EMPLOYMENT TRIBUNALS

Claimant: **Mr D Gayle**

Respondent: **Gavin Jones Limited**

Heard at: **London South** **On:** **5 & 6 September 2019**

Before: **Employment Judge Cheetham QC**

Representation

Claimant: Ms E Howlett (lay representative)
Respondent: Mr P Chadwick (consultant)

JUDGMENT

1. The Claimant's summary dismissal for gross misconduct was fair and the claim for unfair dismissal is therefore dismissed.

2. The claim for unauthorised deduction of wages is also dismissed.

REASONS

1. This is a claim by Daniel Gayle, the Claimant, against his former employer, Gavin Jones Limited, which was brought on 21 December 2017.

2. At the start of the hearing and at various subsequent points, we clarified and agreed the issues.

3. First, there was an allegation of unfair dismissal:

(i) What was the reason for the dismissal? The Respondent contended that it was conduct, whereas the Claimant believed it to be redundancy.
(ii) In the event that this was a conduct dismissal, did the Respondent have a genuine belief in the Claimant's guilt, based upon reasonably held grounds, following a proper investigation?
(iii) Was dismissal a sanction reasonably open to the Respondent?
(iv) Was the dismissal also procedurally fair? The Claimant contended that there was no proper investigation.

4. Much harder to identify and agree was the Claimant's claim for unauthorised deduction of wages. In its final iteration (as provided by Ms Howlett on the second day of the hearing), it also included a claim for unpaid holiday pay. As far as I could understand the claim, it was as follows:

(i) 7 days' unpaid holiday in respect of 7 – 11, 14 & 15 December 2015;
(ii) 17 days' holiday "used for this period in December 2015";
(iii) "4 days used in December 2015 shown on December 2015 payslip";
(iv) 10 days holiday "used in December 2015 shown in January 2016";
(v) 3 bank holidays in the Christmas/New Year period 2015/2016;
(vi) 1.12.15 December "pay deduction when he was at work";
(vii) Overtime deducted: 19 hours
(viii) "Deduction of leave for no pay for December 2015".

5. At a glance, one could see the difficulty with this claim, which is that (a) as a series of deductions, it ended in January 2016 (apart from item (vii)) and was therefore out of time; (b) in any event, it seemed to relate to a total of 41 days within a period of about 31 days; and (c) at the same time as making this claim, Ms Howlett said that there was no claim for unpaid holiday pay.

6. Unclear as the claim was, it became obvious that it would be quicker to hear the evidence and make the necessary findings of fact, rather than seek to refine the claim further.

7. I heard evidence from the Claimant and, for the Respondent, from Mr Neil Attride (the dismissing officer) and Mrs Nicola Prior (HR Manager).

Findings of fact – the Claimant's dismissal

8. The Respondent is a company that manages a number of sites in London and the South East, where it carries out landscape construction work and also in some cases maintenance work. It employs between 4 and 60 people on each site. The number of operatives on site will vary, depending upon the main contractor's programme for the construction. Each construction project has a programmed end date and, when that is reached, all operatives are moved to a new site.

9. The Respondent works with a company called Lend Lease at Elephant Park in London and has done since October 2014. Under its contract, it is required to employ local unemployed people through an organisation called Southwark Works, which is how the Claimant came to be employed by the Respondent. His employment started on 19 January 2015.

10. In January 2016, the Claimant was given a final written warning for being absent without good reason. Although that warning had lapsed by the time of the matters that gave rise to his dismissal, it meant that the Claimant knew that absences without good reason were something that the Respondent took seriously and that they were likely to lead to a sanction.

11. The evidence suggested that the Claimant's subsequent absences were indeed frequent, although he did on each occasion contact his employer to notify them that he would be late or why he was absent. Therefore the Respondent tolerated this behaviour, although I accepted Mr Attride's evidence that the obligation on the Respondent to employ local unemployed people worked very much in the Claimant's favour.

12. On 29 August 2017, the Claimant contacted his supervisor Mr Potop to say he would not be a work. However he also did not attend for work on 30, 31 August or 1 September without making any contact with his employer. This led to a meeting on 5 September with Mr Attride, attended by the Claimant and his colleague Joe Whelan. By that time Mr Attride had sent a letter to both employees (because Mr Whelan had been absent also) explaining that this absence without contacting anyone was a disciplinary matter, which could amount to gross misconduct and lead to dismissal. At the meeting the Claimant said he had not received that letter, so Mr Attride explained everything to him.

13. Importantly, the Claimant did not dispute that he had been absent and did not provide any evidence to show that he had made contact with his employer to explain his absences on those three days. The reason this is important is because there was no need for Mr Attride to carry out any further investigation. In fact, Mr Attride candidly accepted that, under the Respondent's policies, it would have been preferable for another person to be involved, but I did not find, in the particular circumstances of this case, that it made any difference.

