# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Aford

**Respondent:** Manchester Breakdown Services Limited

**Heard at:** Manchester **On:** 30 September 2019
5 November 2019

**Before:** Employment Judge Phil Allen
(sitting alone)

**REPRESENTATION:**

**Claimant:** Miss S Quinn (Solicitor)
**Respondent:** Mr A Craven (Solicitor)

# JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant was unfairly dismissed by the respondent on 14 February 2019. The complaint of unfair dismissal is therefore upheld.

2. It would be just and equitable to reduce any relevant award to be made to the claimant in accordance with *Polkey* principles by 20%.

3. It would be just and equitable to reduce any relevant award to be made to the claimant as a result of his contributory fault by 25%.

4. The claimant was provided with written particulars of employment and therefore his claim under section 38 of the Employment Act 2002 is not upheld.

5. The claimant was wrongfully dismissed in breach of contract, and is entitled to damages for breach of contract equivalent to eight weeks notice.

6. The respondent did make unauthorised deductions from the claimant's wages in respect of one day's pay.

7. The claimant has been paid for all pay due in relation to annual leave, and accordingly his claim for additional payments due on termination for annual leave is not upheld.

# REASONS

## Introduction

1. The claimant was employed by the respondent from 15 April 2010 until his employment ended in January or February 2019. The claimant says that he was dismissed by the respondent either at a meeting on 8 January 2019, or on 9 January, or on 14 February or on 22 February. The respondent says that the claimant resigned by his conduct following the meeting on 8 January 2019 and in particular by being absent from work. The case is primarily about whether or not the claimant resigned or was dismissed, and, if he was dismissed, about the fairness of his dismissal.

## The Issues

2. The issues were confirmed at the start of the hearing and, as they needed to be determined, were as follows:

(1) Was the claimant dismissed and, if so, what was the date of dismissal?

(2) If the claimant was dismissed, what was the principal reason for dismissal? The respondent relies upon conduct, having confirmed at the start of the hearing that they were not arguing that the dismissal was by reason of redundancy.

(3) If the dismissal was for conduct, was it fair in accordance with section 98(4) of the Employment Rights Act 1996?

(4) If the respondent failed to follow a fair procedure, but the reason for dismissal was fair, would the claimant have been dismissed had a fair procedure been followed? (Applying the principles in *Polkey*)

(5) Did the claimant by blameworthy or culpable actions cause or contribute to his dismissal to any extent and, if so, by what proportion if at all would it be just and equitable to reduce the amount of any award?

(6) Has the respondent failed to provide the claimant with a statement of terms and conditions of employment as required by section 1 of the Employment Rights Act 1996?

(7) If the claimant was dismissed, was he wrongfully dismissed without being given the eight weeks' notice to which he was entitled?

(8) Did the respondent make unauthorised deductions from the claimant's wages, without sufficient contractual, statutory or other authority? This

claim relied upon: the claimant's contention that he was paid a week's pay in hand and therefore was due a further week's pay; and that the claimant had not been paid the salary to which he was entitled during January and February 2019.

(9) Was the claimant not paid holiday pay to which he was otherwise entitled? The claimant claims that he was due a further eight days' holiday pay for the year in which his employment terminated, and 14 days for the year 2017/18. There may be an issue of jurisdiction in relation to the 2017/18 pay.

3. In the respondent's List of Issues put forward in the skeleton argument prepared on its behalf, the respondent also submits that the tribunal needs to consider: whether the claimant committed a repudiatory breach of contract by failing to follow the sickness absence reporting procedure and failing to attend work; and whether the respondent accepted such a breach. This is part of the consideration of whether or not the claimant was dismissed (under issue 1). If it were to be concluded that the claimant resigned, then he would not have been dismissed by the respondent.

4. It was agreed with the parties that the issues of *Polkey* and contributory fault would be determined as part of the liability Judgment. Other issues in relation to remedy were left to be determined at a subsequent remedy hearing, should that be required.

5. The respondent's *Polkey* and contributory conduct arguments relied upon the claimant's absence from work and the respondent's contention that he would have been fairly dismissed in any event as a result of that absence and/or that his period of absence contributed to his dismissal. The respondent also argued that in relation to *Polkey* it would need to be considered whether the claimant would have been dismissed by reason of redundancy in any event, as an alternative argument, even though by the time of the hearing the respondent was no longer contending that the dismissal was fair by reason of redundancy

6. From the papers it had appeared that the respondent might be pursuing a counterclaim. At the start of the hearing it was clarified that the respondent was not pursuing a counterclaim, but rather the issues referred to as a counterclaim were in fact part of the argument that was being pursued in relation to *Polkey* and/or contributory fault. That argument related to the alleged operation of an alternative business by the claimant, Aford Fleet Services. By the end of the hearing and following the evidence, the argument that the claimant would have been dismissed in any event for conducting this alternative business whilst employed, was not pursued by the respondent.

**The Hearing**

7. The claimant was represented by Miss Quinn at hearing and the respondent was represented by Mr Craven.

8. The Tribunal heard oral evidence from the claimant and, on his behalf, from Michael Chadwick who had been employed by the respondent as a Service Technician until February/March 2019. The claimant also provided a witness statement from Gary Taylor, an individual who had been employed by the respondent as a Breakdown Recovery Driver until August 2019, although as Mr Taylor did not attend the Tribunal to give evidence his statement has been given very little weight.

9. For the respondent, the Tribunal heard oral evidence from: Gerard Queenan, the Managing Director of the respondent; David Sweeney, who is described in his statement as the Finance Manager of the respondent, but who in evidence was keen to emphasise that he did not have a particular job title and was responsible for many different matters; and Scott Evans, the contract facilitator and manager of the respondent's roadworks and AA hire contracts.

