# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Smith

**Respondent:** The Good Eating Company Ltd

**Heard at:** **London Central**

**On:** **12 and 13 December 2019**

**Before:** Employment Judge Quill (Sitting Alone)

**Appearances**
For the Claimant: Mr N Decker, legal representative
For the respondent: Mr M Cornish, solicitor and in-house lawyer

JUDGMENT having been sent to the parties on 19 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. This was a claim brought by a former employee against his former employer. It is a claim of unfair dismissal. It arises out of a dispute about whether the claimant had been authorised to take holiday or not and if not, whether he committed misconduct by failing to attend work.

## The hearing and the evidence

2. I had a bundle of documents of slightly more than 100 pages.

3. There was one witness for each side and written statements had been prepared for each witness. The respondent called Mr Mark Cornish. The claimant gave evidence himself. Each witness gave oral evidence and was cross-examined by the opposing party and by me.

4. In addition to the agreed bundle of documents, the claimant sought to rely on the ACAS code and I agreed that that could be done.

5. Based on the claim form and response, there seemed to be some disagreement over the start date of continuous service. Before the evidence commenced, both sides agreed that the start date was 3 January 2013.

6. The response mentioned that the claimant had allegedly received a previous warning in relation to conduct. Before the evidence commenced, the Respondent stated that it was not alleging that any previous written warning had been taken into account when making the decision to dismiss.

7. At the outset of the hearing, through his legal representative, the claimant confirmed that there had been no intention to allege either breach of the Working Time Regulations or breach of contract. I pointed out that the claim form did appear to expressly refer to a breach of the working time regulations. Mr Decker confirmed that the reference to the requirements in the Working Time Regulations ("WTR") for an employer to serve a counter notice to an employee (if refusing a leave request) was only being relied on in relation to the alleged unfairness of the dismissal, and the Claimant had not intended to pursue breach of WTR as a claim in its own right.

**Claims and Issues**

8. The claim presented was one of unfair dismissal only, contrary to Part X of the Employment Rights Act 1996 ("ERA").

9. It was not disputed that Claimant was an employee or that he was dismissed, by the current Respondent having TUPE transferred to it prior to the dismissal. There was no dispute that the Claimant had two years' service. The Claimant accepted that his period of continuous employment began 3 January 2013.

10. The liability issues therefore were these:

    10.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

    10.2. Was the reason (as alleged by the Respondent) a genuine belief that the Claimant had taken an unauthorised absence from work?

    10.3. If so, then was this (as the respondent asserts) a reason relating to the claimant's conduct?

    10.4. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The Claimant invites me to consider, as part of my analysis:

        10.4.1. Was there unfairness because (as the Claimant alleges) the Respondent decided to hold a hearing on 7 November 2018, despite (allegedly) knowing the Claimant would be unable to attend and to dismiss in Claimant's absence?

        10.4.2. Was there unfairness in connection with the Respondent's treatment of a letter sent dated 11 November 2018 which allegedly stated that the Claimant would like to get back to work?

        10.4.3. Was there unfairness due to an alleged failure to follow ACAS code?

## Findings of Fact

11. The claim was presented in time following early conciliation. This was the case regardless of whether the effective date of termination was 7 November 2018 or 11 November 2018.

12. The claimant commenced a period of continuous employment with Compass Group UK and Ireland Ltd on 3 January 2013. This entity either changed its name to, or traded under the name of, "Restaurant Associates" and, for convenience, I will refer to it as such for the remainder of these reasons, regardless of the date of the name change.

13. The Claimant remained continuously employed by Restaurant Associates until, on 29 October 2018, his contract of employment automatically transferred to a new employer by operation of TUPE. That new employer was The Good Eating Company Ltd, the respondent to this claim. The respondent employs approximately 300 people in total.

14. The claimant was employed as a chef de partie. Prior to 2013, the claimant had had previous employment with Restaurant Associates. He had left the company on good terms. After a significant break in service, on wishing to rejoin the company, he approached his immediate line manager, who was the head chef, Mr Nathan Clark. Mr Clark told the Claimant that he was glad to have him back and the claimant was able to start almost immediately upon providing a copy of his passport to show his eligibility for work.

