EMPLOYMENT TRIBUNALS

Claimant: **Mr Lamin Mbenga**

Respondent: **Churchill Contract Services Limited**

Heard at: **Birmingham** **On:** **1-3 July 2019**

Before: **Employment Judge Coghlin QC** (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr R Kerr, consultant

JUDGMENT

1. The claimant's claim of unauthorised deductions from wages in relation to accrued holiday pay succeeds. The respondent is ordered to pay the claimant the sum of £1,851.30. This is calculated as a gross sum, and the respondent shall pay it subject to any appropriate deductions in respect of tax and national insurance.

2. The claimant's remaining complaints of claims of unfair dismissal, unauthorised deductions from wages and breach of contract fail and are dismissed.

REASONS

Introduction

1. The claimant brings a complaint of unfair dismissal and claims that the respondent made unauthorised deductions from wages and/or breaches of contract by failing to pay him a day's sick pay in respect of 8 September 2017[1], failing to pay him in accordance with an alleged agreement relating to the storage and transportation of cleaning materials, and failing to pay him in respect of accrued but untaken holiday payments.

2. The respondent admits that the claimant is owed pay in respect of accrued but untaken holiday but disputes the amount claimed. Otherwise it denies the claimant's claims: it contends that the claimant was fairly dismissed for misconduct, that there was no sick pay owing to him, and that there was in fact no agreement in respect of storage and transportation costs.

3. The issues were identified by EJ Jones at the preliminary hearing on the 31 August 2018 and are attached as Annex A to this judgment.

4. At the hearing before me the claimant represented himself and the respondent was represented by Mr R Kerr. There was an agreed bundle of documents, to which various documents were added during the hearing.

5. I heard evidence from five witnesses: the claimant himself, and four witnesses called by the respondent:

    a. Paul Calladine, Key Account Manager, who conducted the disciplinary investigation meeting;

    b. Paul Foster, Senior Account Manager, who conducted the disciplinary hearing and took the decision to dismiss;

[1] The claimant originally claimed that he was owed sick pay for both 8 and 9 September 2017 but, having considered the documents in evidence which related to his pay, he accepted that he had indeed been duly paid for 9 September.

c. Paul Eastwood, who at relevant time was Senior Operations Manager, and who conducted the appeal against dismissal; and

d. Nazir Hussain, who at the relevant time was employed by the respondent as a train cleaner at Birmingham New Street Station.

The Facts

6. The claimant's period of continuous employment began on 15 July 2003 when he took up employment with Silverlink Train Services Limited. His employment contract transferred to the respondent under TUPE on or around 8 February 2017.

7. The claimant is an intelligent and well-educated man. He completed a law degree in 2011, and in 2016 he began studying for the LPC to qualify as a lawyer. He has been working on the LPC part-time ever since, working in his free time, mainly on Saturdays.

8. The respondent is a contract cleaning company. One of its clients was Siemens who lease rolling stock to London Midland, a train operating company. The respondent's contract with Siemens was to clean the London Midland fleet at locations including Northampton, Bletchley, Coventry and Birmingham New Street. The respondent is a large employer with about 12,000 employees in Great Britain.

9. The claimant was employed as a supervisor[2] based at Coventry station. He also oversaw the cleaning operation at Birmingham New Street, although he spent little time there. Three cleaners reported to him at Coventry, including Mr Martin Zemla and Mr Istvan Burai, and two at Birmingham New Street, including Mr Nazir Hussain. He worked a regular pattern of nightshifts: 5 nights per week with Wednesdays and Thursdays off. His hours were 9pm to 6am.

10. There is a book at Coventry in which staff are required to sign at the start and end of their shifts ("the signing-in book"). The respondent also says, and I accept, that staff are also expected to sign out if the leave site during their shift, and to sign back in again when they return. The signing-in book has more than one column to record signing in and signing out in any one shift.

[2] The respondent says in its ET3 that he was a senior supervisor. Nothing turns on the difference in terminology.

Events on 14/15 August 2017

11. Central to the unfair dismissal claim are events on the night of 14/15 August 2017. The signing-in book shows the claimant signing in at 9pm on 14 August and signing out at 6am the next morning. Mr Zemla and Mr Burai are both recorded as having signed in at 9pm and out at 5am.

12. At 3.38am Michael Cairo, the claimant's manager, arrived on site at Coventry. He was accompanied by Ian Johnson from Siemens. They were surprised to find that neither the claimant nor any of his team were on site. Mr Cairo called the claimant to find out where he was. Mr Cairo did not give evidence to the tribunal but set out his version of events in a subsequent email which was in the hearing bundle. His account was that when he called the claimant, the claimant told him that he was at Birmingham New Street with his team cleaning trains. Mr Cairo also said that the trains at Birmingham were in an unsatisfactory and unclean condition, as did Mr Johnson in another email.

13. Mr Cairo asked the claimant to come back to Coventry. That is a journey which would normally take about 40 minutes, but the claimant did not arrive back at Coventry until 5.05am.

14. Beyond signing in at 9pm on 14 August and signing out at 6am on 15 August, there was no entry in the book to record the claimant or indeed his two colleagues being away from the site that night.

15. During the subsequent investigation meeting, the claimant told the investigator, Mr Calladine, that on the night in question he was asked by Mr Hussain to go to Birmingham New Street to deliver stock. On its face this would have been a surprising request since the respondent operates mobile teams for the precise reason of delivering stock to cleaners at train station sites. The claimant told Mr Calladine that he went to Birmingham New Street and was there with Mr Burai and Mr Zemla when he was asked to return to Coventry.

16. At other times the claimant has given differing accounts of events that evening. As I have noted, Mr Cairo said that the claimant told him he was cleaning trains (as opposed to delivery stock); and the claimant has said subsequently that his reason for

going to Birmingham New Street was to audit the trains, in other words checking how well trains have been cleaned.

17. Until exchange of witness statements in these proceedings, the claimant gave a consistent account that he was at Birmingham New Street with his team, meaning Mr Burai and Mr Zemla. This is the account which he gave both to Mr Calladine, and also to Mr Cairo according to Mr Cairo's email. He gave the same account in his subsequent appeal letter, in his particulars of claim and his amended particulars of claim. However the account given in his witness statement and oral evidence to the tribunal was that he was at Birmingham New Street with Mr Burai but that Mr Zemla had gone to another site, Birmingham International.

