EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Cottrell	**v**	NFT Distribution Operations Limited

Heard at: Cambridge **On:** 22 July 2019

Before: Employment Judge Foxwell

Appearances
For the Claimant: No attendance
For the Respondent: Mr T Welch (Counsel)

JUDGMENT

The Claimant's claims of unfair dismissal, notice pay, unlawful deduction from wages and for failure to pay accrued holiday pay are not well-founded and are dismissed.

REASONS

Introduction

1. The Claimant, Mrs Eva Cottrell, was employed by the Respondent, NFT Distribution Operations Limited, between 1 November 2013 and 7 October 2016 when she was summarily dismissed for alleged gross misconduct.

2. Having entered early conciliation through ACAS on 23 December 2016, on the same day the Claimant presented claims of unfair dismissal, breach of contract as to notice, for unpaid wages and for unpaid holiday pay to the Tribunal. An issue which arose subsequently is whether this claim included complaints of automatic unfair dismissal or of being subjected to detriments for making public interest ("whistleblowing") disclosures. At a hearing on 4 May 2017 Employment Judge Moore decided that no such complaints had been made. This Judgment was sent to the parties on 15 May 2017 and, following a request from the Claimant, written reasons were sent on 25 July 2017.

3. The Respondent filed a response denying the claims. It asserted that the Claimant had been fairly dismissed for gross misconduct in that she had failed to follow a reasonable management instruction. It also claimed to have paid her her full entitlements to wages and holiday pay at the time of her dismissal.

The Claimant's application for a postponement and for further case management orders

4. This case has had a protracted procedural history which I shall not recite in full here. It suffices to state that, further to a direction from Regional Employment Judges Byrne, notice of a 2-day final hearing at Cambridge County Court on 22 & 23 July 2019 was issued, dated 9 November 2018. One of the Claimant's complaints is that she says that she did not receive this notice until 28 February 2019; in her most recent letter to the Tribunal (19 July 2019) the Claimant alleges that this renders the listing "null & void" (I shall return to this below).

5. On 23 June 2019 the Tribunal administration wrote to the parties at Employment Judge Ord's direction asking them to confirm that the case was fully prepared for final hearing. The 23 June 2019 was a Sunday but I can see from the Tribunal's file that Judge Ord gave his direction on Tuesday, 4 June 2019. It is, unfortunately, not uncommon for there to a be a delay in the administration actioning judges' instructions because of the current volume of work in the Employment Tribunal and, for the same reason, administrative staff often work overtime at weekends.

6. Both parties replied promptly to the Tribunal's letter. The Respondent confirmed that it was ready for the hearing. The Claimant did not address this question directly in her letter of 24 June 2019, rather she queried whether judges and administrative staff work on a Sunday. She also challenged the appropriateness of Judge Ord case managing this claim because he had dealt with another claim in which she was involved.

7. On 10 July 2019 (received 12 July 2019) the Claimant wrote to the Tribunal asking for a postponement of the final hearing due to start on 22 July 2019. She requested that a one-day hearing be listed instaed to make new case management orders. She suggested that this was necessary because of the number of witnesses she wished to question (9 in total, including the Respondent's CEO, none of whom the Respondent had intended to call) and to deal with her whistle-blowing claim.

8. The Claimant's letters of 24 June and 10 July 2019 were referred to Employment Judge Kurrein who refused the application for a postponement. In a letter emailed to the parties on 18 July 2019, he drew their attention to Judge Moore's ruling in 2017 about whistle-blowing complaints and expressed the view that there was nothing to show that case management remained outstanding (a little confusingly, he referred to the Claimant's letters of 24 June and 10 July 2019 by their date of receipt, 26 June and 12 July respectively, but the references will have been clear to the parties).

9. Judge Kurrein's letter crossed with the Claimant's own of 17 July 2019 in which she reiterated her request for a postponement of the final hearing and asked for case management to be dealt with in her absence. On 19 July 2019 she wrote to the Tribunal alleging that the notice of final hearing was "null & void" because of when she alleges she received it; she did not mention the Tribunal's email of 18 July 2019 in this letter but I think it likely that she had seen it and this was her response.