10. Prior to the hearing there had been standard directions made in a letter sent to the parties on 14 May 2019. These included an order that full written statements of evidence of all witnesses who intended to give evidence at hearing needed to be exchanged, with it being highlighted that no additional witness evidence may be allowed at the hearing without permission of the Tribunal.

11. The claimant gave evidence at the hearing by way of an amended statement, which had been changed from the initial statement which had first been provided to the respondent on his behalf.

12. The evidence of the claimant's witnesses concluded during the first day of hearing and the evidence of Mr Queenan for the respondent was also heard by the end of the first day.

13. At the start of the second day of the hearing, the claimant applied to be given leave to introduce evidence from Michael Harris, a former employee of the respondent. Mr Harris did not attend the hearing, but it is understood that a statement of evidence had been prepared on his behalf. The respondent objected to Mr Harris' statement being considered. The parties were each given the opportunity to explain why the evidence should (and should not) be admitted. The Employment Tribunal considered those submissions and refused to consider the additional statement which the claimant wished to provide at that stage. Statements should have been exchanged in accordance with the Case Management Order. The claimant had not exchanged a statement for this witness. The statement had not been sent to the respondent in a timely manner, having only been produced shortly before the second day of hearing. The claimant's evidence had finished during the first day of hearing and therefore, at the time of the application, the Tribunal was part way through hearing the respondent's case. In any event, the witness was not in attendance and therefore his statement would have been given very limited weight even had it been allowed to be admitted.

14. A bundle of papers was considered by the Employment Tribunal. That bundle was added to at the start of the second day of hearing. Ultimately the bundle ran to 162 pages. In common with the decision regarding his witness statement, two pages which were effectively emails containing the evidence of Mr Harris were not

considered by the Employment Tribunal. The other additional pages produced by the claimant on the second day were considered by the Tribunal. Only pages referred to in evidence were read or considered by the Employment Tribunal.

15. At the end of the two days of hearing, judgment was reserved. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

## Findings of fact

*Terms and conditions*

16. The claimant commenced employment with the respondent on 15 April 2010. In the bundle of documents provided to the Employment Tribunal there was no employment contract or statement of terms and conditions for the claimant. There was a standard employment contract for 2018-19 but this contained no specific particulars relating to the claimant. The claimant's evidence was that he never received a contract of employment from the respondent, had never signed a contract, and had never been told to issue his own contract to himself.

17. The respondent's evidence in relation to this was somewhat contradictory. Mr Queenan's evidence was that each employee was issued a new contract every year, albeit no contracts that demonstrated this were provided. He also stated that the claimant was responsible for providing his own contract and storing it, and he therefore found it *"ludicrous"* that the claimant alleged that he had never received one.

18. Mr Evans gave evidence to the Employment Tribunal that he could *"categorically confirm"* that, at the claimant's contractual start date, he was given a contract of employment. Mr Evans was not cross examined on his statement. Accordingly, his evidence is accepted. It is found that the claimant was provided with a statement of terms and conditions of employment, albeit a copy of it could not be produced for the Employment Tribunal hearing.

*Pay in hand*

19. The claimant gave evidence that he was paid a week in hand, which was a change which had been applied to him at some point during his employment. When questioned about when this had occurred, he was unsure but thought it was about three years back but he couldn't be 100% certain. There was no evidence to support this, save for the claimant's assertion.

20. Mr Sweeney's evidence was that the respondent did move to paying staff a week in hand, but when this change occurred it applied only to new employees and not to the claimant. This was implemented as a way of ensuring that new recruits had sufficient wages outstanding from which to deduct costs if they left, as the respondent had been unable to recover costs in some cases from new recruits where they left owing more money than was due. On this issue, the Tribunal prefers the clearer and more cogent evidence of Mr Sweeney, to the claimant's evidence.

*Job title and responsibilities*

21. The Tribunal heard a considerable amount of evidence about the claimant's job title and responsibilities. The claimant's own evidence was that when he started with the respondent his job title had been HGV Heavy Recovery Driver and Roadside Technician. By late 2018/early 2019, he said he was the respondent's Garage Manager. That evidence was supported by Mr Chadwick who said that he knew the claimant as the manager of the respondent's garage (Mr Taylor's statement also supported this albeit his evidence is given little weight).

22. Mr Queenan's evidence was that the claimant was always employed throughout his employment as a Heavy Recovery Driver, albeit he would undertake other responsibilities. He emphasised that job titles were not really something that were used by the respondent (or in the industry) and were flexible. Mr Sweeney's evidence supported Mr Queenan on this issue. The claimant was paid the same as other Heavy Goods Recovery Drivers.

23. No contractual document or statement of terms was provided which recorded the claimant's job title. The only document which recorded a title was a document (page 150) which appeared to be a promotional document for the respondent which described the claimant as both "*the boss*" and as being the "*Operations Manager*", working alongside the Garage Manager. It was agreed by all witnesses that the claimant had never in fact been the Operations Manager.

24. Mr Queenan confirmed in evidence that the claimant had responsibility to oversee other recovery drivers and that he supervised them. Whilst he said that titles did not mean anything in the industry, Mr Queenan's evidence was that the claimant was the most experienced Recovery Driver and did have supervisory duties (although Mr Queenan emphasised that they were not managerial). The fact that the respondent considered the claimant's role to be more than a Recovery Driver is also evidenced by the terminology used in the letters of 9, 16 and 28 January 2019 (addressed in more detail below – pages 78, 80 and 81) which refer to offering the claimant *"an alternative position"* to that he fulfilled (or use similar terminology).

