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EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M Sran	**AND**	**Royal Mail Group Ltd**

HELD AT: **London Central** **ON:** **18-20 & 24 June 2019**

BEFORE: Employment Judge Brown

Members: Mr M Simon
Ms L Moreton

Representation:

For Claimant: Mr Clair, Solicitor
For Respondent: Ms L Roberts, Legal Executive

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. **The Respondent did not breach the Claimant's contract or make unlawful deductions from his wages.**

2. **The Respondent did not subject the Claimant to race discrimination.**

3. **The Respondent did not unfairly dismiss the Claimant.**

REASONS

Preliminary

1. The Claimant brings complaints of unfair dismissal, unlawful deductions from wages / breach of contract and race discrimination against the Respondent, his former employer. The issues in the claim were set out at a

Preliminary Hearing in front of Employment Judge Clark on 12 April 2019. The Claimant relies on his ethnic origins, which he describes as Indian, and on his colour, in bringing his race discrimination case. The issues are as follows.

Unfair Dismissal

(1) Whether the Claimant was dismissed for a potentially fair reason.
(2) If so, whether the Respondent acted reasonably in dismissing the Claimant for that reason.
(3) If so, whether the Claimant caused or contributed to his dismissal.
(4) If the Claimant's dismissal was procedurally unfair, whether the Claimant would have been fairly dismissed in any event.

Unlawful Deductions and/or Breach of Contract

(1) Whether the Respondent was contractually entitled to reduce the Claimant's hours from 39 to 24 per week with effect from 25 December 2017.
(2) if not, whether the Respondent was entitled to deduct wages from the Claimant from 25 December 2017 until his dismissal or alternatively, whether the Claimant is entitled to damages for breach of contract.

Direct Race Discrimination

The racial grounds on which the Claimant relies are his ethnic origins which he describes as Indian and/or his colour. He compares himself to two white English men.

The allegations of less favourable treatment are:-

(1) The Claimant's dismissal (his comparator is Mr Withers)
(2) The Respondent's refusal to grant the Claimant special or annual leave (compared to Mr Weeks)

2. The Tribunal heard evidence from the Claimant. It heard evidence from Joseph Blakiston, dismissing manager, and Lisa Turley, appeal manager. There was a bundle of documents. Both parties made oral submissions.

3. Earlier during the process of his claim, the Claimant had submitted a lengthy set of further and better particulars. The comparators in the further and better and particulars were different to those confirmed at the PHC. The Claimant's witness statement and evidence to the Tribunal did not reflect, or cover, many of the issues in the further and better particulars. The Employment Tribunal proceeded on the basis that the PHC issues and the Claimant's witness statement and evidence to the Tribunal at the Final Hearing accurately reflected the case which the Claimant wished to bring.

Findings of Fact

4. The Claimant was employed by the Respondent from 15 October 2007, page 147. Initially the Claimant was employed as a part time employee. His job title at all times was Operational Postal Grade.

5. In the Claimant's contract of employment dated 27 October 2018, clause 9.1 provided, ".. Your weekly hours of attendance will be 18 hours per week... Your hours of work will be allocated to you by your manager, however these hours may change from time to time after giving you reasonable notice", page 149.

6. On 29 February 2016 the Claimant's terms and conditions were varied. The written contractual variation said that it was made, " .. due to a temporary move from part time to full time hours". Pages 160-161. The variation was that the Claimant would work 39 hours a week.

7. The Respondent has an unauthorised absence policy, pages 87-88. This provides, "When planning to take time off from work employees should get prior authorisation from their line manager. While it is expected that an employee will notify their manager in advance of taking time off there may be occasions when this is not possible, for example sudden illness or an unexpected event. If this is the case the employee must try to make contact with the line manager as soon as practically possible".

8. The policy provides that where an employee is not at work and has not made contact, there should be two attempts to telephone them at home and, if unsuccessful, the Respondent should telephone or contact the next of kin.