10. The Claimant did not attend the final hearing. I asked the clerk to telephone the mobile phone number given on her claim form at about 10.20am to see whether she was on her way but held up. There was no response. I waited a further 20 minutes before starting the hearing (during which time I was reading the witness statements, including the Claimant's).

11. At the commencement of the hearing, I considered whether to postpone it as requested by the Claimant or to proceed in her absence. I decided to proceed for the following reasons:

11.1 Taking the Claimant's case at its highest, she has been aware of the final hearing dates since the end of February 2019 which had given her sufficient time to prepare.

11.2 The Claimant did not apply to postpone until 10 July 2019, shortly before the hearing was due to start. Notably, she did not apply for a postponement in her letter of 24 June 2019.

11.3 Judge Kurrein had dealt with the applications in her letters of 24 June and 10 July 2019 and there had been no material change in circumstances since.

11.4 The Claimant's claim that further case management was required because of her whistle-blowing claims made no sense when Judge Moore had ruled that there were no such complaints before the Tribunal (there is no evidence of a successful appeal against this decision which is, therefore, binding).

11.5 Additional time was not required for the Claimant to question 9 witnesses who were not going to attend the hearing in any event. There was no evidence of any application for witness orders in respect of them and it was difficult to see how any could give relevant evidence in any event.

12. I chose not to exercise my power under rule 47 of the Tribunal's Rules of Procedure 2013 to simply dismiss claims for non-attendance, rather I decided the claim on the evidence presented which included the Claimant's original Grounds of Claim, her witness statement, her list of documents and schedule of loss. I also considered a list of alleged disclosures in case they contained information relevant to the complaints before me.

13. I heard evidence from Mr Michal Maszotta-Mazur, the dismissing officer, and Mr Jon Old, the first appeal officer, on behalf of the Respondent. Mr Maszotta-Mazur is an Operation Manager at the Daventry depot where the Claimant was based, and Mr Old is the Manager of the Respondent's Bristol depot. I did not hear from the second-tier appeal officer, David Leighton, who is a Warehouse Director, but I read his decision letter (pages 231-232).

14. In addition to this evidence I considered documents in a bundle comprising 247 pages. References to page numbers in these Reasons relate to this bundle.

15. Finally, I heard closing submissions from Mr Welch. During the course of these Mr Maszotta-Mazur was recalled to give some brief additional evidence relating to the claim for unpaid wages and holiday pay.

The legal framework

Unfair dismissal

16. In any case where an employer dismisses an employee, it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. It suffices to state that misconduct is a potentially fair reason for dismissal.

17. If the Tribunal is satisfied that misconduct is the reason for dismissal, it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in section 98(4) of the Act which provides as follows:

> *"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."*

18. There is no burden of proof on either party in respect of this.

19. The test of fairness does not permit the Tribunal to decide what it might have done had it been making the decision to dismiss (*London Ambulance Service NHS Trust v Small [2009] IRLR 563*). On the contrary, what the Tribunal must do is consider the reasonableness of the Respondent's decision and decision-making process. In the context of a conduct dismissal it is well established that the questions a Tribunal must consider are as follows (see *British Homes Stores v Burchell [1978] IRLR 379* as approved by the Court of Appeal in *Weddell & Co Ltd v Tepper [1980] ICR 286*):

19.1 Did the employer genuinely believe that the employee was guilty of the conduct alleged against her?

19.2 Did the employer have reasonable grounds for that belief? Important components of this are the existence of a fair procedure and an adequate investigation.

19.3 If the Tribunal is satisfied of those matters on the evidence before it, the final question is whether the decision to dismiss fell within the band of reasonable responses of an employer (see *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*).

20. Furthermore, when the Tribunal approaches questions such as the adequacy of the procedure or investigation it must also apply the band of reasonable responses test (see *Sainsbury's Supermarkets Limited v Hitt [2003] ICR 111*); it is certainly not a *'one size fits all'* approach to these matters, although the Tribunal will have regard to the ACAS Guidelines on Discipline and Grievances at Work and to any relevant workforce agreement. The focus of the Tribunal's enquiry is, therefore, on the reasonableness of the employer's decision-making process when measured against a range of approaches that could be open to different employers looking at the same facts as they were reasonably believed to be at the time (see *Devis v Atkins [1977] ICR 662*).