25. For the purposes of the issues to be determined, it is not necessary for the Tribunal to decide exactly what the claimant's job title was. However, what is clear from the evidence and is found by the Tribunal is that the claimant's role was not simply one of being only a Heavy Goods Recovery Driver, he also had some overseeing or supervisory responsibilities, which were to be impacted by what was proposed in January 2019.

*The other business*

26. In mid 2018 an issue arose about a Mr Harris operating a business which used the claimant's name, being Aford Fleet Services. The claimant, for a period, drove a vehicle with the words *"Aford Fleet Services"* on the side. A business card was also produced in July 2018 referring to the claimant and Mr Harris as directors of Aford Fleet Services (page 109). The claimant's evidence was that Mr Harris had asked to use his name because of his reputation in the industry and he had agreed, but that he received no money for him doing so and he was not personally involved

in that business. He had not agreed to the business cards and asked Mr Harris to destroy them when he became aware of them.

27. This clearly had been an issue of concern to the respondent. However, Mr Sweeney confirmed in evidence that both the business card and the van were discussed with the claimant in mid-2018. It is understood that the claimant changed the wording on the side of his van at the respondent's request, and that he asked Mr Harris to destroy the business cards. Accordingly, although the claimant's potential connection with the competing business was something which had concerned the respondent (for entirely understandable reasons), the issue was discussed, addressed and resolved in mid-2018. No evidence was presented to the Tribunal which showed the claimant as having any connection to or involvement in the business after that date. Whilst the matter was mentioned in the meeting on 8 January 2019, it is clear from the time which had elapsed since the issue had been raised and addressed, that it was not the reason for any decisions made in January 2019, nor could it fairly have been. The Tribunal finds that the claimant would not have been dismissed because of this in 2019, had his employment not terminated.

*The 8 January meeting*

28. The claimant booked annual leave from 24 December 2018 until 10 January 2019. Albeit there is a dispute about whether the claimant still had sufficient annual leave available to enable him to be on paid leave throughout this period, there was no dispute that this was a period of leave which the claimant had been authorised to take. Even though he was on authorised leave, on 7 January 2019 the claimant received a message asking him to attend a meeting at midday on 8 January 2019. There was no written invitation to this meeting and no agenda was prepared. The claimant was not informed in advance what the meeting was about.

29. In attendance at the meeting on 8 January 2019 was the claimant, Mr Queenan and Mr Sweeney. Mr Sweeney recorded this meeting and the Employment Tribunal therefore had the benefit of a 28 page transcript of what was discussed (pages 49-77). Mr Sweeney recorded the meeting for his own benefit – he explained in evidence that without recording he had difficulty recalling what was said in a meeting. The transcript was prepared for the purposes of the Employment Tribunal hearing and was not a record that was previously circulated to attendees. Indeed, no note or formal record of the meeting, or of what was discussed, was ever received by the claimant prior to the end of his employment.

30. Mr Queenan's evidence was that there was no plan for the meeting or for the business. The transcript shows a meeting which was somewhat unfocussed and covered a variety of issues in an unstructured way. Various issues were discussed about the business generally. It is unsurprising that following the meeting there appears to be some confusion about the outcome and what would happen next, particularly on the part of the claimant.

31. What is clear from both the transcript and Mr Sweeney's evidence, is that there was a proposal to close the workshop in which the claimant worked to external customers. The respondent operates a recovery business and has a large number of its own vehicles which require maintenance in a workshop. That maintenance would

continue. However, Mr Sweeney's evidence was that by late 2018 the respondent was no longer making any money in its provision of services to external customers, the number of which had reduced significantly prior to the end of 2018. Accordingly, what was being proposed in the meeting is what he described to the Employment Tribunal as a "*revamp"*, that is to have a period whilst the respondent stopped providing services to external customers, identified what the respondent was capable of providing, before relaunching the service. It was this proposal and the impact that it had upon the claimant, that appears to have been the respondent's intention behind the 8 January 2019 meeting and was, to an extent, the focus of what was discussed.

32. It is not entirely clear from reading the transcript what exactly was being suggested to the claimant his role would be during this period, but there was extensive discussion about other duties he could fulfil. The respondent did not at any point in the meeting suggest that the claimant was being dismissed nor did either Mr Queenan or Mr Sweeney refer to redundancy. Nonetheless the claimant was being informed that the duties which he had been fulfilling were going to change materially and he would therefore need to undertake different duties (at least for a period). This was suggested in the context of significant staffing changes.

33. Amongst the things said by Mr Queenan in the meeting were (at page 65):

> *"We are going to probably stick everybody back on recovery until we figure out what we are doing. We are obviously going to get rid of some of the recovery drivers and move the staff out until we figure out what we are doing – that is probably what we will do."*
>
> and (at page 67)
>
> *"We are just dismantling the garage and putting everybody back out somewhere else and then we are probably going to tear it down, clean it up and start again."*

34. In the meeting Mr Sweeney referred (at page 72) to the fact that in his view *"we have got far too many staff".* Mr Queenan stated *"we have actually got too many people"*, and Mr Sweeney clarified this by saying, *"when I say get rid of I don't necessarily mean sack, I actually mean move into the right place".* At this point in the meeting (at page 73), unsurprisingly in the light of what was being said, the claimant made reference to redundancy. He was reassured by Mr Queenan that he knew he could do the job (that is the recovery job), and that they did not want to lose him.