9. The policy also provides, "When an employee makes contact or returns to work from an unauthorised absence their line manager should seek an explanation for their absence. Where the manager is satisfied with the reasons given for the absence they will discuss with the employee how the time off will be recorded. This could be: Sick absence, Annual holiday, Other time off (Special Leave paid or without pay) …. If the manager is not satisfied with the explanation provided by an employee for their unauthorised time off, pay should be stopped for the period of the absence. Where pay has already been withheld this should not be reimbursed. The manager should consider dealing with the absence under the Conduct Policy. Absence without authorisation is considered to be Gross Misconduct and could result in dismissal, page 88.

10. The Respondent has a Special Leave Guide which outlines types of Special Leave which can be granted by the Respondent. These include; urgent domestic leave and domestic leave, family emergency leave and dependant's leave. Dependant's leave applies to an employee who has dependants who are defined as a spouse or civil partner, child, parent, someone who lives as part of the employee's family and anyone who reasonably relies on the employee for assistance when they fall ill, pages

52.2-53.3. The special leave guide provides that requests for time off should be arranged through the employee's manager, page 52.9.

11. The Claimant had unauthorised absence on 28 May 2016. The reason recorded in the absence records for this was, "Had car accident so cannot come to work". The Claimant had another period of unauthorised leave on 9 July 2016 when the Claimant's pay was stopped, page 165.

12. A manager, Jags Chandler, counselled the Claimant on 12 July 2016 for having to failed to attend work on Saturday 9 July 2016, page 168. The Claimant's absence on 9 July 2016 was classed as unauthorised absence because it was the result of the Claimant drinking heavily on Friday night which resulted in inability to come to work on the Saturday. "Counselling" is the Respondent's term for an informal warning.

13. The Claimant told the Tribunal that he had a good absence record in the early years of his employment. The absence records for the Claimant were in the Tribunal bundle. In each of the years 2008 to 2014 the Claimant had little, or moderate, absence. The Respondent did not take any action against the Claimant regarding absences until 2016. However, in 2015, he had had 14 days of absence for various reasons.

14. On 12 December 2016 the Claimant attended work when drunk. On 13 December 2016 Mr Blakiston, a manager, counselled him about this, pages 168 and 165.

15. On 14 January 2017 the Claimant did not attend work and did not report the reasons for his absence. When he attended work on 17 January 2017, he explained that he had been in police custody and the shift manager authorised unpaid special leave for 14 January 2017, page 168.

16. After he had been in work for few hours on 17 January 2017, the Claimant's colleagues complained to managers that he appeared to be drunk, page 168.

17. The Claimant was called to a conduct hearing in respect of this, to consider an allegation of gross misconduct for "attending work on 17 January 2017 under the influence of alcohol from 06:00 hours to 11:00 hours in an unfit condition to carry out his work in a safe and effective manner."

18. On 1 March 2017 the Respondent's Early Shift Manager, Ms Faro-Rodriguez, found the gross misconduct allegation against the Claimant to have been fully substantiated and gave the Claimant a two-year serious warning effect from 1 March 2017, page 167. In the document explaining the reasons for the decision, the Early Shift Manager said that the Claimant had demonstrated ownership of his behaviour by admitting the facts and seeking support in the form of counselling, medication and having stopped drinking since the incident. She decided that a two-year serious warning would be enough encouragement to improve the Claimant's behaviour to the required standard. The Early Shift Manager concluded, "I certainly hope that Manpreet

takes this opportunity to correct his behaviour to an acceptable standard as any future reoccurrence may result in disciplinary action up to and including dismissal". Page 171.

19. On 3 June 2017 the Claimant failed to attend work. He later attended a Conduct Hearing to consider an allegation of gross misconduct for unauthorised absence. At that Conduct Hearing he admitted that he had "fallen off the wagon" and that he had not attended work because he had drunk too much, pages 171-175.

20. On 14 July 2017 the same Early Shift Manager found the allegation of gross misconduct substantiated and issued the Claimant with another two-year serious warning, effective from 14 July 2017. The Early Shift Manager ordered that the Claimant be reinstated to his 24 hours per week, part time late shift. The rationale for the decision appeared to be that the Claimant's alcohol binges did not cause him problems working on the late shift, but did on the early shift, page 171-18.