18. Mr Cairo remained at Coventry until about 4.50am. Shortly before leaving he sent an email to the claimant at 4.42am in which he said that he was "deeply, deeply disappointed" that no cleaners were on site and that the matter would be investigated.

19. During the course of the next shift on the night of 15/16 August 2017, Mr Cairo discussed various concerns with the claimant. Notes of these discussions appear at pages 45 to 47 of the bundle. The matters discussed include cleaning standards, leaving site early, and the need to notify his manager in the event of being away from work. The claimant signed and dated the notes.

<u>The investigation meeting</u>

20. On 23 August 2017 Mr Cairo wrote to the claimant to invite him to an investigation meeting. The matters to be discussed were set out in bullet point form, as follows:

- Unauthorised absence
- Failure to follow absence reporting procedure
- Fraudulent timekeeping
- Serious breach of trust and confidence

21. The letter stated that Mr Cairo would chair the meeting and that another person might be in attendance to take notes.

22. The meeting took place on 30 August 2017, and it was conducted not by Mr Cairo but by Paul Calladine, Key Account Manager. In the absence of suitable facilities the

meeting took place in Mr Calladine's car. No-one else was present. Mr Calladine himself took notes during the meeting. Although the situation was far from ideal, Mr Calladine did at least ensure that the claimant signed his notes of the meeting and I am satisfied that they are broadly accurate. The claimant gave his account of events on the night of 14/15 August, which I have summarised above.

23. The claimant also raised two other matters. He told Mr Calladine that he overheard Mr Johnson, from Siemens, telling Mr Cairo that he should put his own people in charge of cleaning "because they are all foreigners". The claimant says that he believed Mr Johnson was referring to him. The claimant is a British national of Black African ethnicity.[3]

24. The claimant also raised concerns that Mr Cairo had asked him to make false declarations as to the number of cleaning staff on duty on certain nights. He showed Mr Callaghan texts which he had received from Mr Cairo, copies of which were also in evidence before me. The first was sent to the claimant at 11.18pm on 18 August 2017 and read "declare 4 Lamin". The second was sent at 10.17pm on 23 August 2017 and it read "Lamin please declare 4 tonight mate!" The claimant's case is that both of these were requests or instructions to declare that four staff were on duty that night rather than the three staff who were in fact on duty; his evidence to the tribunal was that Mr Cairo "*clearly knew this to be false*" and that these were attempts to defraud the client. The claimant's case before me is that he refused to do so and that this is why he was then subjected to a disciplinary process.

25. I do not accept the claimant's account. On the face of the texts, there is nothing to suggest that the request to "declare 4" related to numbers of staff on duty as opposed to numbers of units (a reference to the numbers of train carriages) that had been or would be cleaned that night. There is evidence in the bundle of Mr Cairo using the word "declare" in the context of declaring how many units were cleaned (see page 59). Moreover the claimant's assertion that these were attempts on the part of Mr Cairo to persuade him to declare false numbers of staff is inconsistent with the attendance records signed by the claimant himself: the signing-in book shows that four members of staff were indeed on duty both on 18 and 23 August 2017. I reject the claimant's assertion that Mr Cairo was asking him to submit information which Mr Cairo knew to be false.

[3] There is no claim before me of race discrimination; an application to amend the ET1 to add such a claim was rejected by EJ Jones at a hearing on 31 August 2018.

26. Mr Calladine did not record in his notes the suggestion that Mr Cairo had asked for false staff numbers to be provided, which he considered irrelevant to his investigation. However he was concerned by the discrimination allegation, and wanted to allow an investigation to take place into it before the disciplinary investigation was continued. For this reason he decided to terminate the interview. Before the meeting ended the claimant agreed that he would produce evidence to support his discrimination allegation. Nothing was subsequently forthcoming from the claimant, and no investigation then followed into the alleged discriminatory remarks by Mr Johnson. Unfortunately the disciplinary investigation was also left up in the air, and Mr Calladine made no progress with it. In particular, no attempt was made by Mr Calladine to speak to other obviously relevant witnesses namely Mr Zemla, Mr Burai and Mr Hussain.

27. However some further investigation was undertaken by Mr Mark Aston, an account manager. He spoke to Mr Cairo to ask about the texts and the alleged request to get the claimant to give fraudulent staffing numbers. Mr Aston recorded the details of that investigation in an email which was sent to the disciplinary hearing manager, Mr Foster, on 13 September 2017. Mr Aston concluded that he was convinced that matters were not as the claimant said and that actually the texts in question had related to the cleaning of units rather than to staffing numbers.

<u>The disciplinary meeting</u>

28. On 6 September 2017 the claimant was invited to a disciplinary meeting. The invitation letter was signed by the disciplinary hearing manager, Mr Foster. It set out the disciplinary allegations in the same bullet-point terms as in the investigation letter (see paragraph 22 above). The letter stated that it enclosed copies of the investigation documents that would be referred to in support of the disciplinary allegations, namely "investigation notes" and "previous record of discussions". A contact number was given for Mr Foster. The claimant's case is that notes of the investigation meeting with Mr Calladine were not in fact included with that letter but he did not ask for a copy of those notes.

29. The disciplinary hearing was scheduled for Thursday 14 September 2017. As I have said, Thursday was one of the claimant's two regular weekly days off. On the day of the hearing the claimant emailed Mr Cairo, stating:

> "I received your letter regarding the [disciplinary hearing]. The day stated for the Hearing fell on a Thursday 14 February, my rest day. You were very well aware Wednesdays and Thursdays are my rest days why fix it for this day? I will not use either of these days or my holidays for any official mission or session."

30. The claimant took me to the respondent's disciplinary procedure which states at paragraph 2.2 that "the employee must take all reasonable steps to attend any meetings and must attend meetings arranged during their working day at their base location," the implicit corollary of which is that employees are not expected to attend on non-working days. The respondent now accepts that because the hearing was on the claimant's scheduled rest day, it was reasonable for him to decline to attend. However that was not the view taken by Mr Foster at the time. He attempted to contact the claimant by phone, without success. Although aware that this was the claimant's rest day, Mr Foster decided to proceed in his absence. He had travelled a long way to get there and did not wish to postpone.