21. The "band of reasonable responses" test is well-established in the law of unfair dismissal. The test requires a Tribunal to treat with respect the conclusions of an employer who has concluded on reasonable grounds that misconduct has occurred but the band is not infinitely wide: the test of fairness requires a Tribunal to decide whether in dismissing the employer has acted reasonably or unreasonably "in accordance with equity and the substantial merits of the case" (see *Bowater v NW London Hospitals NHS Trust [2011] IRLR 331* and *Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677*). In establishing the parameters of the band of reasonable responses a Tribunal must walk a narrow line between an assessment of the evidence in accordance with the test of fairness and what has been termed the "substitution mindset".

22. A relevant consideration in assessing whether a disciplinary investigation was reasonable in its scope (or even necessary at all) is whether the employee has admitted the relevant misconduct (*RSPB v Croucher [1984] ICR 604*).

23. No special legal principles apply to dismissals where the misconduct is said to relate to a breach of health and safety rules (*Newbound supra*).

24. It is irrelevant to all of these questions whether the Claimant actually did what was alleged against her but, if the Tribunal is satisfied that the dismissal is unfair, what the Claimant did is relevant to the issue of contributory fault as the Tribunal must consider whether any compensation should be reduced because of the Claimant's own blameworthy conduct.

Breach of contract

25. In this case the claim of breach of contract as to notice is contingent upon the reason for dismissal. If the reason is an act of gross misconduct that will be a repudiatory breach of contract by the Claimant entitling the Respondent to dismiss without notice; in any other circumstance she will be entitled to contractual notice (or the statutory minimum if greater). The question whether a repudiatory breach of contract has occurred is to be assessed objectively by the Tribunal on the evidence; it is not a question of reasonableness nor is the subjective belief of either party a factor.

Unpaid wages

26. "Wages" are defined in section 27 of the Employment Rights Act 1996 as sums payable to a worker in connection with her employment. An employer must not withhold wages properly due to an employee or worker unless the deduction is authorised by statute (for example to pay tax or National Insurance) or a worker has agreed to the deduction in writing in advance.

27. It is for an employee to prove that the sums claimed as unpaid wages are sums payable to her in connection with her employment.

Holiday pay

28. An employee's right to a payment for accrued but untaken annual leave is contained in regulation 14 of the Working Time Regulations 1998. Sometimes an employee may enjoy an independent contractual right to such a payment but this depends on the terms of her contract of employment. The statutory right relates only to leave accrued in the current leave year (subject to exceptions not applicable to the facts of this case).

29. It is for the employee to show that she has not been paid her full entitlement on her employment ending but Tribunals recognise that employers generally keep records of these matters so in practice there can be an evidential burden on them when it appears that there may have been an underpayment in respect of accrued but untaken holiday.

Findings of fact

30. I make the following findings on the balance of probabilities.

31. The Claimant was employed by the Respondent as a warehouse operative at its depot in Daventry. This is a large site with about 500 directly employed staff and 100 agency workers. The Claimant had begun working at the site in February 2012 as an agency worker but was taken on as an employee in November 2013.

32. On 12 August 2016 the Claimant was suspended by Steven A'Hara, Acting Operations Manager, pending a disciplinary investigation of allegations relating to the Respondent's social media and dignity at work policies. While

suspension is a neutral act in disciplinary terms, the Claimant describes feeling humiliated by this and I accept her evidence about this.

33. It is common ground that on 5 September 2016 Steven Hunt, the Transport Manager, spoke to the Claimant by telephone to tell her to return to work the following day, 6 September 2016. Mr Hunt's contemporaneous account of this call is at page 124; he says that he told the Claimant to return to work the following day and that she would be issued with an outcome letter from the recent disciplinary process at the beginning of her shift. The Claimant's response was to say that she did not trust Mr Hunt and would not return to work until she had received written confirmation that her suspension was at an end. Mr Hunt told the Claimant that there would be further implications if she did not follow his instruction.