35. There was then a discussion in the meeting about the claimant working on the roadworks. The claimant had issues with both his eyes and his leg which meant that there were some restrictions on the duties he could fulfil. At the end of the meeting, the claimant confirmed that if he had to, he would go back on the roadworks but he did not want to be stuck there day in and day out (page 76). However, the claimant ended the meeting by explaining that he had an appointment for his eyes the following Tuesday (15 January) and that some form of further treatment was needed in February.

36. From the transcript it is not at all clear at the end of the meeting what the attendees thought was going to happen next. Mr Queenan's evidence to the Tribunal was that he thought the claimant would come back when he was fit and work on the roadworks. There appears to be no dispute that the claimant was not expected back in prior to Monday 13 January following this meeting, and possibly later in the light of his medical issues. The transcript of the meeting certainly does not record it as ending with any decisions having been made or with anything about the claimant's role or employment having been determined.

37. The one dispute in relation to the transcript is whether it contains a complete record of what was said or not. The claimant in his evidence alleged that there was a prior conversation on 8 January with Mr Sweeney before the transcript started, in which the claimant was told that he was "*unemployed*". He also alleged that there were other gaps when what was said was not recorded in the transcript. Mr Sweeney was not cross-examined about this alleged prior conversation.

38. The Tribunal finds that the content of the transcript is not consistent with the claimant having already been dismissed prior to the meeting. The claimant's recorded comments, questions and responses do not suggest that the claimant has been dismissed and are indeed inconsistent with him believing that he had been. Had the claimant been dismissed at the start of the meeting prior to the transcript starting, the Tribunal finds that the meeting would not have progressed in the way that the transcript records. It is understandable that at the end of the meeting the claimant was confused about his position and what would happen next, but the content is not consistent with dismissal having occurred before it started.

39. In his evidence Mr Sweeney suggested that he could not be held responsible if the claimant could not remember what had happened in the meeting. However, where an employee attends a lengthy meeting to address issues relating to their employment, it is unsurprising that the employee is subsequently unable to recall the details of everything said. That is why good practice is for notes to be taken of such meetings and copies provided to attendees. This would particularly be the case for a situation where an individual is recalled from leave without any formal invite or agenda and in the course of the meeting is told that the duties which he has fulfilled are going to change. In those circumstances it is unsurprising that the claimant's recollection of the meeting is confused or that it differs from the recollection of someone else (who had the benefit of having a recording of what occurred).

*Events following the meeting*

40. Following the meeting, a letter was prepared to be sent to the claimant dated 9 January 2019 (page 78). This letter was in the name of Mr Queenan but was prepared for him by Mr Sweeney. The letter tells the claimant that, *"The position of Garage/Workshop Supervisor/Manager will cease to exist".* It also tells the claimant, *"We must ask you to reassume your previous role as a Heavy Recovery Driver/Technician".* As confirmed above, this terminology suggests that the claimant's role was fundamentally changing and that the role that he had fulfilled was ceasing (at least to some extent). The letter also contains a brief explanation of the reasons for this. Unfortunately, the claimant did not receive this letter. Whilst the respondent suggested that he must have done as it was addressed to his home

address, the Tribunal accepts the claimant's evidence that he did not receive it. The Tribunal can see no reason why the claimant would not have responded to this letter had it in fact been received (as he subsequently did with the first letter he says was received).

41. On 11 January 2019 text messages were exchanged between the claimant and Mr Queenan (page 79). The claimant asked why he had not been paid for the previous week. The 11 January payslip shows the claimant being paid nothing at all for that week, save for a tax rebate (page 90). Mr Queenan's response was to tell the claimant to call Mr Sweeney, and to tell him that he was on the roadworks from Monday. Mr Queenan's evidence was that this was the only exchange he had with the claimant following the meeting on 8 January and that he neither spoke to nor met with the claimant after that meeting. Mr Queenan's evidence was also that he expected the claimant to respond to his text. In fact, the claimant liaised with Mr Sweeney, as the text appears to suggest he should do. In evidence Mr Queenan also confirmed that he never spoke to Mr Sweeney about whether the claimant had responded to these texts by contacting Mr Sweeney.

42. Separately, the claimant exchanged text messages with Mr Sweeney. On 9 January 2019 the claimant texted (page 133) asking *"can you tell me if I still have a job or not?".* This evidences that the claimant was confused at the end of the meeting on 8 January (but does not support the claimant's argument that he had been dismissed in a clear and unequivocal way at the meeting). In subsequent text exchanges the claimant asked (at page 134) *"so have I been sacked or redundant?";* Mr Sweeney responds *"No Rick, do you want to do the roadworks?"*. The text messages exchanged between the claimant and Mr Sweeney conclude with the claimant suggesting that he would talk to him in person (page 135).

43. The final text, sent on Sunday 13 January from the claimant (page 135), says *"I come meet on Monday at 1300 hr to sort out prop on whot going on I only need to speak to you is that ok"*. The claimant's evidence was that he believed that he was suggesting to Mr Sweeney a meeting the following day, but Mr Sweeney never responded and therefore he assumed the suggestion for a meeting had not been accepted. Mr Sweeney's evidence was that he understood the text message to be saying that the claimant would attend the following day, and he waited for him to do so. Mr Sweeney's evidence was that he never left his office and was there throughout the working day, and therefore would have been available had the claimant attended. The message itself is unclear and can be read either way. The claimant has dyslexia, which may also partly explain the wording used. In any event, when the claimant did not attend a meeting on Monday 14 January, Mr Sweeney made no further attempt by telephone or text to contact the claimant or to identify why he had not done so.