15. The claimant signed a new contract of employment upon rejoining this employer in 2013.
    15.1. The contract refers to disciplinary procedure as per the staff handbook and states that it is not contractual and may change from time to time.
    15.2. The contract stated that his holidays were 28 days annual holiday pay year which was to include bank holidays.
    15.3. It said that the leave year ran from 1st of April until 31st of March.
    15.4. It said that the company had the right to stipulate when annual leave be taken dependent on business needs.
    15.5. It said that the claimant was only entitled to take a maximum of 10 days holiday at any one time. [In fact, that was not rigorously enforced, at least in the case of the claimant, and there were occasions during his employment when he was permitted to take more than 10 days holiday in one block.]
    15.6. It said that if more than 4 days holiday was being booked as a block, then the employee had to give the employer at least 5 weeks' advance notice.
    15.7. It said that where a request was put in by more than one employee for the same period, then leave was to be granted on a first-come, first-served basis.

16. The line manager for the head chef was the general manager. At the times relevant to this dispute that was Ms Christina Benjamin.

17. In relation to the arrangements for booking holiday, the claimant's understanding was that he simply spoke to Mr Clark, who would then confirm whether it was possible to take a specific period of leave. If it was possible, then Mr Clark would mark this up on a calendar on the wall in his office and would hand the employee a form to complete. Employees were not given a form to complete unless Mr

Clark said that the days were okay as far as he was concerned. However, the form was a "Holiday / Absence Request Forms" (sic) and mere completion of the form did not mean that the holiday request had been approved by Restaurant Associates. The form contained a space for the manager to add his/her signature if the request was approved. Up until June 2018, every time the Claimant had submitted a request, it had been approved by Restaurant Associates. Restaurant Associates did not always supply the Claimant with copies of the forms, signed by the relevant manager, but in no case – prior to June 2018 did Restaurant Associates inform the Claimant that his request was refused.

18. In (at least) one case, the Claimant did receive a copy of the holiday request form back with Ms Benjamin's signature. That was when he varied the request he had made (in January 2018) for 20 days leave in June/July 2018, and Ms Benjamin approved the variation (reducing it to a much shorter period of absence at the Claimant's request).

19. On 7 June 2018, the Claimant had a discussion with Mr Clark about booking some leave and was handed a form by Mr Clark to complete. On 12 June 2018, the Claimant made a payment for some flights leaving the UK on 26 October 2018 and returning 1 December 2018.

20. On 29 October 2018, Mr Clark was one of the employees who transferred to the Respondent as part of the TUPE transfer, but Ms Benjamin was not.

21. Mark Cornish is director of HR and legal for the Respondent. He was one of the employees of the respondent who was involved in the arrangements for the TUPE transfer. At the time, Mr Cornish was the only HR adviser employed by the Respondent.

22. Mr Cornish met a group of employees together, one of whom was the claimant in September 2018. On 10 October 2018, Mr Cornish had a one-to-one meeting with the claimant.

23. As part of the information supplied to the respondent by Restaurant Associates prior to the transfer, Ms Benjamin had supplied some information in relation to the claimant and what was – as far as Restaurant Associates were concerned – the Claimant's annual leave situation.

24. The situation described by Ms Benjamin was that the claimant had submitted a leave request which had been declined.

25. She sent an email to Mr Cornish dated 13 September 2018 (which followed prior discussions with the Respondent). Her email attached a copy of a letter dated 18 June 2018 which Ms Benjamin stated had been sent to the claimant.
    25.1. According to that letter, the claimant had submitted a leave request for the period 29 October to 30 November 2018. The letter said, "*I can confirm that unfortunately I will be unable to allow you all of the dates requested as annual leave.*"
    25.2. Having explained the reason for that, it went on to say "*The dates I can allow you to take as annual leave are 29 October 2018 to 16 November 2018*".
    25.3. The 18 June letter said that if the claimant wanted to take those dates as annual leave, he had to refill a holiday form which would be signed off by

Ms Benjamin.