21. The Claimant had been working full time on the early shift until that point, following the contractual variation. He appealed against the outcome and, during the appeal process, he continued to work full time on the early shift. The Claimant told the Tribunal that his appeal was successful to the extent that he was permitted remain working full time on the early shift, but with the two-year warning remaining in place, page 171-10.

22. On 16 November 2017 the Claimant signed a letter to his manager saying, "I would like to go back to the late shift due to my personal reasons but could I remain on my full time contract". Page 171-20. The Claimant told the Tribunal that he was pressed by his union into signing this document because he had been late for the early shift on several occasions and his union told him that he was likely to be dismissed if he continued to be late for the early shift.

23. There was no contemporaneous evidence to support the Claimant's assertion that the union had pressurised him into signing the document. The Tribunal finds that the Claimant did sign the request and that he represented to managers that he wanted to change to the late shift.

24. The Respondent told the Tribunal that there were no full time late shift roles after Christmas 2017 and that, therefore, the Claimant was given part time hours on the late shift, pursuant to his request to move to the late shift.

25. At the Tribunal the Claimant did not dispute that there were no full time hours on the late shift after Christmas 2017. The Respondent confirmed to the Claimant in writing that, with effect from 25 December 2017, he would be moved from full time hours to part time hours, working 24 hours a week, page 161.

26. The Claimant's union representative challenged the move to part time hours on the Claimant's behalf, on more than one occasion between February

and April 2018, page 176. However, on 14 April 2018, Michael Clark, Plant Manager, confirmed to the Claimant's representative that the Claimant had been moved to part time hours, page 176.

27. In 2018 the Claimant had the following absences from work:

> 24 January 2018 - 1 day when the Claimant's car broke down; leave was granted as special leave, after the event
>
> 5-6 February 2018 – 2 days, the Claimant was given retrospective special leave because his father was unwell
>
> 12 February 2018 – 1 day, the Claimant was given special leave because he was "stuck in Brighton". The Claimant was not paid for this day and it appears that he was given special leave retrospectively
>
> 20 February 2018 – the Claimant was given special leave, unpaid, for a doctor's appointment which appears to have been granted retrospectively
>
> 9-13 April 2018 – the Claimant had unauthorised absence which was converted to annual leave
>
> 20-21 April 2018 – the Claimant was given special leave retrospectively for the reason "insurance dropping car off"
>
> 24 April 2018 the Claimant was given special leave for "car issues"
>
> 25-27 April 2018 - the Claimant was off work, sick
>
> 12 May 2018 – the Claimant had unauthorised absence. Special leave was granted retrospectively because the Claimant had builders at his house which he was attending to
>
> 4-5 June 2018 – the Claimant was given special leave retrospectively for the reason, "builder can't speak English"

28. On 11 June 2018 the Claimant's Manager, Mr O'Sullivan, counselled the Claimant about his absences and unauthorised absences. On 21 June the Claimant was given a written note, confirming the counselling. It said that the Claimant had had 25 absences and six unauthorised absences from 2010 to 2018. The note said, "I would like to point out that this is unacceptable … this sort of behaviour must stop … if this ever arises again this will be treated through the process of code of conduct", page 180

29. On Saturday 23 June 2018, 2 days later, the Claimant was due to work from 13:00 to 17:00. He failed to attend work. He did not contact the Respondent before, or during, the shift. After the shift was over at 17:09

hours, the Claimant telephoned his manager to say he had been in police custody and had not been able to attend the workplace.

30. On 29 June 2018 the Claimant attended a fact-finding interview in relation to his absence on 23 June. At the interview, he told the Respondent that, on Friday 22 June he had drunk a half a pint of beer at each of two different pubs and then had gone to a house party, where he had drunk a Coca Cola. He said that, thereafter, a police van had pulled up and bundled him into the van and that he was put into a cell, where he passed out. He said that he believed his drink had been spiked. He said he was released from the police station at 2am, when his mobile phone run out of charge. He said that he then went home to bed. By the end of the interview, however, the Claimant said that he had contacted the police station, but they had no detention records in respect of him. He said, therefore, that he believed that his drink had been spiked and that he had been hallucinating the arrest and detention at the police station, pages 183-185

31. The Claimant was provided with notes of the meeting and signed them with some amendments, page 185.

32. Mr Blakiston, Weekend Shift Manager, invited the Claimant to a formal disciplinary hearing to consider a charge of gross misconduct. The letter inviting him to the meeting said that the manager would take into account the Claimant's conduct record, including a two-year serious warning, and that, if the current allegation against the Claimant was upheld, the outcome could be dismissal without notice. The Claimant was told of his right to be accompanied, page 188.