34. In view of what the Claimant had said to Mr Hunt, the Respondent took the precaution of sending the outcome to the August disciplinary proceedings (a written warning) by recorded delivery on 5 September 2018, although the Claimant did not receive this until 8 September 2018. I am not concerned with the substance of the August 2016 disciplinary process in this decision; it was simply the backdrop to the events which led to the Claimant's dismissal.

35. The Claimant did not report for work on 6 September 2019. A further letter, dated 6 September 2016, was sent to her by Simon Flavell, an Operations Manager, saying that she was absent without leave. The Claimant telephoned Mr Flavell on 7 September (a Tuesday); his contemporaneous note of their conversation is at page 127. The Claimant was adamant that she would not return to work until she had received written notification that her suspension was lifted. Mr Flavell told the Claimant that her absences were not authorised and would be unpaid.

36. The Claimant reported for work on her next working day, which was 12 September 2016. The Claimant was handed a letter that day requiring her to attend an investigation meeting the following day to consider whether she had failed to follow a reasonable management instruction by not reporting for work on Monday, 6 September 2016.

37. The investigation was done by Stefan Gallo, a Warehouse Shift Manager. He met the Claimant on 13 September 2016 and the notes of this meeting are at pages 140-143. The Claimant accepted in this meeting that she had been told to return to work by Mr Hunt in a call on 5 September 2016 but she did not accept that it was a reasonable management instruction.

38. Mr Gallo's investigation summary report (page 144) recommended that the matter be referred to the disciplinary process as he was satisfied that there was evidence of failure to follow a reasonable management instruction.

39. Mr Maszotta-Mazur was appointed to deal with the disciplinary hearing. He wrote to the Claimant on 26 September 2016 inviting her to a meeting on 29 September 2016. He said that copies of the evidence gathered in the investigation would be sent to her home (there is no evidence to suggest that this

did not happen). He also told the Claimant of her right to be accompanied by a workplace colleague or trade union representative. He also warned the Claimant that a possible outcome might be summary dismissal for gross misconduct.

40. The hearing scheduled for 29 September 2016 had to be put back to 6 October 2016 by Mr Maszotta-Mazur for business reasons. Nothing turns on this change.

41. The Claimant was not accompanied at the disciplinary hearing. Mr Maszotta-Mazur had two people from HR with him, one simply to take notes. The notes are at pages 170-179. The Claimant did not dispute receiving a call from Mr Hunt on 5 September 2016 telling her to return to work but she characterised this as harassment and a breach of data protection on the basis that he should not have been given her personal phone number. She did not accept that it was reasonable to be asked to return to work over the phone and alleged that it was a breach of the law.

42. Mr Maszotta-Mazur convened an outcome meeting on 7 October 2016 in which he told the Claimant that he found the allegation established and that it was a failure to follow a management instruction which warranted summary dismissal for gross misconduct.

43. The Claimant was notified of a right of appeal which she exercised by letter dated 11 October 2016 (185-194). Mr Old was appointed to hear the appeal; he was selected as a manager from a different region with no prior knowledge of, or relationship with the Claimant. The appeal hearing took place on 25 October 2016. The Claimant attended with a friend but, as this was not something expressly permitted in the Respondent's disciplinary procedure, the friend was not allowed to attend the meeting. The Claimant was offered, but did not take up a postponement to obtain another supporter from her former workplace colleagues (she is not a union member). Once again, the basic facts were not in dispute: the Claimant accepted that she had been told to come back to work by Mr Hunt and had declined to do so until she had received written confirmation of this.

44. Mr Old set out his appeal decision in a letter dated 6 December 2016. He identified six grounds of appeal, some of which related to the earlier disciplinary process in August 2016. He did not uphold any of them and dismissed the appeal.

45. The Claimant exercised a right to a second stage appeal and attended a stage 2 appeal hearing before Mr Leighton on 28 December 2016 (notes are a pages 228-230). Mr Leighton dismissed the appeal by letter dated 3 January 2017.

46. The Claimant received her final salary payment on 25 October 2016. This included a payment of £518.51 for accrued but untaken holiday.