25.4. The letter then purported to cite lengthy extracts from the claimant's contract of employment (which is in the bundle, and the extracts appear to be correct) and also the Restaurant Associates staff handbook (which has not been supplied to me and has not been supplied to the respondent either).

26. Although the extracts cited in the letter did refer to provisions that an employee was only entitled to take 10 days leave at a time, Ms Benjamin's 18 June letter did not say that the claimant's leave request was being refused on the basis that he was seeking more than 10 days. On the contrary, the letter said that he could take a block of more than 10 days (having the same start date, but ending 16 November). The letter stated only one reason for the refusal (or partial refusal) and that was that another employee had already booked leave for the two weeks after 16 November 2018.

27. Ms Benjamin's email to Mr Cornish dated 13 September 2018 also asserted that the reason for the refusal had been that another employee had previously booked 19 November to 30 November 2018 off. The implication was that otherwise the entire period requested by the Claimant might have been approved by Restaurant Associates.

28. At the meeting on 10 October 2018, Mr Cornish asked the claimant about the annual leave issue. The claimant stated to Mr Cornish that, as far as the claimant was concerned to leave had been approved. Mr Cornish said that that was not his understanding based on discussions with Restaurant Associates, but he would speak to Ms Benjamin again.

29. On 19 October 2018, Mr Cornish sent an email to Ms Benjamin asking her about the letter dated 18 June 2018, and specifically asking if that letter meant that leave for 29 October to 16 November had been approved. Ms Benjamin replied on 23 October. She said that, in her opinion, the fact that no further holiday form had been completed meant that no leave at all had been approved. She went on to say: "*He will therefore be AWOL from 29th October unless he comes to work*."

30. Mr Cornish replied to that email asking whether the claimant was working up to the Friday (which would have been 26 October 2018). He said: "*I am trying to work out the best time to send him a letter the day before his last day on site*."

31. In fact, the Claimant was not scheduled to work that Friday and his last shift was due to be on Thursday 25 October.

32. On 23 October 2018, the claimant spoke to Chris Daynes, Director of Food Development of the respondent. Mr Daynes was one of the respondent's employees, who was assisting in the arrangements for the TUPE transfer. The reason the claimant spoke to Mr Daynes was that, after the meeting on 10 October 2018, the Claimant had been waiting to hear back from Mr Cornish with a decision in relation to his annual leave.

33. Mr Cornish sent an email to Ms Benjamin about this conversation, which included the sentences, "*Chris's reply was consistent with what we have said thus far. However, it makes sense to send the letter today now and so I will be sending it shortly*".

34. Also on 23 October, Ms Benjamin informed Mr Cornish that she and Mr Clark had both told the claimant that day that his holiday had not been signed off.

35. At approximately 17:19 on 23 October, Mr Cornish sent an email to the claimant with an attachment which was a letter bearing the date 24 October 2018. Mr Cornish would not have sent the email on 23 October but for the fact that the Claimant had spoken to Mr Daynes that day. It had been Mr Cornish's intention to send the letter 24 (or 25) October: ie the Claimant's second last (or last) day at work before 29 October.

36. The letter dated 24 October 2018 stated that the Respondent regarded it as a requirement that the claimant present for work on 29 October and that a failure to do so would be regarded as gross misconduct and potentially lead to dismissal.

37. In his evidence to the tribunal, the claimant denied ever having received this email and letter from Mr Cornish. He also denied ever having received the 18 June letter from Ms Benjamin. Because of the potential relevance to remedy, I need to make my own findings of fact on these assertions. These findings of fact are not relevant to my liability decision.