33. The Claimant attended the disciplinary hearing, conducted by Mr Blakiston, on 2 August 2018. At this hearing, he told Mr Blakiston that he had arrived at the house party at about 2am and had a drink of Coke at about 2.30am, when his phone had run out of charge. He said that police cars arrived and, at that point, he was detained until 7am, when he was released. The Claimant said that he arrived home at 1pm and charged his phone. The Claimant said that the Early Shift Manager had advised the Claimant to go to the police and get evidence of what had happened. He said that, when he attended the police station, he was told that, if he had been arrested he would have been given paperwork and/or a bail notice. The Claimant said, however, that there was no paperwork and that Hayes station, which he had consulted, had no police cells. The Claimant said he must have been hallucinating. He reported that his GP had told him that it was likely that he had been given ketamine or LSD, but it was too late to test him for those drugs by the time he attended the GP. The Claimant said that he was a victim of having had his drink spiked, pages 191-194.

34. The Claimant was sent minutes of the meeting, page 196.

35. On 21 August 2018, at a decision hearing, Mr Blakiston told the Claimant that he had decided to dismiss him. In his conclusions, Mr Blakiston said that the Claimant was responsible for attending work on 23 June, or pre-warning

work of his non-attendance, but that he had done neither. Mr Blakiston recorded that the Claimant's defence was that his drink had been spiked with LSD or ketamine, but Mr Blakiston said that the Claimant's timeline of events did not fit with this. Mr Blakiston had consulted the Ask Frank website which advised that the effects of the drugs would not be as described by the Claimant. Mr Blakiston decided that the Claimant's account lacked credibility. He said that the Claimant had a current serious warning for two years and had been counselled about excessive absences in June, page 199. Mr Blakiston said that he had therefore decided that the Claimant should be summarily dismissed from 21 August 2018, page 200.

36. At the Tribunal, Mr Blakiston was cross-examined about his reasons for deciding to dismiss the Claimant. He told the Tribunal that he did not find the Claimant's explanation for his absence on 23 June to be credible, partly because of the lack of consistency in the two versions of his events.

37. Mr Blakiston gave extended reasons for his decision to dismiss, pages 201-204. He said that he had considered that dismissal was the appropriate sanction because the Claimant had chosen to ignore a serious warning in March 2017. The Claimant had had three unauthorised absences in 2018 and no improvement had been seen in the Claimant's behaviour, despite a counselling session after his unauthorised absence on 12 May 2018. Mr Blakistan said that he had no doubt that an award short of dismissal would not correct the Claimant's behaviour. The Claimant had had warnings that no improvement would result in conduct proceedings. He said that the disciplinary procedure had not been applied to the Claimant on the first two occasions of unauthorised absence in 2018, demonstrating the Respondent's leniency. However, the Claimant's behaviour, coupled with an existing two years concurrent serious warning, led to a finding of gross misconduct and the penalty of dismissal.

38. The Claimant appealed against that decision on 22 August 2018, page 205. On 29 September 2018 he attended an appeal hearing, page 206. The appeal hearing was by way of rehearing and was conducted by Lisa Turley, an independent case work manager. At the appeal hearing, the Claimant discussed his history of absences and he argued that his absence on 23 June 2018 should have been treated as authorised absence retrospectively. He argued that he should be referred to Occupational Health for help with alcohol issues and support, pages 208-212. The notes of the appeal hearing were sent to the Claimant.

39. On 25 October 2018 Lisa Turley dismissed the Claimant's appeal. She said the Claimant's explanation for his absence on 23 June was that he had been detained in police custody during the night, but that, when asked to produce evidence of it, the police station had no record of his detention, so the Claimant concluded that he must have been drugged and said that his memory was a result of hallucinations. Ms Turley said that the Claimant's version of events was not credible and that there was not an acceptable and credible reason for his absence. Ms Turley said that unplanned absences can be difficult to cover without notice and may incur extra costs in terms of

overtime payments. She said that the Claimant's behaviour was so serious and so unacceptable that mitigation did not provide sufficient justification for a reduction in penalty.