31. The meeting proceeded in the claimant's absence. Other than Mr Foster, Mr Cairo was the only other individual present, as note-taker. The outcome of the meeting was that Mr Foster decided to dismiss the claimant with immediate effect for gross misconduct, a decision which he communicated to the claimant by letter dated 18 September 2017. He set out again the four bullet points originally found in the investigation invitation letter. He continued:

> "I fully reviewed all evidence presented at the disciplinary hearing to understand your whereabouts on Tuesday 15 August 2017. Witness statements confirmed you were not at Coventry station, which you confirmed on the day in text messages and during the investigation hearing. I reviewed timesheets from Tuesday 15 August 2017 which you have signed in at 9pm and have signed out at 6am, however as confirmed by you, you were not on site.
>
> I appreciate you claim to be at our Birmingham New Street site however this is in direct conflict with the timesheets at Coventry Station and you failed to provide any further evidence to demonstrate your whereabouts on Tuesday 15 August 2017. As you failed to attend, you were unable to provide mitigating circumstances as to why the timesheets had already been completed, however was not on site as expected whilst failing to notify anyone of your absence from site. As mentioned in the notes, you are unable to confirm your whereabouts on Tuesday 15 August 2017 and I have reason to believe you were not on site as required whilst claiming for monies not worked (*sic*). This is a serious breach of trust and confidence and is gross misconduct in line with our company disciplinary policy."

32. He enclosed copies of Mr Cairo's minutes of the disciplinary hearing.

<u>The appeal process</u>

33. The claimant appealed against his dismissal by letter dated 28 September 2017.

34. On or around 27 October 2017, and before the appeal against dismissal was heard, the claimant began in new employment with a company called Westgrove Support Services Limited. In his ET1 he stated that this alternative employment had begun on 27 November 2017, and both his schedule of loss and subsequently his amended schedule of loss were prepared on that same incorrect basis.

35. On 1 November 2017, the respondent wrote to the claimant to invite him to an appeal meeting on 9 November 2017. The appeal meeting took place that day, chaired by a Paul Eastwood, senior operations manager. The appeal meeting went badly, and part-way through Mr Eastwood asked the claimant to leave. There is a dispute of fact about what happened in the meeting.

36. The claimant's case before me was that it was Mr Eastwood who had become aggressive and shouted at him. In his witness statement, the claimant said this:

> "I said to Mr Eastwood that he was not allowing me to explain my case, but he became angry and started shouting loudly at me saying 'get out of my office you coon[4]', 'go back to where you came from, there is no job for you here.'"

That account is denied by Mr Eastwood, who says that it was the claimant, not him, that was aggressive, and that it was for this reason that he brought the meeting to a close.

37. I prefer Mr Eastwood's evidence and reject the claimant's version of events. The claimant alleges that Mr Eastwood engaged in what would have been an outrageous, shocking, and overtly racist outburst which was entirely unprovoked. The allegation is inherently implausible: Mr Eastwood was not personally invested in the matter in any way and had no prior involvement in it. Moreover the claimant, who is an intelligent man, educated in the law, would have been well aware of the significance of such an event. He had shown himself ready to complain of alleged mistreatment, including discriminatory treatment, as he did in his appeal letter, yet prior to the exchange of witness statements in these proceedings the claimant made no reference to Mr Eastwood using any such language. There was no mention of this in his email of 15 December 2017 to which I will return below, or in his particulars of claim, or, most significantly, in the draft amended particulars of claim which his solicitors drafted specifically in order to set out full details of the allegations of race discrimination which

[4] The spelling used by the claimant is "kune" (which he interpreted as "black dog"), but nothing turns on the spelling.

he was then seeking to bring. The allegation was first mentioned in his witness statement produced in June of this year. By contrast Mr Eastwood's account is supported by his contemporaneous notes of the meeting and by his reference in subsequent correspondence to the meeting having ended due to the claimant's aggressive behaviour. Further, having heard both individuals giving evidence, I found Mr Eastwood a convincing witness on this point and I regret to record that I did not find the claimant a credible witness, either overall or on this particular point.

38. The respondent wrote to the claimant on 17 November 2017. The letter was signed "HR Team". It reads:

> "I write further to your disciplinary appeal hearing on Thursday 9 November 2017 with Paul Eastwood, Operations Manager. Paul has requested that we write to you to confirm that as you were asked to leave site due to your aggressive behaviour, there will be a slight delay in a decision being made.
>
> We aim to confirm a new date to re-invite you to a rescheduled disciplinary appeal hearing and would like to reassure you that Churchill Contract Services Limited are using this additional consideration time to review all facts and evidence heard during your appeal."

39. Mr Eastwood wrote to the claimant again on 21 November 2017 to invite him to a reconvened hearing on the 7 December 2017 "to continue discussing the below grounds of dismissal", and he then set out the four bullet points originally listed in in the investigation invitation letter. Although this letter used the expression "disciplinary hearing" it appears that what he meant was a reconvened appeal hearing.

40. The claimant did not attend the meeting on 7 December 2017. Nevertheless, in his absence, Mr Eastwood effectively upheld his appeal. On 12 December 2017 Mr Eastwood wrote to him in the following terms:

> "After hearing your case and the reasons you have put forward for your grounds of appeal and considering the available evidence, I have decided to have this disciplinary reheard by an independent level of management. You will be contacted by human resources with details of this meeting. Therefore, I am writing to request your attendance to an Investigation Hearing on Monday 18 December 2017 at 10am."

41. Mr Eastwood explained that he would himself chair that meeting.

42. The claimant emailed the respondent on 15 December 2018 to say that he could not attend the meeting due to the short notice. There was no mention of any other reason why the claimant might be reluctant to attend a meeting chaired by Mr Eastwood.