38. In relation to the 18 June letter, my finding is that it was sent by Ms Benjamin and that, on the balance of probabilities, the Claimant received the letter, and/or he received oral confirmation of the contents of the letter, on or soon after 18 June 2018. My reasons for this finding are that:
    38.1. It does not seem inherently likely that Ms Benjamin would forge such a letter and no motive was suggested to me as a reason that she would do so.
    38.2. The Claimant's particulars of claim state that he had a discussion with Mr Clark on 7 June 2018 in relation to annual leave and handed in a leave form "later". The particulars of claim assert that he was then told by Ms Benjamin that he could not take the leave, but he sought to persuade her to agree and that this discussion was said to have taken place before he booked his flight. Such a discussion taking place between 7 and 12 June 2018 is consistent with the tone and content of Ms Benjamin's 18 June letter, which contained a formal decision, backed up with reasons, quoting from written procedures.
    38.3. The Claimant took a photograph of the wall calendar on his phone. He says that he did this after becoming aware that Ms Benjamin had informed him (whether directly or via Mr Clark) that his leave was not approved. The Claimant's account of the date on which the photo was taken was inconsistent and contradictory. However, he expressly denied taking the photograph only after 10 October 2018. It seems likely to me that the photo was taken in June, either because Ms Benjamin had told him orally that the leave was not approved, or because the Claimant had received her letter formally confirming the same.

39. In relation to Mr Cornish's 23 October email / 24 October letter, my finding is that the Claimant did receive that email, and that he read the letter on either 23 or 24 October.
    39.1. The particulars of claim to the employment tribunal refer to this letter and there is no allegation in the particulars of claim that the letter was not received. The particulars of claim merely note that no offer was made in the letter in respect of the cost of flights which the claimant had already

incurred.

39.2. Furthermore, the claimant's written witness statement prepared for these tribunal proceedings and signed by him on 18 November 2019, stated that he did receive the letter dated 24 October 2018 (albeit it says he did not receive it until several days later, when he was already abroad.)

39.3. My reasons for concluding that the Claimant read the email/letter on 23 or 24 October include: he received emails to his phone; he was waiting for a decision from Mr Cornish (following the 10 October meeting) and would have had a good reason to be looking out for an email and to read it promptly; on 25 October 2018 the Claimant handed a copy of his leave request form, dated 7 June 2018, to one of the respondent's on-site employees, Jodie Minshall, which I infer was an attempt to get the Respondent to reverse the decision in Mr Cornish's 24 October letter.

39.4. Furthermore, the last sentence of paragraph 8 of the particulars refers to the fact that the 24 October letter makes no offer of reimbursement, and the first sentence of paragraph 9 states that the Claimant "took annual leave as planned". My interpretation is that the Claimant's final decision to go on leave was made after reading the 24 October letter, and deciding that the 24 October letter did not give a good enough reason for him to cancel his plans.

40. Further emails from Ms Benjamin to Mr Cornish on 25 October 2018 asserted that the claimant had been in further discussions with Restaurant Associates, but that Restaurant Associates had not changed their decision in relation to the refusal of annual leave.

41. The claimant's last shift for Restaurant Associates was 25 October 2018, a Thursday. He was not due to be in work the following day. 29 October 2018 (a Monday) was due to be his next day in work and was also the first day of his employment with the respondent.

42. The claimant did not attend work on 29 October 2018, and in fact he had flown to Ghana. The claimant arrived in Ghana on 26 October 2018, and, as soon as he arrived, he replaced the UK SIM card in his mobile phone with a Ghana SIM card. In principle, the claimant was able to receive emails on his phone while in Ghana, but this was subject to network availability and prepayment charges.

43. On 31 October 2018, at 11:44am, Mr Cornish sent an email to the claimant with attachments. The attachments were also posted. There was a letter which required the claimant to attend a disciplinary hearing on 7 November 2018. There were copies of documents to be referred to at the hearing, including Mr Cornish's letter dated 24 October, Ms Benjamin's (alleged) letter dated 18 June and a copy of the leave request (dated 7 June) which the claimant had handed to Ms Minshall on 25 October 2018.

44. Mr Cornish knew that the claimant was probably abroad at the time. Mr Cornish expected the claimant to receive the email because he assumed that the claimant would be able to receive emails abroad. Mr Cornish knew that the claimant was not likely to be in the country by 7 November 2018.