40. The Claimant relied on two comparators in bringing his race discrimination claim. In relation to his claim that he was discriminated against by the Respondent's refusal to grant the Claimant special or annual leave, he relied on Mr Weeks as a comparator. He said that Mr Weeks was given special and annual leave to care for his elderly mother and to deal with domestic emergencies, but that the Claimant was not. He also said that other people in the work place were given lots of time off.

41. Mr Weeks' absence record showed that he was given special leave for an urgent domestic issue on 16 March 2017 and on 27 July 2018, page 228.

42. The Claimant was given paid special leave on 20 June 2015 when his grandmother sadly passed away, and on 3-6 February 2018 when his father was unwell. He was given special leave on 22 February 2017 when his boiler needed to be replaced and on 4-5 June 2018 when he needed to deal with issues regarding building work at his home.

43. The Claimant made a general allegation about absences not being properly recorded in the Respondent's workplace, but he produced no evidence to support the allegation. The Tribunal considered that the records produced by the Respondent appeared to be detailed - recording each absence and the reason for it.

44. The Claimant contended that Jonathan Withers had had absences and unauthorised absences and was not dismissed and that Mr Withers boasted to others about the time off he was granted. The Claimant said that he had fewer unauthorised absences, but was dismissed, when Mr Withers was not.

45. On Mr Withers' absence record, Mr Withers was given special leave on 8 occasions between January and July 2018 to care for child or dependents, page 228-1. The Claimant was given special leave on 8 occasions in the same 7 month period of 2018, page 263.

46. From the written records, Mr Withers had one occasion of unauthorised absence on 29-30 October 2018. The Respondent told the Tribunal, and the Claimant did not dispute, that Mr Withers was given two years serious warning for this absence. The Claimant said that, however, this was after the Claimant had been dismissed.

47. Given that the Claimant made a generalised allegation, without evidential support, that the Respondent's records were inaccurate and, on the other hand, that the records seen by the Tribunal appeared to be accurate and detailed, on the balance of probabilities the Tribunal found that the Respondent's records were accurate.

48. The Claimant contended that Mr Blakiston should have contacted Occupation Health for advice about the effects of drugs. In evidence, Mr Blakiston said that he believed that Occupational Health was not there to give advice on such matters; rather, but that Occupational Health advised on occupational matters. He said that he had contacted the Ask Frank, helpline which was a reputable one.

49. The Claimant contended that, during the hearing on 2 August, Mr Blakiston had refused to see emails which the Claimant had sent to the Metropolitan Police. The notes of the hearing record that the Claimant said that he had contacted three police stations to ask why he had been arrested, Southall, Uxbridge and Hayes. They record that he offered to show emails in this regard. Mr Blakistan said, at the hearing, that he would ask Royal Mail Investigations to contact police stations to make further checks on behalf of the Claimant. In the disciplinary hearing outcome, Mr Blakiston said that Royal Mail Investigations Department had told him, however, that unless they were requesting information from the police regarding a criminal matter which the Royal Mail was investigating, Royal Mail could not ask for evidence from the police.

50. From the notes of the disciplinary meeting, the Claimant told Mr Blakiston that he had contacted police stations. Mr Blakiston did not contradict this, or say that he disbelieved the Claimant about his having contacted police stations. He did not find, in his outcome, that the Claimant had not contacted police stations. The notes do not record Mr Blakiston refusing to look at the emails.

51. It was put to Mr Blakiston in cross-examination at the Tribunal that there was nothing to suggest that the Claimant was lying about his version of events relating to 23 June 2018. In evidence, Mr Blakiston said several things did not add up; the spiking of the drink, timescales of the drug effects and the fact that nothing fitted the timescales that the Claimant had given about what he was doing that night and the next morning.

52. It was put to Mr Blakiston that he should have considered testing the Claimant's for drugs. Mr Blakiston said that the Claimant had recounted that his own GP had said that, after three days, the drugs would be out of the Claimant's system. Mr Blakiston's meeting with the Claimant was more than a month after the relevant event.