43. The meeting on the 18 December 2017 therefore did not proceed. Suzanne Hawkins, Head of HR, wrote to the claimant on 2 January 2018 giving further details of the respondent's intentions. The letter reads as follows in relevant part:

> "I write to you following your rescheduled appeal meeting which took place in your absence on 7 December 2017 and the outcome letter sent to you on 12 December 2017, where we advised you that the outcome of your appeal was that we wished to reinvestigate the allegations against you with an independent manager… The purpose for inviting you to the investigation meeting is to fully revisit the circumstances leading to the decision made in your absence and to engage with you to ensure that you were given an opportunity to have your case heard fully once more and a thorough and new investigation is carried out.
>
> As of course you will be aware, the purpose of the appeal process, and the reason you sent us your letter of appeal, is to look at the case in its entirety and review all elements. Having done this and taking into account the points raised in your appeal letter, we do agree that there have been shortcomings in the investigation from both sides and as such, we would now like to go back to the investigation stage. I feel it is in your best interest to attend, as it allows us all the opportunity to revisit the events and fulfils our findings of the appeal you have raised. As you were unable on 18 December, I am inviting you to attend a rescheduled investigation meeting on … 10 January 2018."

44. Ms Hawkins said that Mr Eastwood would chair the meeting that there would be a note-taker present. She continued:

> "As we are taking this matter back to the start, there is no documentary evidence at this point to share with you. the documentary evidence that was relied upon at the disciplinary hearing will be shared to you during the investigation meeting and you will be given time to consider its content and to comment upon it.
>
> We hope that you are fully engaged with this re-investigation process and attend the meeting detailed above. Once we have commenced the new investigation process, your dismissal will be overturned and you will be reinstated to the business. Payroll will be informed of your return and any outstanding monies / back pay will be paid to you in the next pay cycle.
>
> We appreciate this is a difficult time for you. As a duty of care and whilst we investigate the allegations raised, you will not be expected to return to the workplace. To allow a thorough investigation, you will be suspended on full pay in accordance with the company's disciplinary policy. It is worth noting that suspension does not imply guilt, it just allows us to investigate in a sensitive manner and is treated as a precautionary measure.
>
> Following the investigation meeting, there may be a couple of possible outcomes which I have detailed below for your reference. You will be notified in writing of the next stage of the process:
>
> - The case may be escalated to a disciplinary hearing and heard by another independent manager
> - There may be no case to answer, at which point you will be reinstated.
>
> We really do hope you are able to attend this meeting and engage with us in reinvestigating this matter.

I also appreciate that this is confusing for you, therefore if you have any queries regarding the content of this letter or the meeting, or wish to confirm your attendance please contact me on [and Ms Hawkins here gave her contact number].

45. One feature of this proposed approach was that the first stage of the restarted process, the investigation, would be undertaken by Mr Eastwood, a relatively senior manager. This would not have caused particular difficulties since there were sufficient managers above him in the chain of command to hear any disciplinary and appeal hearings.

46. The claimant did not answer that letter, and the matter was left there.

AOS Security Limited

47. Around the end of 2017, the respondent purchased a company called AOS Security Limited ("AOS") which provides security staff at railway stations. Subsequently, as a result of this purchase, the respondent became aware that on 2 December 2016 the claimant had begun in AOS's employment, at the same time as he was working for the respondent's predecessor company prior to the TUPE transfer.

48. The claimant's work with AOS was on a zero hours contract, but the comprehensive records of his hours worked at AOS, which were available in the trial bundle and which the accepts are accurate, make clear that he in fact worked full-time (principally on day shifts) for AOS, alongside his full-time night job with the respondent. I shall return to this below.

Analysis and Conclusions

Unfair Dismissal

The Law

49. Section 98 of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

"(1) 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 subsection (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.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee …

…

(4) … 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) –

(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."

50. In **Orr v Milton Keynes Council** [2011] ICR 704 at [78] Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases (a summary which incorporates the well-known test described in **British Homes Stores Ltd v Burchell** [1978] IRLR 379):

"(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the

employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

51. In **Turner v East Midlands Trains Ltd** [2013] ICR 525, Elias LJ at [16]-[17] added:

"[T]he band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

Conclusions on unfair dismissal

52. I am satisfied that the respondent, in the person of Mr Foster, in deciding to dismiss, did so because he genuinely believed that the claimant had committed misconduct. This was the reason, and the only reason, for dismissal.

53. I have concluded however that Mr Foster's belief was not held on reasonable grounds, and that, prior to the appeal process, the process followed by the respondent was one which no reasonable employer would have adopted.

54. There were a number of serious flaws in the process by which the respondent came to dismiss the claimant.

a. Prior to dismissing the claimant, the respondent did not interview or speak to any of three potentially relevant witnesses, namely Mr Burai, Mr Zemla and Mr Hussain. They were obviously relevant witnesses bearing in mind the account which the claimant had given; and any reasonable employer would have made enquiries of those individuals: at the very least, Mr Hussain.

b. It was unreasonable to proceed with the disciplinary meeting in the claimant's absence, given that, as Mr Foster knew, it had been scheduled for the claimant's rostered day off. The respondent accepts it was reasonable for him to decline to attend, and unreasonable for it to proceed in his absence.

c. In reaching the decision that the claimant was guilty of gross misconduct, Mr Foster took account of matters which had never been raised with the claimant or put to him. In his witness statement, having described his concerns about the claimant's conduct, Mr Foster said that "in addition, I was concerned that he was intending to take holiday that had not been authorised and also it seemed he had authorised holiday for others without permission." In his evidence Mr Foster told me that he had not taken these matters into account when deciding that the claimant was guilty of gross misconduct. However, I was subsequently provided with a copy of Mr Cairo's notes of the disciplinary meeting from which it is quite clear that he did in fact take account of these two matters in reaching his decision. There had been no notification to the claimant that he was required to answer such charges, they had not been put to him in the investigatory interview, they were not mentioned in the disciplinary invitation letter, and it was unfair and unreasonable to take them into account.

d. The next issue relates to an aspect of Mr Foster's decision-making, as reflected in his wording in the dismissal letter set out above: "you are unable to provide mitigating circumstances as to why the timesheets had already been completed". Mr Foster told me in evidence that he thought that the signing-in book entry had already been filled in by the claimant (including the signing out time of 6am) before the end of the shift on the night of the 14/15 August. This allegation had formed no part of the disciplinary case against the claimant, and there was no evidence to support it. On the contrary the evidence before Mr Foster in the form of Mr Cairo's email of the 12 September 2017 was that Mr Cairo "could not check the signing in/out sheet on the night due to it being locked in the storeroom on site." In short, there was, and could have been, no evidence before Mr Foster that the claimant had completed the timesheet prior to the end of this shift.

e. In reaching his decision on sanction Mr Foster had no regard to the claimant's long period of service. He had 12 years' previously unblemished service with the respondent and its predecessors. Mr Foster said he was unaware of the claimant's length of service, he made no effort to find it out. The claimant's long record of good service is something which any reasonable employer would have taken into account in considering what sanction to impose.