45. The 31 October 2018 letter stated that the allegation was absence without authorisation, which was an allegation of gross misconduct and that one potential outcome was dismissal. The letter asked the claimant to reply to confirm his attendance and to tell Mr Cornish if he intended to be accompanied.

The letter said that in the absence of any reply from the claimant or "*failure to attend the hearing for any reason, then in view of the nature of the misconduct (and it relating to your failure to present for work), the meeting will regrettably have to go ahead in your absence and a decision will be taken on the information available*".

46. It was the claimant's oral evidence to the tribunal that he did not receive the 31 October 2018 email at all, on any date. Because of its potential relevance to the issue of remedy, I need to make my own findings. My finding is that it is more likely than not that the Claimant read this email on or shortly after 31 October, and before 7 November 2018. My reasons for this finding include that:
    46.1. The Claimant did not assert that there was any technical issue preventing email access completely, although he did mention that a signal would not be present 100% of the time, and the need to pay for usage. I think it is likely that the Claimant would have wanted to, and did in fact, check his emails while he was abroad. This was particularly because (but not only because) he was aware that his employer might seek to contact him in relation to his absence.
    46.2. His written witness statement prepared for the tribunal and signed by him on 18 November 2019, said, at paragraph 18 that "*on 31st October 2018, I received another email from the respondent inviting me for a disciplinary hearing scheduled for the 7th of November 2018…*". Not only does that paragraph fail to assert that the email was never received at all, it positively states the date of receipt as 31 October.

47. The 31 October email attached the respondent's disciplinary and capability procedures.
    47.1. These included a list of 5 bullet points which was said to be a non-exhaustive list of the behaviour which the company treats as misconduct falling short of gross misconduct. This included "*unauthorised absence*".
    47.2. There was a much longer list of examples of gross misconduct, which was also said to be a non-exhaustive list. These included "*serious insubordination or refusal to carry out reasonable management instructions*" and "*serious breach of the company's policies or procedures*".
    47.3. Within the Respondent's general procedures, it stated that "*if an employee persistently fails or is unwilling to attend a hearing without good reason the meeting may take place in their absence*".
    47.4. The procedure (under "Guiding Principles – All Procedures") says that there is a right of appeal. It states that "*appeals must be submitted within 5 days to the HR Manager*". It states that appeal grounds must be stated clearly, and suggests some example grounds for appeal, but does not state that the exact word "appeal" must be used, or that appeals could not be made on different grounds.
    47.5. It states that wherever possible, appeal decisions would be made by a "*manager or director who had not been involved in*" the hearing which led to the decision under appeal.
    47.6. Within the disciplinary part of the procedure there is reference to the need for an investigation into a misconduct allegation, and that this will be carried out by an "Investigating Officer". A decision at a disciplinary hearing is to be made by a Chairperson. The procedure does not expressly comment on whether the "investigating officer" and the "chairperson" must be different or can be the same person.
    47.7. The procedure states that a disciplinary hearing can take place "*once the employee has had a reasonable opportunity to consider the information*

*provided with the notice of the hearing*".

48. No written submissions were made by the claimant to Mr Cornish, prior to 7 November 2018, either seeking a postponement of the hearing, or giving reasons why the claimant thought he should not be dismissed.

49. On 7 November 2018, the claimant did not attend the meeting. Mr Cornish had not been planning to hear any witness evidence at the hearing. He had been proposing to rely on what Ms Benjamin and Mr Clark had told him during his earlier conversations with them and the documents supplied with the invitation letter, and to listen to the claimant's account. A note taker was present with him but was not needed. Given the claimant's absence, no notes were made.

50. The disciplinary meeting was due to commence at 10am. By email sent at 12:57 on 7 November 2018, Mr Cornish sent a letter to the claimant. The letter said:
    50.1. That "*I have been left with no alternative but to hold the meeting in your absence and make a decision on the evidence available to me*".
    50.2. That the claimant was dismissed with immediate effect.
    50.3. That the claimant had a right of appeal within 7 days
    50.4. That the reason for dismissal was gross misconduct.
    50.5. That the gross misconduct was failing to present for work without explanation or authorisation.
    50.6. That Mr Cornish thought it was reasonably clear that the Claimant had left the country, as planned, despite knowing that annual leave was not agreed.
    50.7. That the claimant's last day of paid employment was Friday 26 September. (That is a typing mistake and it should say 26 October.)
    50.8. That the claimant had been paid by Restaurant Associates up to and including that date.
    50.9. That the claimant would not be paid from 29 October onwards because he had not presented for work on any of the working days during that period.