53. Ms Turley was cross-examined about why the Claimant was not given special leave at the time, rather than being dismissed. Ms Turley told the Tribunal that she would have to had believed the Claimant's account and that it was appropriate to classify his absence as special leave. She said that people had to give a credible account within the policy, but that was not the case in this instance.

54. The Claimant contended that there were factual errors in the appeal notes and that Ms Turley had, for example, wrongly described the Trade Union representative as a Divisional representative. The Claimant also

contended that it was not said during the appeal hearing that he had only had 11 absences in 11 years. Later in evidence, however, he was shown that the statement that he had had 11 absences in 11 years had been repeated on the Claimant's behalf on several of occasions, including in his claim form and his further and better particulars. The Claimant said that maybe his representative had said that he had 11 absences in 11 years and the Claimant had not corrected him.

55. The Claimant contended that the Respondent should have telephoned him when he did not attend for work. It was put to him in cross-examination that his phone was switched off. The Claimant said that the Respondent could have called his home telephone. However, he had just told the Tribunal, in evidence, that he did not arrive home until 5pm on 23 June 2018.

56. The Claimant told the Tribunal, on a number of occasions during his evidence, that he was not given a full time permanent contract and that he was upset about this.

57. He accepted that it was expensive and inconvenient for the Respondent when employees did not attend work and failed to give notice of their absence. He accepted that the Respondent may need to pay for cover staff in those circumstances.

Relevant Law

58. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination.

59. Direct discrimination is defined in *s13(1) EqA 2010:*
"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

60. Race is a protected characteristic, *s4 EqA 2010.*

61. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

"Because"- Causation

62. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

63. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

64. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Burden of Proof

65. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

66. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgement.

67. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in race/sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Unfair Dismissal

68. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

69. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

70. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

71. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

72. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

73. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

74. In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

75. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

76. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

Discussion and Decision

Breach of Contract Claim

77. The Claimant's contract of employment stated that the Claimant was employed part time for eighteen hours a week, clause 9.1, page 147.

78. The Claimant was granted a temporary move form part time to full time hours with effect from 29 February 2016, pages 160-161.

79. The Claimant told the Tribunal that he was not given a permanent full time contract. When the Claimant was working full time, he was working on the early shift. The Claimant asked the Respondent to move to the late shift, page 171-20. He asked whether he could remain on his full time temporary contract when he made that request. The Tribunal has accepted the

Respondent's evidence that the Respondent did not have full time hours available on the late shift.

80. On 2 January 2018 the Respondent wrote to the Claimant saying that his hours of attendance would be 24 hours part time, more hours than the 18 hours in his permanent contract page 161. The Claimant's permanent contract was for part time hours, that was not in dispute. The contractual term of the move to full time hours included a statement that the move was temporary.

81. Accordingly, on the evidence, the Tribunal found that, when the Respondent gave the Claimant part time hours on 25 December 2017, it was not breaching the Claimant's contract, because his hitherto full time hours had always been temporary and not permanent. The Claimant repeatedly said in evidence to the Tribunal that he was never given permanent full time contract.

82. As such, there was no breach of contract by the Respondent when it moved him to part time hours.

83. The rights not to suffer unlawful deductions from wages *under s13 Employment Rights Act 1996* relates to wages as defined in *s27 ERA 1996*. By *s.27*, wages in relation to the worker mean any sums payable to the worker in connection with his employment including any fee, bonus, commission or holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. The Tribunal found that the Claimant was paid in accordance with the Claimant's contract. There was no dispute that he was always paid for the hours he actually worked. Accordingly, there was no deduction from the Claimant's wages, or the wages payable to him in connection with his employment, when the Respondent paid him for the part time hours that he worked after 25 December 2017.

Race Discrimination Claim

84. The Claimant relied on two allegations of race discrimination. He said that the Respondent's refusal to grant him special leave or annual leave was race discrimination and he compared his treatment with that of Mr Weeks.

85. On the particular occasion when the Claimant was absent from work on 23 June 2018, the Respondent did refuse or decline to grant the Claimant special or annual leave retrospectively.