44. There is no doubt that by the week of 14 January the situation was somewhat confused. A further letter was provided in the bundle dated 16 January 2019 (page 80) addressed from Mr Queenan to the claimant, albeit it was confirmed in evidence that it was written by Mr Sweeney. That letter told the claimant that he had been absent from work since 13 January 2019 and needed to explain the reasons for his absence. The letter concluded by saying that the company viewed unauthorised absence as misconduct which may result in disciplinary action being taken. Mr

Sweeney accepted in evidence that this was a standard form letter sent to all employees in such situations, reflected by the fact that it includes elements in square brackets. It was in no way tailored for the claimant nor does it reflect what had been discussed at the 8 January meeting. It did not refer to what either Mr Queenan or Mr Sweeney expected the claimant to have done in response to the exchange of texts. In any event, this letter was also not received by the claimant. The claimant did not attend work during this period and did not provide any fit notes or other documentation to certify his absence.

45. In evidence the claimant stated that he had a telephone conversation with the respondent on 15 January 2019 in which he was offered employment as a road worker on lower pay and in which he said he would not be able to start work as a roadworker as he was awaiting surgery. Both Mr Queenan and Mr Sweeney denied that they spoke to the claimant. There is no document which corroborates this conversation, save that in his letter of 7 February (page 82) the claimant recounts this call and says that Mr Queenan told him in it that he should not attend work because the work he was doing was unavailable (something Mr Queenan denied in evidence). That part of the conversation was not recounted in the claimant's witness statement. It appears unlikely to be the case that any conversation took place, however, even if one did, it is the Tribunal's finding that it did not include any clear statements about roles or not attending work. It is accepted that the claimant's confusion reflects the uncertainty at the time and the fact that he had not received anything from the respondent which clearly explained the position in any detail following the 8 January meeting.

46. A further letter was sent to the claimant, signed by Mr Queenan but written by Mr Sweeney, dated 28 January 2019 (page 81). This stated that despite the claimant *"being offered an alternative job position"* he had been absent from work since 13 January. The claimant was asked to come into the respondent's office as a matter of urgency. This letter explained that the company viewed unauthorised absence without good cause as gross misconduct, and stated that it could result in disciplinary action being taken.

47. The claimant did receive this letter and responded in a letter of 7 February 2019 (page 82). In his response, the claimant stated that he had been told in the 8 January meeting that he was being made redundant as the workshop was closing. The letter says *"you specifically instructed me not to attend work as the job I was doing was no longer available".* The claimant does state in the letter, *"in the circumstances I consider myself to have been dismissed"* and seeks redundancy pay.

48. Mr Sweeney's evidence was that he believed that Mr Queenan had spent the few weeks following the 8 January meeting trying to make contact with the claimant to understand why he was absent from work. In fact, save for the text messages referred to above, Mr Queenan made no attempts to contact the claimant (as he confirmed when he gave evidence). This may have given Mr Sweeney a false impression of what had occurred when he came to respond to the claimant's letter and the explanations provided by him in it.

*12 February letter*

49. A letter was sent to the claimant dated 12 February 2019 which explicitly responds to his letter (pages 83 and 84 – although it misdates the letter to which it responds). That letter is in the name of Mr Queenan. Mr Queenan confirmed in evidence that he had never previously seen the letter sent by the claimant dated 7 February (page 82) to which the letter responded, prior to the Employment Tribunal proceedings. He also made it very clear that the content of the 12 February letter was not his own. This was a letter written by Mr Sweeney.

50. The letter began by explicitly acknowledging the apparent misunderstanding that seems to have occurred. It confirmed that the claimant advised the respondent in the 8 January meeting that there was a medical issue relating to his eyes. It said that on 14 January, when his return had been expected, the claimant had not turned up for work (albeit it did not refer to the exchanges of text messages or to non-attendance at any agreed meeting). It informed the claimant that he was the one who had raised redundancy in the meeting. It said that, *"despite being offered an alternative job position, you have been absent from work since Monday 13 January 2019".* Nothing in the letter responded to the claimant's assertion that he had specifically been instructed not to attend work.

51. The letter made reference to the fact that people had informed Mr Sweeney that the claimant had left his job and that he believed he had been dismissed. In evidence both Mr Queenan and Mr Sweeney referred to things they had been told by others in the workplace about the claimant. Mr Sweeney, in particular, emphasised that the breakdown industry is one in which gossip is rife, something which Mr Sweeney referred to as *"scuttlebutt".* Nonetheless it seems clear, both from the content of this letter and from Mr Sweeney's own evidence, that what he said was partly in response to what Mr Sweeney had been told by others as part of such gossip, rather than what had been said to Mr Sweeney by the claimant himself.

52. Importantly, the letter went on to say two things. First, it asserted that because the claimant has been absent from work for 28 days without any explanation, it was assumed that he had resigned. This statement was made, despite the fact that the 7 February letter provided an explanation for why the claimant had not attended. The claimant had not communicated to the respondent that he had resigned. Mr Sweeney confirmed in evidence that this assumption was based purely upon the fact that the claimant had not attended work.

53. The second thing that the letter did was to inform the claimant that his current absence was unauthorised and was in contravention of the company's absence reporting procedures. The claimant was informed that (at page 84), *"the company views this unauthorised absence, without good cause, as gross misconduct".* The letter went on to say *"Regrettably therefore we have prepared and enclose your P45 for your attention".* No process or procedure whatsoever was followed by the respondent prior to this statement.

54. Mr Queenan was absolutely clear in his evidence that he had not dismissed the claimant, and did not know who had done so. Mr Sweeney's evidence was that he did not hire or fire anyone in the business and the only person who had authority

to dismiss was Mr Queenan. Mr Sweeney's evidence was that he would give advice and indeed did give advice in this case, but he did not dismiss the claimant. Accordingly, the evidence before the Tribunal was that there was a letter stating that the claimant had been dismissed for gross misconduct, but none of the respondent's witnesses could provide any evidence of the reasoning behind that decision or what had been considered when it was made.