55. There were other matters which represented flaws in the process but which would not, in themselves, have been sufficient to render the dismissal unfair.

a. There was a lack of detail in the disciplinary charges set out in the letter inviting the claimant to the disciplinary hearing, which as I have said were limited to four bullet points and framed in generalised terms. However in my judgment the claimant was adequately aware of the charges which it was intended he should face in relation to events on the night of the 14/15 August namely that he was absent from work without permission and had not correctly recorded his absence in the signing-in book.

b. It was unsatisfactory that Mr Calladine's investigatory interview with the claimant took place in Mr Calladine's car. However it is not suggested by the claimant that the location or circumstances of that investigatory meeting, awkward though they may have been, actually had any influence on the way in which he answered questions nor on the fairness of the subsequent dismissal. I do not consider it to represent a fundamental flaw which went to the fairness of the process.

c. The claimant complains, and I accept, that he was not provided with investigatory notes prior to the disciplinary hearing. However as I have said the letter inviting him to the disciplinary hearing made clear that it was intended that the notes would be enclosed. This omission would have been obvious to the claimant; it was easily remediable in that it was open to the claimant to contact the respondent to ask for them. In circumstances where the disciplinary hearing took place in the claimant's absence, the failure to provide him with notes of the investigatory meeting added little to the unfairness and was no more than academic in its effect.

d. It was unsatisfactory that Mr Cairo was present at the disciplinary hearing as a notetaker. Mr Cairo was a material witness and prior to the hearing had expressed the view to Mr Foster in emails that the claimant had conducted himself in a "totally unacceptable way"; that his conduct amounted to "fraudulent activity to say the least"; that "this is a clear act of fraudulent activity and will not be tolerated at any level"; and that "Lamin had been claiming for hours not worked and has been found guilty". In the circumstances Mr Cairo was not an appropriate person to have present as a notetaker at the disciplinary

hearing. However had this been the only flaw in the process it might not have been sufficiently fundamental to render the dismissal unfair.

56. The claimant also made other criticisms of the respondent's approach which I do not accept.

a. The claimant complains that his concerns about Mr Cairo were not investigated, I don't accept that criticism: as I have described above Mr Aston looked into the matter and his report was provided to Mr Foster.

b. The claimant criticises the respondent for not investigating his assertion that Mr Johnson was out to get him. It does not seem to me that it was a necessary part of a fair procedure for the respondent to challenge Mr Johnson, who after all was a client particularly given that allegation against the claimant was not one which rested principally on the evidence of Mr Johnson. It relied equally on what Mr Cairo said and moreover on the admitted fact that the claimant was not on site at Coventry on the night in question.

c. The claimant also says there was an unfair disparity in treatment between first of all himself and Mr Burai and Mr Zemla and also between himself and Mr Cairo. As to Mr Burai and Mr Zemla, it certainly appears on the face of it that if the claimant was guilty of misconduct then those two individuals may well have been guilty of very similar misconduct. However there was no evidence before me as to what if any investigation took place in respect of those two individuals, and I am not in a position to make findings on whether they were treated differently and if so for the reasons for any such difference (for example the claimant's greater seniority compared with them as their supervisor). As for Mr Cairo, the claimant says that his allegations against Mr Cairo were not investigated, whereas the allegations against the claimant were, and indeed that that disparity was due to his race (though as I have said there is no claim of race discrimination before me). However fact is that the allegations against Mr Cairo were not the same as the allegations against the claimant, and they were anyway in fact investigated by Mr Aston and found to be unsubstantiated. In short if the claimant's dismissal would otherwise have been fair, I do not accept that there was a disparity in treatment such as would render the dismissal unfair.

57. In light of the flaws in the respondent's procedure and decision-making which I have already described, then were I considering the matter without regard to the appeal outcome, I would have concluded the dismissal was unfair dismissal. The respondent is a large employer with access to human resources advice, and there were fundamental flaws in the respondent's process and in Mr Foster's decision-making. However, I have to consider not just the process leading up to the dismissal, but the process as a whole including the appeal process and the outcome of that appeal: **Taylor v OCS Group Ltd** [2006] IRLR 613. The claimant's appeal in this case was upheld. The position as explained by Mr Eastwood first in December 2017 and then more fully in January 2018 was that the process – not just the disciplinary hearing but the entire investigation - would be restarted, with appropriate provision being made for the reinstatement of the claimant and the paying of back pay. All of the elements of unfairness which I have already identified were swept away by that appeal outcome. Had the claimant agreed to engage, the investigation would have restarted from the very beginning.

58. The only issue which has caused me hesitation in this regard is the question of delay and the passage of time. It took some time for the claimant's appeal to be acknowledged, and subsequent to the appeal hearing, there was some further delay in confirming the outcome. However, the delay following the appeal hearing, in the circumstances I have described above, was not a delay for which in my view the respondent can be criticised and overall I do not regard the delay in itself as sufficient to render the dismissal unfair.

59. In summary therefore, I conclude that the dismissal would have been unfair but for it being rectified following the appeal process. The process as a whole including the appeal outcome was not unfair, and the complaint of unfair dismissal accordingly fails.

Remedy

60. The question of remedy in respect of unfair dismissal does not therefore strictly arise. However I have heard evidence and full argument on questions of remedy, and I make the following findings for completeness and in case I am wrong on the question of unfair dismissal.