Conclusions

Unfair dismissal

47. My impression is that the Claimant considered that she had been unfairly targeted for disciplinary action for some while and this dismissal was simply the culmination of this. I have seen no evidence of this; at its highest there were two disciplinary processes in quick succession but the second resulted from the Claimant's response to the first.

48. I am satisfied on the evidence that the reason for dismissal was misconduct and that the events of early September 2016 were not simply a pretext for some other reason. The essential facts underlying the allegation of a failure to follow a reasonable management instruction were not disputed by the Claimant.

49. There was an adequate investigation and a fair procedure.

50. I questioned the two decision makers before me on their reasons for dismissing rather than taking some lesser course. Mr Maszotta-Mazur told me that he concluded that summary dismissal was warranted because the Claimant had been in contact with two senior managers on 5 and 7 September 2016 who had made it clear what the consequence of failing to report to work would be. As far as the Claimant's objection to being contacted by phone and insistence on a letter were concerned, he said that it was reasonable to contact workers by phone and this was necessary in a business the size of the Respondent's where workers work complex shift patterns. He said too that it was difficult to understand the context of the Claimant's objection when she had said that it was "ridiculous" to contact her by phone or that it was in breach of the Respondent's procedures or British law (neither being the case). Mr Old said his reasons were the same as Mr Maszotta-Mazur's. I accepted their evidence; they both presented as thoughtful witnesses giving balanced evidence. I did not hear from Mr Leighton but his written decision followed the same lines as Mr Maszotta-Mazur's and Mr Old's respectively.

51. I noted that paragraph 10.4 of the Respondent's Attendance Management Policy says:

> *"The extent of the absence without leave is immaterial and you will be subject to the disciplinary procedure and may be subject to summary dismissal".*

52. I noted that the Respondent's disciplinary procedure identified *"prolonged unauthorised absence"* as potential gross misconduct at page 26 but did not think that 2 days unauthorised absence could reasonably be said to fall within this definition. I also noted the example of *"offences which by its nature flagrantly contradicts your responsibilities"* and was satisfied that what the Respondent's witnesses had described fell within this. In any event such lists in disciplinary procedures are not exhaustive.

53. For these reasons, I find that the decision to dismiss fell within the band of reasonable responses of an employer and that the Claimant's dismissal was fair.

Notice pay

54. I find on the evidence that the Claimant refused a reasonable management instruction and that this was a repudiatory breach of contract by her entitling the Respondent to dismiss without notice.

Unpaid wages

55. I looked for evidence relating to this claim. All I could find was a reference in the Schedule of Loss (repeated in the Claimant's list of documents) to instances in 2015 and 2016 when the Respondent had failed to deduct sufficient tax at source (page 5 of the Schedule and paragraphs 10 and 11 of the list). If accurate, this allegation did not appear to be a deduction by the Respondent of an amount lawfully due to the Claimant. It was impossible to discern the basis of this allegation from the evidence presented in any event. This claim fails on the facts.

Holiday pay

56. The Claimant acknowledged receipt of £518.51 on account of holiday pay but appears to claim a further 16 days' pay in an unquantified amount. I asked for some additional evidence on this and Mr Maszotta-Mazur told me that workers working the same pattern as the Claimant accrue 1.4 days holiday at the end of each month in a holiday year beginning on 1 April. In addition, they are entitled to 8 days representing Bank holidays; these can be taken on or after each holiday in question (because of shift working). Accordingly, he said, the Claimant would have a full annual entitlement of 24 days. The Claimant had accrued 8 leave days and 5 bank holidays by the time of her dismissal, some 6 months in to the holiday year, a total of 13 days. Mr Maszotta-Mazur told me that her daily rate was £93.05 gross, which would give a total of £1,209.65 for accrued holiday pay, assuming the Claimant had taken no holiday (including Bank holidays) since the beginning of that year. I think that that is improbable and, once Bank holidays are removed from the calculation, the amount reduces to £744.40, much closer to what was paid. In these circumstances I think that the amount paid is probably correct. The Claimant has adduced no evidence to the contrary.

Summary

57. For these reasons the Claimant's claims are dismissed.

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Employment Judge Foxwell
Date: 22/7/2019

Sent to the parties on: .....

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For the Tribunal Office