86. The Respondent has a policy for dealing with unauthorised absence, page 88. Under the terms of the policy, where an employee has been off work on unauthorised absence, if the manager is satisfied with the reasons given for the absence, the manager will discuss how the employee's time off should be recorded. However, if the manager is not satisfied with the explanation provided by the employee, pay should be stopped and the manager should consider dealing with the absence under the Conduct policy.

87. In the present case, the Tribunal accepted the Respondent's evidence that the managers were not satisfied with the reasons given by the Claimant for his absence. Mr Blakiston told the Tribunal that he did not find the Claimant's explanation for his absence on 23 June credible and that there were several things which did not add up. Mr Turley said that, in order for the Claimant's absence to be converted to annual leave, he would have to have given a credible reason within the policy.

88. The Claimant said that Mr Weeks was given a lot of time off, that much time off was not recorded, and that the Claimant was not afforded the same leniency.

89. The Tribunal has decided that the Respondent's records of absence were detailed and reliable. It did not accept that others, including Mr Weeks, had a lot of time off which was unrecorded. On Mr Weeks' record, he was given special leave on two occasions on 16 March 2017 and 17 July 2018. The Claimant was given special leave on numerous occasions and, in particular, to deal with urgent domestic issues on 5-6 February 2018, 22 February 2017 and 4-5 June 2018. The Respondent also allowed the Claimant unpaid special leave on 14 January 2017 when he was in police custody following an argument at the Claimant's house.

90. On the facts, the Respondent had previously allowed the Claimant special leave for domestic matters, when it was satisfied that he required that leave for domestic matters. It also allowed him special leave when it was satisfied that he was in police custody.

91. The Claimant was given at least as much special leave as Mr Weeks for urgent domestic matters.

92. On all the facts, the Tribunal was concluded that Mr Blakiston and Ms Turley were not satisfied with the Claimant's explanation for his absence on 232 June 2018 and that that was the reason that they did not convert the absence to special leave. This was nothing to do with race.

93. Moreover, the Claimant was not treated less favourably then his comparator, Mr Weeks, in the same or not materially different circumstances. The Claimant was given special leave on at least as many occasions as Mr Weeks, when managers accepted that the reason for absence came within the special leave policy. The Claimant was treated consistently with the policy on unauthorised absence, page 88.

94. The Tribunal concluded that the Respondent did not treat the Claimant less favourably than the comparator and did not discriminate against the Claimant because of race in failing to covert his absence to special leave.

95. The Claimant also contended that he was subjected to race discrimination when he was dismissed, when Mr Withers was not dismissed. Under the Respondent's unauthorised absence policy, page 88, absence

without authorisation is considered as gross misconduct and could result in dismissal.

96. At the time of his dismissal the Claimant had two live serious warnings, one given on 14 February 2017 for attending work in an unfit condition due to being under the influence of alcohol, page 167, and another given on 14 July 2017 for unauthorised absence, page 171-10. That latter warning was still live, albeit part of the sanction which had been applied, a move to the late shift, had been overturned on appeal. There were therefore two live warnings on the Claimant's record, one of which was for unauthorised absence.

97. The comparator, Mr Withers had not had any unauthorised absence until 29-30 October 2018. On that occasion, he was given a two-year serious warning.

98. When the Claimant was dismissed, he was not in the same circumstances as Mr Withers. The Claimant had two live warnings at the time. When Mr Withers had his period of unauthorised absence, he had no live warnings. Indeed, Mr Withers was treated in exactly the same way as the Claimant was for a first instance of unauthorised absence, in that he was given a two-year serious warning.

99. The Claimant was not treated less favourably than Mr Withers in the same or not materially different circumstances. The Respondent did not discriminate against him because of race when it dismissed him.

Unfair Dismissal

100. The Tribunal considered, first, whether the Respondent had shown the reason, or principal reason, for dismissal and that the reason was a potentially one. The Tribunal was satisfied that the Respondent had shown it that the reason, or principal reason, for dismissal was unauthorised absence.

101. At all relevant times the Claimant was investigated for unauthorised absence in relation to his unexplained absence on 23 June. That was the matter which was explored in the hearings and was dealt with in the letters of dismissal and appeal outcome.