55. It was agreed that the letter would have been received by the claimant on 14 February 2019.

*Pay and other matters*

56. The claimant received no pay after the salary received on 4 January 2019.

57. The claimant's payslips for 2018/19 contain a breakdown of the holidays due to the claimant for the year and the holiday taken/remaining. Those record the claimant as having taken his entire holiday entitlement of 28 days by 4 January 2019 (page 91).

58. The claimant in evidence was unable to point to any evidence that he was entitled to holiday from a previous year and/or that there was any agreement that holiday from the previous year should be carried over. In the bundle were some sheets recording when holiday was taken for the claimant in each of the years ending 2017, 2018 and 31 March 2019 (pages 85-87). They do not record the claimant as having taken his full entitlement in either the years ending 2017 or 2018. For the year ending 31 March 2019 page 85 appears to suggest that the claimant took 28 days up to and including 4 January 2019.

59. The claimant's evidence was that he had not been paid the annual leave due to him for 2018/19 and in previous years he had not taken his full entitlement. His evidence was uncertain and he confirmed that he had no records of when leave was booked or taken.

60. Mr Sweeney's evidence on leave was that the claimant took and was paid for all leave due, and he highlighted the record on the payslips.

61. It is clear from the evidence that the claimant was on authorised absence until 13 January 2019. The claimant clearly expected to be paid for that period. Mr Sweeney's evidence was that the claimant had exhausted his entitlement to paid leave by 4 January 2019 and the remainder of his absence was unpaid.

62. On issues relating to pay and holiday, Mr Sweeney's evidence is preferred to that of the claimant as it appears to be supported by the payslips in the bundle and the record of leave identified on those payslips. There is nothing in the bundle which evidences any agreement to carry forward leave from previous years or the claimant having any right to do so. There is no evidence of the claimant being prohibited from taking leave.

63. The P45 in the bundle completed by the respondent, for which Mr Sweeney accepted responsibility, stated that the claimant's leaving date was 22 February 2019 (page 118).

**The Law**

64. The relevant legal principles that the tribunal must apply were not substantially in dispute. The claimant bears the burden of proving that he was dismissed. If it is accepted that the claimant was dismissed, the respondent bears the burden of proving, on a balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

65. The respondent contends that its size should be taken into account. It is a small employer with no professional HR function. The claimant contends that the respondent is not that small and has a number of employees, albeit the majority of those engaged by the respondent appear to be contractors.

66. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

67. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach. The Tribunal must ensure that it does not substitute its own view for that of the employer. The Tribunal is required to take into account the ACAS code of practice on disciplinary and grievance procedures.

68. The respondent also referred to the cases of **Iceland Frozen Foods v Jones**, **Linfood Cash & Carry v Thomson**, **West Midland Cooperative Society v Tipton**, and **Sainsbury's Supermarket Limited v Hitt**. The respondent's representative also referred to the cases of **Scope v Thornett** and **Hill v Governing Body of Great Tey Primary School** in relation to the *Polkey* test (the latter as authority that the question is what this employer would have done). The respondent's submissions and detailed skeleton argument contained a number of points which are not reproduced in this Judgment, but were considered.

69. In her submissions the claimant's representative placed some reliance upon the cases of **Kirklees Metropolitan Council v Radecki**, **London Transport Executive v Clarke**, **Geys v Societe Generale** and **Venkatesan v Surabi Ltd** (the latter as authority that, when considering *Polkey*, the Tribunal should not focus purely on how long a fair procedure would have taken, but should also address whether there was a real-world chance that, had such a process been followed, there might not have been a dismissal). The claimant's submissions and skeleton argument contained a number of points which are not reproduced in this Judgment, but were considered.

70. Prior to submissions the Employment Tribunal brought to the attention of the representatives the case of **East London NHS Foundation Trust v O'Connor**, a very recent EAT decision. That authority confirms that for there to be a dismissal the employer must communicate to the employee that it is terminating the contract under which the employee is employed, and must communicate that it is doing so to take effect on a date which is either expressly stated or unambiguously ascertainable from the communication. Communication of dismissal may be by express words (whether oral or written) or it may be by words or deeds which convey that the employer is dismissing on an identified or uniquely identifiable date. Whether it is a communication of dismissal must be determined by the Tribunal in the light of the wider context and all the facts of the particular case. A termination can be communicated by conduct as well as words, but whether a termination has been communicated is to be judged by how the words or conduct would be understood by the objective observer.

**Discussion and Analysis**

Dismissal

71. Applying the legal principles to the facts, the Tribunal finds that the claimant was not dismissed in the meeting on 8 January 2019, no dismissal was communicated to the claimant. As confirmed above, it is found that Mr Sweeney did not state categorically to the claimant that he was dismissed in a part of the meeting that is not recorded in the transcript. Whilst the claimant was given the information at the meeting that his role would need to change and that was discussed at some length, the words used in the transcript do not have the effect of dismissing the claimant. The claimant was the first person to raise the issue of redundancy in that meeting and the only person to do so. When he did so, he was told that the respondent wanted him to stay in a job. At the end of the meeting the claimant stated he would do the roadworks role (if he had to). At that point he had not been dismissed. There was an ongoing discussion about what he would do whilst remaining in employment.

72. Whilst the subsequent text messages and correspondence (at least as received by the claimant) added to the claimant's uncertainty, none of the documentation prior to the letter of 12 February 2019 has the effect of dismissing the claimant. Mr Sweeney's texts reassure the claimant that he has a role.