51. Mr Cornish made the decision using the Respondent's disciplinary policy. He had not received Restaurant Associates' policy. Neither the claimant nor the respondent made any assertions as to the contents of Restaurant Associates disciplinary policies or procedures. (Though both have commented on their understanding of Restaurant Associates holiday booking procedures).

52. At 2218 on 11 November 2018, the claimant replied to Mr Cornish. The email did not use the specific word "appeal". The email stated that the claimant was not in London and stated that Mr Cornish knew this.

53. The email asserted that the claimant had booked his trip 3 or 4 months prior to the TUPE transfer. It admitted that he had been told by the Respondent that the leave was not authorised. He did not expressly say when (or if) Ms Benjamin told him that the leave was not authorised, other than to say that he had already booked his tickets before "my manager" told him that it had not been signed off. The email asserted that in the claimant's opinion, he had followed the correct procedure to book leave and it had been validly approved. The final sentences were, "W*hen I come back from my trip, I would like to return back to my job. Thank you.*"

54. Mr Cornish sent a reply to the email dated 12 November 2018 at 1202. Amongst other things, the reply stated "*you decided to go despite repeated warnings from a number of people including myself and my letters to you, that doing so would*

*be gross misconduct and likely to lead to your dismissal*. *That is now precisely what has happened, and you cannot be remotely surprised by this outcome*." It later added: "*In summary, you have now been dismissed as my previous letter, and there is no possibility of your returning to work with us. Please do not try to present for work at [client's premises]. Your pass has been revoked and you will not be granted access to the building in any event should you try to do so.*"

55. Mr Cornish did not pass the claimant's email to anybody else for consideration.

**The Law**

56. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

57. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

58. Provided the respondent does persuade the tribunal that the claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

59. In considering this general reasonableness, I must take into account the respondent's size and administrative resources and I will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

60. In doing so I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303; Iceland Frozen Foods Ltd v Jones [1993] ICR 17; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82.

61. In considering the question of reasonableness, I must analyse whether the

respondent had a reasonable basis to believe that the claimant committed the misconduct in question.

62. I should also consider whether or not the respondent carried out a reasonable process prior to making its decisions.

63. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances.

64. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23).

65. It is not the role of this tribunal to access the evidence and to decide whether the claimant did or did not commit misconduct, and/or whether the claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the respondent.

66. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by an Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). A failure to follow the Code does not – in itself – mean that a dismissal is unfair. The following paragraphs of the Code are relevant:

*5 It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

*6 In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

*11 The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

*12 Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.*

*22 A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.*

*23 Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.*

*24 Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.*

*25 Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.*

*Provide employees with an opportunity to appeal*

*26 Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.*

*27 The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.*

67. Section 123(6) ERA states that: "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

68. In Nelson v BBC (No.2) 1980 ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy
- it must have actually caused or contributed to the dismissal
- it must be just and equitable to reduce the award by the proportion specified.

**Analysis and conclusions**

69. My finding is that the reason for the dismissal was that the Claimant did not report for work on 29 October (or on any later date up to and including 7 November 2018) and that Mr Cornish believed that this was unauthorised absence, and that Mr Cornish believed that the Claimant knew it was unauthorised absence.

70. My finding is that Mr Cornish had reasonable grounds for his beliefs. He had the 18 June 2018 document, and had emails from Ms Benjamin asserting that she had supplied that letter to the Claimant at the time, and that – as far as she was concerned at least – none of the period was authorised leave (not even 29 October to 16 November which the letter said she was willing to grant subject to a new leave form being submitted). Mr Cornish had the email from Ms Benjamin dated 23 October which asserted that the Claimant had been told by her and Mr Clark that his leave was not authorised. Mr Cornish had the evidence that his own email dated 23 October had been sent. Mr Cornish believed – based on reasonable grounds – that the Claimant had read this email before his last shift.