The claimant's alleged after-discovered gross misconduct

61. The respondent argues that the evidence which has come to light in connection with the claimant's work with AOS demonstrates that he was guilty of gross misconduct. Since this alleged gross misconduct was only discovered after the claimant was dismissed, the respondent rightly accepts that the tribunal cannot take it into account when considering the fairness or unfairness of dismissal. However the respondent argues that in light of the claimant's conduct it would not be just and equitable to make either any basic award (having regard to s122(2) ERA) or any compensatory award: **W Devis & Sons Ltd v Atkins** [1977] IRLR 314.

62. I need to explain how that point came to be raised. It was initially raised by the respondent in May 2018 by way of an application to amend its grounds of resistance (GOR) to make specific reference to these matters. The draft amended GOR made express reference to the **Devis v Atkins**. The application to amend the GOR came before EJ Jones at a preliminary hearing on the 31 August 2018. The principal focus of that hearing was the claimant's own application to amend his claim to alleged race discrimination. The claimant's application to amend was rejected, but so also was the respondent's application to amend its response. Mr Kerr, who represented the respondent at that preliminary hearing, told me that he understood EJ Jones' position to be that no amendment was strictly required, since the point went only to remedy not liability, and that EJ Jones was not seeking to shut down the respondent's ability to take the point.

63. In the list of issues EJ Jones identified as the third remedy issue:

> "Would the respondent have been able to dismiss the claimant fairly in any event? The respondent relies on matters that have come to light since the dismissal and will adduce evidence on those matters (which have been brought to the claimant's attention)."

64. It is clear that the "matters" referred to here are those which the respondent sought to introduce by way of its amended GOR. This supports Mr Kerr's understanding of EJ Jones' intention. Moreover I have seen and considered EJ Jones' notes of the decision which she made including the reasons for that particular decision and which read:

> "decision: refuse application does not go to liability Respondent entitled to bring these matters into any discussion about remedy."

65. I am therefore satisfied that Mr Kerr is correct, that EJ Jones' approach was not to be taken as seeking to restrict the respondent in arguing these points, and that it is open to the respondent to run them in full.

66. The claimant's employment with AOS began in December 2016 and continued even after his employment with the respondent ended. There are records of the claimant's hours worked for AOS in the bundle which the accepts are accurate. On 22 January 2017, in preparation for the TUPE transfer which occurred in early February 2017, the claimant filled out an information form which among other things asked the question "do you have any other employment, if so, how many hours per week do you work"? The claimant answered "no" to that question. That was not true: he had already begun working full-time for AOS as an employee. Indeed on the day when he signed the form denying outside employment, he worked a 12-hour shift for AOS. The claimant told me in evidence that he answered that question "no" since his contract with AOS was a zero hours contract. I reject that evidence. As the clamant was aware, the contract with AOS was an employment contract, whether zero hours or not, and the claimant was anyway in fact working full time with AOS.

75. The claimant's employment contract with the respondent contained no express prohibition on undertaking simultaneous employment with another organisation. However on the evidence I have seen, and in particular the records of his hours worked for the two companies, I am satisfied that the claimant was indeed guilty of gross misconduct in relation to this outside employment.

76. The first issue is that the records show the claimant on a number of occasions working for both employers simultaneously. For example, on Friday 18 August 2017, the AOS records show that the claimant worked for AOS between 15:30 and 00:30 on the morning of the 19 August. The entries in the respondent's signing-in book, completed and signed in his hand, record him working from 9pm on 18 August to 6am on 19 August. The same overlapping pattern is recorded on the nights of 19/20, 20/21, and 26/27 August.

77. In each of these cases of overlapping hours, the period of overlap was substantial: some three and a half hours. During this time the claimant was contractually committed to work for the respondent in Coventry, when he was in fact working for AOS some 40 or 50 minutes' drive away at Oxford Parkway. In each case, he signed the

respondent's signing-in book to indicate that he was working at Coventry when he was not. He was paid by the respondent for these hours despite not having worked them.

78. The claimant's evidence to me, which on this particular point I accept, was that where there was an overlap between his work for one employer and the other, he was in fact working for AOS. AOS timesheets record him signing in on an hourly basis as he did his rounds as security guard.

79. The claimant stated in his evidence that during these periods of overlap, he would arrange for another staff member of the respondent to cover for him and he would pay them. I do not accept this evidence. The first time the claimant made a suggestion of paying for staff to cover his hours was in his oral evidence. He had put before the tribunal two versions of his witness statement, one of which dealt with the respondent's concerns about him working for AOS and one which did not. The version which dealt with the point made no mention of him paying staff; rather he said there that he would swap hours with a staff member who covered for him. He was not able to offer any cogent explanation for that discrepancy.

80. The claimant also suggested that his arrangements with other staff – be it swapping part of a shift or paying them to cover for him - he did so with the respondent's knowledge and approval. I reject that assertion, which was inherently implausible, was not supported by any evidence, and was not put to the respondent's witnesses in cross-examination.

81. By accepting a particular AOS rota in any given week which overlapped with his rota with the respondent, the claimant was committing himself to work simultaneously for two separate employers many miles apart. That was gross misconduct in itself, and the falsification of records which followed (by the claimant signing to confirm he was at work when he was not) was further gross misconduct. It was important for the respondent to have accurate records for a number of reasons, including to ensure staff were paid appropriately, to have a proper record of who was on site when, and to monitor working time for staff.

82. A further major area of concern raised by the claimant's work for AOS is the sheer number of hours apparently worked even where there was no overlap of hours. It was the claimant's evidence that where there was no overlap in hours, he did in fact work the hours which he was recorded as working in his timesheets for both companies.

Over the period from February to September 2017, the claimant worked average 45 hours per week for the respondent and nearly 40 hours per week for AOS. The respondent had an obvious general interest in knowing that the claimant had two jobs for the purpose of monitoring his working time and for the management of health and safety and of performance. The claimant would be working at railway stations and in a supervisory role. He was driving to and from work and on occasion during the course of his work. The risks of doing so while working a full time day job as well as a full time night job are self-evident. I am satisfied that the claimant never told the respondent that he had this other work and indeed on the contrary, he had actively concealed it by misrepresenting the position in the TUPE information form which I have referred to above.