73. The respondent's case is that the claimant resigned and the evidence for this resignation was simply his absence from work. Whilst it may have been appropriate

and/or advisable for the claimant to have attended work on an occasion after 13 January or to have confirmed in writing why he was not doing so (before 7 February letter), it is found that his absence alone did not constitute a resignation by the claimant.

74. In his letter of 7 February 2019 the claimant provided the respondent with an explanation for his non-attendance at work. Whether or not this was accurate or accepted by the respondent, it still provided the respondent with an explanation for why he was not in work and undermines an assertion that by absence alone he had resigned by 12 February (particularly when that assertion/assumption was not raised with the claimant and he was not given an opportunity to refute it). The claimant's non-attendance must be considered in the context of the claimant's confusion about what had occurred at 8 January meeting, a state of confusion which was acknowledged at the start of the respondent's letter of 12 February.

75. In any event, Mr Queenan's evidence was that he and Mr Sweeney did not discuss whether the claimant had been in contact with Mr Sweeney by text, so it seems difficult to understand how Mr Queenan could have assumed the claimant had resigned when he did not establish with his colleague whether the claimant had been in touch. If the conclusion was Mr Sweeney's, his evidence was clear that he did not make decisions about the end of employment, and the assertion of assumed resignation appears to not be consistent with his last contact being the confusing text of 13 January and the claimant's non-attendance at a meeting which had not been followed up.

76. The claimant's own wording used in his letter of 7 February does not amount to a resignation. What he said was that he believed he had been dismissed, not that he resigned. Mr Sweeney's evidence was that he did not believe the claimant had resigned because of anything he said, but simply because of the fact that he had been absent from work.

77. The claimant was accordingly still employed as at the respondent's letter of 12 February 2019, having neither been dismissed nor resigned prior to it. The Tribunal's finding is that the words used by the respondent in that letter are a clear and unequivocal dismissal. There can be no doubt that the words used and the statement that his P45 was enclosed, were an effective dismissal of the claimant. Accordingly, the claimant was dismissed when he received the letter of 12 February 2019 sent by Mr Sweeney (in Mr Queenan's name). It is accepted by the parties the letter would have been received by the claimant on 14 February 2019. Accordingly, the claimant was dismissed on that date upon receipt of the letter.

<u>The fairness of the dismissal and related issues</u>

78. The respondent contends that the principal reason for dismissal was misconduct. There was no evidence before the Tribunal from any decision-maker about the reason for dismissal. As confirmed above, both Mr Queenan and Mr Sweeney denied that they had dismissed the claimant. However the letter of 12 February is clear and explicit about the reason why the claimant was being dismissed, stating that *"unauthorised absence"* was the reason for dismissal.

Accordingly it is accepted that the principal reason for the claimant's dismissal was conduct, that is the respondent's view of his continued non-attendance at work.

79. The respondent has not demonstrated that dismissal was fair in the circumstances, in accordance with equity and the substantial merits of the case. There is an absence of any evidence about what was taken into account by a decision-maker in determining that the claimant would be dismissed. The respondent failed to follow any procedure whatsoever and did not follow any of the steps required under the ACAS Code of Practice on disciplinary and grievance procedures. The respondent did not: establish the facts of the case; invite the claimant to a meeting to discuss the problem; hold such a meeting; or decide on the appropriate action. The respondent simply dismissed the claimant in one letter. It is accepted that the respondent is a relatively small employer and does not have access to the same expertise as a larger employer may have done, nonetheless this does not mean that a conduct dismissal without any process whatsoever is fair. The respondent's submission that the respondent's investigation and disciplinary process fell within the reasonable band of a reasonable employer is not found by the Tribunal, it finds that the limited process followed is one that no reasonable employer would have carried out. The respondent had neither reasonable grounds for its belief, nor did it carry out all reasonable investigation in all the circumstances.

80. The decision to dismiss is also not one which a reasonable employer could reach within the range of reasonable responses. The claimant had provided an explanation for his absence in his letter of 7 February. He had been absent for a relatively short period. No prior formal warnings had been given. Dismissal for non-attendance at work is a situation where prior warnings would be expected to be imposed by a reasonable employer before dismissing. In any event, the acknowledged confusion about the claimant's position and the lack of follow up to previous texts about a meeting (and what Mr Sweeney believed to be his non-attendance at a meeting), render the dismissal in this case outside the decision which a reasonable employer could take, without a formal warning (or warnings) before doing so.

*81.* In her submissions, the claimant's representative invited the Employment Tribunal to find that the claimant was dismissed either: in an attempt by the respondent to avoid playing a redundancy payment once it had identified that the claimant was in fact employed; or because the claimant had been replaced by Mr Evans. It is certainly the case that Mr Evans' recruitment took place shortly after the claimant's dismissal and his supervisory responsibilities appear to have been subsumed into Mr Evans's role. Both Mr Queenan and Mr Sweeney stated that some of the duties for which Mr Evans was recruited could have been undertaken by the claimant as an alternative following his change in role had he remained employed. However, the Tribunal does not find that the claimant was dismissed for either of these reasons.

*Polkey*

82. There is absolutely no evidence whatsoever to support the respondent's contention that the claimant would have been dismissed in any event by reason of redundancy. The respondent's witnesses emphasised that they wished to retain the

claimant in employment and that is what is recorded in the transcript of 8 January 2019 meeting. Indeed the evidence appears to suggest that the aim of the changes to the respondent's workshop was to change the roles of employees rather than reduce the number employed (as confirmed in the quotes of Mr Queenan and Mr Sweeney highlighted above from the transcript). No full and fair redundancy consultation process was followed and there is no evidence that anyone else was dismissed as redundant.