102. The Tribunal then considered whether the Respondent followed a reasonable procedure before deciding to dismiss the Claimant. The Respondent acted in accordance with the ACAS Code of Practice. It invited the Claimant to an investigation and a conduct hearing. It gave him notes of the meetings. It gave him an opportunity to state his case in the meetings and in the appeal. It allowed him the opportunity to appeal.

103. The Claimant contended that the Respondent acted unreasonably in not asking Occupational Health for advice on the likely effect of drugs on the Claimant. Mr Blakiston told the Tribunal that the function of Occupational Health was to give occupational health advice, that is, advice regarding work

in the workplace. Mr Blakiston had consulted the Ask Frank website which was a reputable website and he had obtained the relevant information from that. Applying the broad band of reasonable responses, the Tribunal concluded that Mr Blakistan did act reasonably in obtaining advice from a reputable source and in concluding that the occupational health service was for advice on employees' functioning in the work place rather than about drugs outside the work place.

104. The Claimant said that the Respondent had not telephoned him twice in accordance with the Respondent's Absence Policy, when he did not attend for work. He was cross-examined on this and accepted that his phone was turned off. He also told the Tribunal that he did not arrive home until 5pm, when his shift would have been over. On the facts, the Tribunal concluded that, the Respondent telephoning the Claimant would have made no difference to the outcome. It would have not received any response from the Claimant, had it telephoned him.

105. The Claimant contended that the Respondent had not looked at emails on the Claimant's phone, which showed that he had contacted the police. However, Mr Blakiston did not disbelieve that the Claimant had contacted the police after 23 June. It was reasonable for the Respondent not to look for further evidence of something which the Respondent had already accepted.

106. It was put to Mr Blakiston that he should have considered testing the Claimant for drugs. The Tribunal accepted that Mr Blakiston acted reasonably in not doing so when the Claimant himself said that his GP had advised that the drugs would have left the Claimant's system within three days and Mr Blakistan met with the Claimant a considerable time later.

107. In his witness statement, the Claimant said that, because he had a known problem with alcohol, Mr Blakiston should have done more to help. However, the Claimant was not saying at the time of his dismissal, or at the Employment Tribunal, that his absence on 23 June 2018 was caused by excessive alcohol consumption or alcoholism. He was very clear at all times that he had only drunk two half pints the night before his absence. The Tribunal concluded that it was therefore reasonable for the Respondent not to investigate an explanation for his absence which the Claimant was not putting forward. The Claimant had had absences for many different reasons in 2017 to 2018 and it was not appropriate for the Respondent to assume that, on this occasion, there was one particular alternative reason which it needed to investigate.

108. The Tribunal then considered whether there was reasonable evidence on which the Respondent could conclude that the Claimant was guilty of unauthorised absence. On the evidence, it was clear that the Claimant had not attended work and did not contact work any time during his shift. The Tribunal concluded that there was reasonable evidence that he had not given an acceptable, or credible, reason for his absence. He had given two different explanations; that he had been arrested and, also, that his drink had been spiked. The Tribunal accepted, from the documents and the Respondent's

evidence, that his timeline of events, which changed during the various accounts that he gave, was very confused and had a lot of unexplained gaps. The Tribunal concluded that the Respondent was reasonable in disbelieving the Claimant's explanation.

109. The Tribunal therefore went on to consider whether dismissal was a reasonable response. The Tribunal concluded that dismissal was well within the band of reasonable responses to the misconduct in question. The Claimant had two live warnings, including one for unauthorised absence. He had been counselled (or warned) in the days immediately prior to his absence regarding unauthorised absences. The Claimant did not provide a credible reason for his absences under the Respondent's policy. The policy warned employees that unauthorised absence could be seen as gross misconduct and could result in dismissal. The Claimant accepted that it was expensive for the Respondent to employ cover staff where employees were absent. In all those circumstances, it was wholly reasonable to dismiss the Claimant for this unexplained and unauthorised absence.

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Employment Judge Brown

Dated:18th July 2019

Judgment and Reasons sent to the parties on:

22/07/2019

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For the Tribunal Office