was experiencing stress and anxiety and although he knew that he had to make contact, he had been hoping that he would not have to speak to either of them. Whether the claimant left a message or not, I accept the respondent's evidence that they did not receive the message.

13. Following that the claimant did not make any further contact with anyone at the respondent other than his evidence was that he sent in a self-certified fit note which was dated 9 July 2018. I accept that the respondent did not receive this self-certified fit note and they made numerous attempts to contact the claimant via his company mobile to no avail. Mr Martin and Mrs Sulston concluded that the claimant was not attending work as he did not intend to work his notice due to the bonus situation.

14. The respondent asked Frank Richardson, who was a colleague and a personal friend of the claimant, to contact the claimant. The claimant informed Mr Richardson via text message that he was going through some personal issues. Mr Richardson did not inform Mr Martin that the claimant

had anxiety or stress or that he had sent in a self-certified fit note for his period of illness.

15. The claimant produced in a bundle copies of texts between him and Mr Richardson but these did not really take us any further as they had not been seen by Mr Martin at the time.

16. Mr Martin asked Mr Richardson to relay to the claimant that he needed to return his laptop and other equipment otherwise he would not be paid at all at the end of July which the claimant duly did by returning them to the Llantrisant store on 22 July 2018. Thereafter it was common ground that there was no contact between the claimant and the respondent until 27 July 2018 when the claimant sent an email to Mrs Sulston querying his pay. He attached his self-certificate form and a G.P fit note which was also dated 27 July 2018. This certified him as unfit for work until 12 August 2018 and had been backdated to 23 July 2018. The claimant had seen the GP on 27 July 2018 who backdated the fit note to 23 July 2018.

17. On 30 July 2018, Mrs Sulston replied to the email thanking the claimant for being in touch and expressing concern that there had been a long period of absence where he had not been in touch and they had been concerned for his wellbeing. In that email Mrs Sulston stated;

> **"We ended your employment on 13 July 2018".**

Following that there was an exchange of correspondence between the parties but it moved no further forward and other than an email of 23 August 2018 in which Mrs Sulston sets out a full explanation as to the reasons that the claimant had been paid in the manner that he had been paid.

Conclusions – Unfair Dismissal

18. Firstly I consider whether the claimant was dismissed by the respondent. I concluded that the claimant was dismissed by the respondent on 30 July 2018 when Mrs Sulston emailed the claimant to say that they had ended his employment. In my view this was a dismissal. The effective date of termination takes place when it is communicated to the claimant. In accordance with **London Transport Executive v Clarke** even if there had been a repudiatory breach by the claimant in taking absence without leave the contract only terminated when the respondent accepted the breach by dismissing the claimant.

19. Having found there was a dismissal I consider whether there was a potentially fair reason under S98 (2). No alternative fair reason was advanced by the respondent but I find there was a potentially fair reason which was conduct. The respondent had reasonable grounds to believe that

the claimant was not intending on working his notice period as he disagreed with the decision not to pay his bonus.

20. I now consider whether the respondent acted reasonably in accordance with S98 (4) ERA 1996. The respondent made substantial efforts to contact the claimant and had reasonable grounds to conclude up until 27 July 2018 that the claimant had decided not to work his notice due to the bonus situation. However they had not taken any steps to inform the claimant that they considered he had resigned or written to him formally to challenge him about unauthorised absence.

21. In my judgment the position changed upon receiving the claimant's fit note and self-certification form on 27 July 2018. They now had an explanation as to why the claimant had not been in contact during the preceding weeks. It was open to the respondent not to have accepted that explanation but only after giving the claimant a reasonable opportunity to explain his version of events. Had they done so they could have considered and evaluated the reasons why the claimant had not been in contact. It would have been appropriate to have investigated the claimant's behaviour and given him an opportunity to have his say at a disciplinary hearing.

22. In such circumstances where an employee is absent without leave, then contacts a fit note covering some or all of the absence, it is not reasonable for an employer to conclude the employee has "resigned himself".

23. For these reasons, I find that the dismissal was unfair. Had the respondent followed a fair procedure I have concluded that it is very unlikely the respondent would have dismissed the claimant because he was due to leave on 4 August 2018 in any event..

Wrongful Dismissal

24. The claimant's claim for wrongful dismissal also succeeds. There were not circumstances where the claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract.

Sick Pay

25. There are two reasons why the claimant is not entitled to full company sick pay during this particular period. First of all, company sick pay was discretionary and the respondent has exercised their discretion not to pay the claimant. There is nothing unreasonable about the exercising of that discretion given the circumstances. Second and more importantly, the contract contains a term which provides that company sick pay would not

be payable during notice periods. This is an express term of the contract. As such the claim for company sick pay must fail.

26. The claimant was entitled to SSP for 9 July 2018 being the date covered by his self-certification received by the respondent on 27 July 2018. Also for the period of 23 July - 3 August 2018 as this was covered by the fit note. There was therefore a period between 15 – 22 July 2018 where the claimant was not covered by a self-certificate or fit note.

Remedy

Basic award

27. Under S122 (2) ERA 1996 a basic award can be reduced if the Tribunal considers the conduct of the claimant before the dismissal (or where the dismissal was with notice, before notice was given) was such that is just and equitable to do so. I have carefully considered whether to reduce the basic award in this unusual case. The purpose of a basic award is compensate someone for loss of job security who find themselves in a similar situation to someone who has for example been made redundant. As the claimant was due to leave the respondent's employment on 4 August 2018 in any event, I am mindful that I do not wish to make an award that could be deemed to be a windfall to the claimant. The calculation of the claimant's basic award without any reduction is £1,524.

28. I consider that there was conduct on the part of the claimant which gave rise to contributory fault. I accept that the claimant had a period of stress following handing in his notice. However he was in a suitably fit state of mind to visit the Llantrisant the store and return his laptop and equipment. There was not sufficient evidence before me as to why the claimant failed to contact the respondent during this period other than to send a self-certification note (which only covered 9 July 2018 in any event) and one telephone message on 16 July 2018. The claimant was aware that the respondent was trying to contact him, particularly through Mr Richardson. He could have left Mr Martin a note when he dropped off his equipment to explain his state of mind. The claimant had intimated that the bonus position was going to make him re-think his notice. He must have known that the lack of contact and breach of notification procedures for absence would be viewed with a level of suspicion by the respondent. The claimant did not seek any medical advice from his GP until 27 July 2018 which was the date, he discovered he had not received the full pay he was expecting from the respondent. He was then able to contact the respondent via email.
29. This lack of contact and failure to follow procedures to my mind contributed to the claimant's dismissal.

30. In the circumstances, I have decided it is just and equitable to reduce that basic award by 50% as this reflects the degree to fault that contributed to the dismissal. and I therefore make a basic award of £762.

Compensatory award

31. The claimant's loss crystalises as of 4 August 2018 as this is a point in time which it had been agreed that he was leaving the respondent in any event.

32. In respect of the amount due there was a 3 day SSP qualifying period which would take account of the days 9, 23, 24 July 2018. SSP therefore falls to be paid on 25, 26, 27, 30, 31 July, 1, 2, 3 August 2018 which is a period of 8 days totaling £147.28.

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Employment Judge S Moore
Dated: 20 June 2019

JUDGMENT SENT TO THE PARTIES ON

……23 June 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.