83. Had the argument been maintained that the claimant would have been dismissed in any event due to the competitive business, it would not have been found that there was any genuine prospect that this would have occurred, as this was a historic issue which had effectively been addressed and resolved long before the events of early 2019 and there was no evidence of the claimant working competitively in early 2019.

84. With regard to *Polkey* and the potential dismissal for the claimant's absence, had the respondent followed a full and fair procedure Mr Sweeney's evidence was that *"it is possible that"* the claimant may have been dismissed as a result of his breach of the absence reporting procedures, had he returned to work. In the light of the claimant's confusion following the 8 January meeting and the explanation that he provided, it is the Tribunal's view that dismissal would not have been within the range of reasonable responses, had it occurred without any prior formal warning having been given.

85. However the question which the Tribunal needs to assess is could the respondent have fairly dismissed and, if so, what are the chances that this actual employer would have done so? This is not an assessment of a hypothetical fair employer, but an assessment of what this employer would have done if it had hypothetically acted fairly. This is an assessment of chance. In assessing the likelihood of a fair dismissal it is necessary to consider what would have occurred with this employer had a fair process been followed, had the claimant provided his reasons for absence (including his confusion), and had a warning or warnings been given – would the claimant still ultimately have been dismissed by the respondent? As part of this relatively speculative exercise the Tribunal needs to consider the chances that the claimant would have responded to any such warnings and returned to work. On balance and in the light of the evidence, this case is a long way from being one in which it can be said with any certainty that the claimant would have been dismissed had a fair process been followed. However, taking into account all of these factors, there is a realistic possibility that the claimant would ultimately have been fairly dismissed by this respondent had he not returned to work after a formal warning had been imposed, and accordingly it is just and equitable to reduce any award in accordance with *Polkey* principles by 20% to reflect this possibility.

Contributory fault

86. The claimant did fail to attend at work from 14 January 2019. This was the reason for dismissal. In not attending work, the claimant's conduct was blameworthy or culpable and this did contribute to his dismissal to an extent. Whilst there was an understandable degree of confusion as addressed above, nonetheless the claimant should have attended at work at some time in the period between 14 January and 14

February 2019 or he should have made a more significant attempt to attend, particularly after he was told to do so in writing in the letter he received dated 28 January 2019. The Tribunal finds that there was contributory fault.

87. The Tribunal's finding is that it would it be just and equitable to reduce the amount of any award by 25% to reflect the claimant's blameworthy and culpable conduct.

Statement of terms and conditions

88. For reasons outlined in the facts the Tribunal does not find that the respondent failed to provide a written statement of particulars to the claimant, even though one was not available for the Employment Tribunal at the hearing.

Wrongful dismissal

89. The claimant did not fundamentally breach his contract of employment for the reasons outlined above. As the Tribunal has found that the claimant was dismissed without notice on 14 February 2019, he was wrongfully dismissed. Accordingly, there was a breach of his contract of employment and he is entitled to damages for the eight weeks' notice pay that he would otherwise have received had his contract been terminated with appropriate notice (the respondent accepted that if the claimant was dismissed he was entitled to eight weeks notice).

Deductions from wages

90. The Tribunal does not find that the claimant was paid a week in hand in the way that he suggests, as there was no evidence to support this save for the claimant's assertion. As confirmed above, the Tribunal accepts Mr Sweeney's evidence in this regard, that the change applied to new employees when it was imposed, for the reasons he gave. His evidence was clearer and more certain than that given by the claimant. The claimant's allegation that the respondent unlawfully deducted a week's pay from his wages fails.

91. The claimant was not paid for the period of his employment after 4 January 2019. The claimant attended and undertook work on 8 January when he attended the meeting and therefore he should have been paid for that one day and the respondent's failure to do so without lawful reason is an unlawful deduction from wages.

92. For the remainder of the period of leave in January 2019, the claimant appears to have been on agreed leave but was not entitled to pay as his annual leave entitlement had been exhausted. From 14 January 2019 the claimant did not attend work and he did not provide any certificates which showed that he was not fit for work. For this period to the date of termination of employment, the claimant is not entitled to any pay as he did not attend work.

Holiday

93. In relation to holiday, as detailed in relation to the facts, it is accepted that the claimant's payslips for 2018/19 contain a breakdown of the holidays taken and

record that the claimant had exhausted his entitlement to holiday pay by 4 January 2019. For previous years there is no evidence either that the claimant was unable to take the leave in the year in which it fell due, or that he had a right to carry over the leave under his contract. Any leave entitlement not taken was lost at the end of the leave year. In these circumstances the Tribunal does not find that the claimant was entitled to any further pay for annual leave or pay in lieu of accrued but untaken annual leave as at termination.

## Remedy hearing

94. At the end of the hearing on 5 November 2019 a remedy hearing was listed for **10 January 2020** at Manchester Employment Tribunal, to commence at 10 am, at which the issues of remedy will be determined. It had been agreed that the issues of *Polkey* and contributory fault would be determined at the same time as liability, as they have been in the Judgment above, but other issues regarding remedy will be addressed at the remedy hearing.

95. The parties should ensure that they are ready and prepared for the remedy hearing, with any documents to be referred to having been exchanged and being included in the bundle (or an additional bundle) and any further statements of evidence being relied upon having been exchanged.

## Conclusion

96. For the reasons given above, the conclusion of the Tribunal is that the claimant was unfairly dismissed, wrongfully dismissed and did have unlawful deductions made from his salary.

Employment Judge Phil Allen

21 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 November 2019

FOR THE TRIBUNAL OFFICE