83. Analysis of the actual pattern of hours worked reveals even more alarming issues. Given the focus of the unfair dismissal case, the paperwork in the bundle is at its fullest in relation to August 2017. This allows a relatively full consideration of the pattern of hours apparently worked by the claimant between the 13 and the 28 August 2017. The records show that between 9pm on Sunday 13 August and 7pm on Wednesday 16 August, the claimant worked an unbroken alternating pattern of three 9-hour nightshifts for the respondent at Coventry and three 12-hour day shifts with AOS at Leamington Spa, in each case with just a 2-hour break after the night shift and a 1-hour break after the day shift. The journey from Leamington Spa Station to Coventry takes about 20 minutes by car. In other words, according to his timesheets, and at any rate according to the rotas which he was committed to work for each employer, the claimant was working 21-hour days, and of the 3 hours of spare time which he had in each 24 hour period he spent some 40 minutes of it driving.

84. On Thursday 17 August 2017, the claimant is shown as working for the respondent from 10am until 4pm and from 9pm until 6am. From Friday 18 to Sunday 20 August the he is shown as working overlapping shifts for AOS (of 9, 11 and 9 hours) and the respondent (of 9 hours on each occasion).

85. There then followed another unbroken sequence of alternating night and day shifts: between 9pm on Monday 21 August and 6am on Saturday 26 August, the claimant is shown as working in alternation five 9 hour nightshifts and four 12-hour day shifts, a total of 93 working hours in a 105 hour period, not counting the time taken to drive from one site to the other. I regard it as entirely implausible that the claimant could in fact work those hours: they simply left no time for sleep. It is more than likely either that the

claimant slept while on duty or that he had absented himself from work with the respondent from time to time. It seems unlikely that the claimant either have slept or left site while working for AOS since the records which he completed on an hourly basis show him at work and working.

86. Further, on balance, I accept the respondent's submissions that the likeliest explanation of where the claimant was on the night of the 14/15 August is that he was asleep somewhere. I shall return to this point below.

87. Even had the claimant been working all his hours for the respondent, so that he was working a pattern of consecutive 21-hour days, that was plainly not safe, nor conducive to him working effectively in what was a responsible job.

88. Overall there was a pattern of sustained gross misconduct on the part of the claimant.

89. Had I found the dismissal unfair, I would have made no award either for a compensatory award or for a basic award. Having regard to his conduct, he suffered no injustice by being dismissed, and it would not have been just and equitable for him to receive any compensatory or basic award.

Contributory fault

90. Section 123(6) ERA provides that where the tribunal finds that the claimant's dismissal was to any extent caused or contributed to by any action of his, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

91. It is not in dispute that on 14/15 August 2017, the claimant was indeed absent from work at Coventry for at least a significant part of the night. A key question is whether he went to Birmingham New Street as he said. On this question, the claimant's case was that he had gone there to deliver stores to Mr Hussain and as I have said, he has at different times variously said that he was auditing the trains cleaned by Mr Hussain and that he was assisting Mr Hussain with his cleaning. Mr Hussain no longer works for the respondent but attended the tribunal to give evidence pursuant to a witness order. His evidence was that he did not see the claimant on the night of the 14 or 15 August 2017. Indeed his evidence was that he had only ever met the claimant at Birmingham

New Street on one occasion, which was in either February or March 2017, shortly after the respondent inherited the cleaning contract and with it, the claimant as an employee. Mr Hussain worked nightshifts, with a pattern of 4 nights on and 4 nights off. His evidence and that of the claimant were irreconcilable and I prefer Mr Hussain's evidence. I did not find the claimant to be an impressive witness, but I found Mr Hussain a reliable and truthful witness. Based on Mr Hussain's evidence I am satisfied that the claimant was not at Birmingham New Street station as he claimed, and he was absent from work without permission.

92. The records show that the claimant worked for AOS for 12 hours during the day on 14 August and for 12 hours the next day, 15 August. Given Mr Hussain's evidence that the claimant was not at Birmingham New Street on the night of 14/15 August as he claimed, it is reasonable to infer that the claimant was asleep, either at home or elsewhere.

93. For these reasons I conclude that the claimant was guilty of seriously blameworthy conduct. That conduct directly led to his dismissal. Had he been unfairly dismissed, I would have reduced any compensatory award by 100% on this ground alone.

Polkey

94. If the dismissal had been unfair, the issue of **Polkey**[5] would have arisen. I would have concluded that had the respondent acted fairly, it would have dismissed the claimant in any event. A fair process would have involved speaking to Mr Hussain, at the least. I have no doubt that had the respondent spoken to him, and had otherwise acted fairly and not committed the errors of approach which I have identified, it would have concluded that the claimant was guilty of gross misconduct and would have dismissed him. Mr Hussain's evidence lent powerful additional weight to the case against the claimant. He was a credible witness with no apparent axe to grind and his account fatally undermined that put forward by the claimant.

95. Further, that dismissal would have been fair. The essence of the disciplinary charges against the claimant was that he was absent without leave and that the entry in the signing-in book which he had signed was incorrect, since it recorded him as

[5] **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

working in Coventry when he was not. Those matters were such as would amply justify dismissal, particularly given that the claimant was in a responsible supervisory role.

96. For these reasons if the claimant would otherwise have been entitled to any compensatory award, I would have reduced it to zero by applying the principles set out in **Polkey**.

Monetary claims

Holiday pay

97. It is common ground between the parties that at the date of termination of his employment, the claimant had accrued holiday pay and that some sum is owing to him in this regard. The question is, how much? That question depends entirely on whether there was a relevant agreement which provided for a leave year for the purpose of Regulation 13(3)(a) of the Working Time Regulations 1998 ("WTR"). If not, then the respondent says that in accordance with the WTR the claimant's leave year is taken to have started on 15 July, being the anniversary of his start date of employment. On that basis, the respondent would say that the claimant had accrued an entitlement to 4.84 days of holiday by the final day of his employment.

98. The claimant had no recollection of how his holiday year was calculated during the period prior to the TUPE transfer in February 2017. The respondent has no direct knowledge of that either. However at the point of the TUPE transfer the respondent was provided with a copy of a statement of terms and conditions headed "Silverlink Train Services Limited", a prior employer of the claimant, and which was provided on the basis that it represented the terms and conditions of the claimant's employment. There is no other evidence before me that these were not in fact the terms and conditions applicable to the claimant's employment. I am satisfied on the balance of probabilities that these terms and conditions did indeed form part of the claimant's contract.