14. At this meeting, Mr Attride had a discussion with Mr Whelan, who had not been employed for very long and who he knew had a young family. Mr Attride was concerned that, if Mr Whelan was dismissed, he would find it difficult to obtain benefits, which would have a serious impact on him and his family. Therefore he suggested to Mr Whelan that he might be better off resigning rather than running the risk of dismissal. I found that this was a reasonable thing for him to do in the circumstances and that it was motivated by good intentions. Kit did not suggest that the Claimant's subsequent dismissal was pre-determined.

15. In his oral evidence and for the first time, the Claimant said that he must have been ill on 30, 31 August and 1 September. This was not plausible, as he would have no doubt mentioned this to Mr Attride at the time. The Claimant does unfortunately suffer from anxiety, but there was no suggestion that this prevented him from phoning in or texting if he was going to be absent, as he had done many times before.

16. The Claimant was summoned to a disciplinary hearing, which took place on 18 September (after two postponements at the Claimant's request) and was chaired by Mr Attride. There was little dispute over the absences and, although the Claimant believed he had a valid reason for his absences, there was no evidence that the Respondent had been notified on those days. The meeting notes show that the Claimant was given every opportunity to explain himself.

In terms, the Claimant accepted what he had done. Mr Attride took into account the Claimant's poor attendance and the likelihood of this happening again. However, the critical feature was the non-notification and he decided this amounted to gross misconduct and he summarily dismissed the Claimant. The reason given for dismissal was, "unauthorised absence without good reason".

17. It was suggested in evidence by the Claimant and in cross-examination of the Respondent's witnesses that the real reason he was dismissed was because of a shortage of work at Elephant Park. However, there was no evidence to support this and I accepted Mr Attride's evidence that work at Elephant Park continued into 2019.

18. The Claimant brought an appeal on the ground that he had not been dismissed, "for a fair or real genuine reason". He was invited to attend an appeal meeting, which he did not attend; the meeting was re-scheduled, but the Claimant then declined to attend. He told me that this was because he had been sent his P45.

Findings of fact – the Claimant's pay

19. It was never clear what exactly were the parameters of this claim. On two occasions, Ms Howlett told me that the Claimant accepted that he had been paid for all his holidays, but the final iteration of the deductions claim still included unpaid holiday.

20. This claim mostly related to the December 2015 and January 2016 pay slips. The Respondent's policy, not unreasonably, was not to pay employees if they did not turn up to work without authorisation. On the pay slips, this was recorded as "LNP" (Leave No Pay) and appeared as a deduction.

21. Where the Claimant's confusion arose was from the way the Respondent recorded holidays on the pay slips. These were also shown as a deduction from pay, marked "Salary Adjustment". However, they were then separately categorised as "annual holiday" or "bank holiday pay".

22. This explained the December 2015 and January 2016 payslips and therefore it also resolved the claim for unauthorised deductions. There were none and the Claimant and his representative had simply misunderstood the way the Respondent (or its payroll company) categorised payments. Deductions related either to days that the Claimant had not attended work without authorisation or to annual leave, which was deducted and then credited under a different heading.

23. As to the overtime claim, again this was based upon a misreading of the relevant pay slip.

Submissions

24. I heard submissions from both representatives, which I need not set out, save to record Ms Howlett's acceptance that, when it came to the unauthorised deductions claim, the Clamant was unable to prove anything.

Conclusions

25. First, the Respondent established that the reason for the Claimant's dismissal. There was no evidence at all to suggest that the reason was redundancy, as contended by the Claimant

26. Secondly, there can be no doubt that the Respondent was entitled to treat the Claimant's non-attendance in circumstances where he had not provided a reason as a serious matter. There was no dispute that he did not attend on those particular days and no evidence that he had tried to make contact with his employer. In those circumstances, it was entirely reasonable for the investigation to be cursory; there was nothing further to investigate.

27. The Respondent, in my judgment, had been very tolerant of the Claimant's absences previously, but his (lapsed) final written warning for being absent without good reason must have made it clear to him that providing a reason and notifying his employer was where the line was drawn. Plainly, the Respondent had good grounds for concluding that, having crossed that line on these occasions, his conduct amounted to gross misconduct entitling them to dismiss the Claimant summarily.

28. The Respondent followed a fair procedure. It was argued that Mr Attride as investigator should not have held the disciplinary hearing, as per the Respondent's own policies. Normally, that would be a strong argument, but in circumstances where the investigation was essentially based upon the Claimant's admission, I cannot see that it made any difference.

29. In all the circumstances, the Claimant's summary dismissal for gross misconduct was fair.

30. Turning to the claim for unauthorised deductions, the findings of fact make it clear that this claim is based upon a misunderstanding of the Respondent's pay recording system. There was no evidence to suggest there had been any deductions, as Ms Howlett recognised in her closing submissions and that claim must fail also.

Employment Judge Cheetham QC

Date 3 October 2019