99. These terms and conditions provide by Clause 10 that "the Company's holiday year is between 1 January and 31 December each year".

100. It follows that the claimant is entitled to payment in respect of accrued, but untaken holiday pay based on a holiday year running from 1 January each year. During the

hearing I gave my decision on this issue to the parties, and the parties confirmed that on the basis of this finding it was agreed that the clamant had accrued an entitlement to 22.5 days' holiday, at a daily rate of £82.28, for which he was paid. The total amount owing is therefore £1,851.30 and I make an award in that amount. This is a gross figure from which the respondent must make any applicable deductions for tax and national insurance.

Transport and storage costs

101. The next claim brought by the claimant is for breach of contract/unlawful deduction from wages in respect of an agreement which he says was made with the respondent, in particular Mr Calladine, for the keeping of cleaning materials at the claimant's home and transporting it to the respondent's sites. He claims at a rate of £15 per day for the period from February 2017 to the end of his employment.

102. When the respondent first took over the cleaning contract in early 2017, Mr Calladine asked the claimant to keep some stock at his house due to a lack of storage facilities elsewhere. However after a few weeks, a mobile team was introduced by the respondent whose function was to deliver stock of cleaning items to different sites, and the respondent arranged for storage space at Coventry station. There was thereafter no need for the claimant either to keep stock at his house or to transport it from his house to other sites.

103. The claimant says that Mr Calladine agreed that the respondent would pay him £5 per day for storing goods at his house and £10 per day for transporting those goods to different sites, payable regardless of whether in fact he did transport any goods on a particular day. Mr Calladine denies that there was any such agreement. Having heard both witnesses I prefer Mr Calladine's evidence in relation to this matter and reject the claimant's account. There was no written evidence of such an agreement. Had there been such an agreement, I would have expected the claimant with his legal background to have referred to it in writing at some point during his employment. It was worth a considerable amount to him: hundreds of pounds per month. His evidence was that he expected to be paid it at the end of each month, but no such payment was ever made. If he believed that he had the agreement with Mr Calladine of the kind that he now claims, he would surely have raised the matter of non-payment during the course of his employment. However he did not do so until after his employment ended. Still further, even if such an agreement might have made sense during the first few weeks

after the TUPE transfer, it would have ceased to make sense as soon as the mobile team came into play and storage space was obtained at the station. There would then have been some discussion between the claimant and Mr Calladine about whether the agreement should end. There is no evidence of that happening.

104. I conclude that there was no such agreement. The claimant's claim in this regard fails.

Sick pay

105. I turn finally with the question of sick pay. The claimant's claim originally was for sick pay for the days of the 8 and 9 September 2017. However having seen evidence to show that he was indeed paid for the 9 September, he limited his claim in his closing to one day's pay, for 8 September 2017.

106. The claimant was recorded in the respondent's timesheet as absent sick on 8 September 2017. He was not paid for that day. The question is whether he complied with relevant self-certification pre-conditions in order to be entitled to be paid for that day. The respondent's policies make clear that it is necessary for an individual who is absent sick to self-certify, and they give details as to how to do that and how to fill out the relevant form. The claimant accepts that he did not fill out any such form, and his evidence to me was that it was not in fact the respondent's practice, whatever its written policies may say, to require such self-certification. I do not accept the claimant's position on this point. He had little direct way of knowing what the respondent's working practice was: he told me that during the period when he worked for the respondent he had never had a day off sick other than on 8 September, and neither had anybody else in his team. I am not persuaded by his assertion that the respondent's practice differed from its written policy. I prefer Mr Foster's evidence that, in line with the written policy, self-certification is required in order for sick pay to be properly payable.

107. I conclude that there was no deduction from the claimant's wages and the claimant's claim in this regard fails.[6]

[6] Although not necessary to my decision on this part of the case, I have a further concern. It was the claimant's evidence that on 8 September 2017 he had a severe headache which lasted for 3 days and kept him off work. That account was difficult to reconcile with the documentary evidence that on both 8 and 9 September he worked 12 hour shifts for AOS. I am left with a concern about whether the true reason for the claimant's absence on 8 September was that he was genuinely ill, as opposed to (say) catching up on sleep; but I do not need to make any finding on this since my decision is based on his failure to comply with the requirement to self-certify.

Conclusion

108. The claimant's claim for holiday pay succeeds. His other claims fail and are dismissed.

Employment Judge Coghlin
16 July 2019

ANNEX A
Issues

Unfair Dismissal

(i) Was the claimant dismissed for a potentially fair reason as set out in section 98, Employment Rights Act 1996? The respondent relies on conduct.

(ii) Did the respondent conduct a reasonable investigation on conduct?

(iii) Did the respondent genuinely believe the allegations were true?

(iv) Did the respondent have reasonable grounds to believe that the allegations against the claimant were true?

(v) Did the respondent follow a fair procedure?

(vi) Did the dismissal fall within the band of reasonable responses?

Remedy

(i) Is the claimant entitled to a basic award and in what amount?

(ii) What losses has the claimant suffered and has he attempted to mitigate his loss?

(iii) Would the respondent have been able to dismiss the claimant fairly in any event? The respondent relies on matters that have come to light since the dismissal and will adduce evidence on those matters (which have been brought to the claimant's attention).

(iv) If so should the compensatory (and basic) awards be reduced accordingly, due to contributory conduct and/or *Polkey*?

(v) Should an uplift be made to any compensatory award on the grounds that the respondent failed to follow the ACAS Code of Practice?

Monetary Claims

Holiday pay

(i) What holiday entitlement had the claimant accrued at the date of his dismissal?

(ii) What holiday has been paid?

(iii) Is there a short fall (and of what amount?)

Transport and storage costs

(i) Did the claimant have a contractual right to be paid for storing cleaning materials at his house, and transporting such items?

(ii) Did he perform such acts?

(iii) Was he paid for this, if so, and is any further payment due?

Sickness pay

(i) Was the claimant off sick on 8 – 9 September 2017?

(ii) Was he entitled to sick pay and if so how much?

(iii) Was he paid his full entitlement?