71. The respondent asserts that its procedure was not so unreasonable that no unreasonable employer would adopt it. I disagree. In reaching my decision, I

have taken account of the ACAS Code and of the respondent's own written procedure. I have also taken into account that Mr Cornish was, at the time, the only person dealing with HR matters for the Respondent and also that (because Ms Benjamin did not transfer) there was no line manager in post for the Head Chef (Mr Clark). I have taken into account that the Respondent has around 300 employees.

72. It was not unreasonable for the Respondent to use its own disciplinary procedure, rather than that of Restaurant Associates, given the fact that the Claimant's contract of employment stated that the Restaurant Associates disciplinary procedure was not contractual and could change.

73. It was not good practice that Mr Cornish was the decision maker or the "chairperson" to adopt the word used in the respondent's procedures. A fairer hearing would not have been one in which Mr Cornish was treated as a witness to alleged events (eg report on what was said by Mr Cornish to the claimant on 10 October 2018), and/or as the Investigator who would present evidence (including anything said to Mr Cornish by Mr Clark or Ms Benjamin).

74. A chairperson might also have asked Mr Cornish to explain to the decision-maker why there was a delay from 10 October 2018 until 23 October 2018, in setting out the respondent's position in relation to annual leave. The Respondent was not the Claimant's employer during that period. However, a fair-minded decision-maker, who was in possession of all the relevant information (including the emails back and forth between Mr Cornish and Ms Benjamin) might have wanted to ask if there had been a deliberate intention to leave it as late in the day as possible to inform the claimant that if he did not turn up for work on 29 October 2018, he would be regarded as having committed gross misconduct.

75. Taken in isolation, the mere fact(s) alone that Mr Cornish acted as chairperson (and was therefore not questioned as to why he apparently wanted to send the letter to the Claimant just before the last shift) would not have persuaded me that the procedure adopted was so unreasonable that no reasonable employer would have adopted it.

76. However, there were two other serious flaws. These were the date of the dismissal decision, and the lack of an appeal hearing.

77. The hearing was arranged for 7 November 2018 despite the fact that Mr Cornish knew that it was very likely that the Claimant was out of the country on that date and would probably not be returning until shortly before 3 December 2018.

78. The Respondent asserts that the situation was urgent and it did not wish to be in situation of paying salary to somebody who was (potentially at least) in serious breach of contract. However, the dismissal letter specifies that the Claimant was deemed to be ineligible for salary from 29 October 2018 due to a failure to attend work. Therefore, if a decision to dismiss was made on 3 December 2018 (for example), the Respondent would have been no worse off in salary terms than if a decision to dismiss was made on 7 November.

79. It is a very common situation that a respondent might potentially be liable to pay salary to an employee up to and including the date of the dismissal hearing (subject to any reductions in pay to take account of sickness absence or unauthorised absence, et cetera).

80. Any reasonable employer has to balance the need for a hearing to take place as quickly as possible against the need for that hearing to be a fair one.

81. No reasonable employer would think that it was reasonable to hold the hearing in the claimant's absence on 7 November 2018. Even if it was reasonable, on 31 October 2018, to propose a hearing date of 7 November, when the Claimant failed to attend the hearing on 7 November, Mr Cornish concluded – as stated in the dismissal letter – that the Claimant was probably out of the country. In those circumstances, a reasonable employer would have deferred the hearing until 3 December 2018, in order to give the Claimant the opportunity to comment on the case against him, whether to try to deny misconduct, or else to put forward an argument as to why the sanction should be something other than dismissal.

82. Furthermore, no reasonable employer would have treated the Claimant's email of 11 November as anything other than an appeal. The email (a) puts forward a purported explanation for not attending on 7 November and (b) puts forward an argument as to why the absence should be treated as authorised (or, at least, not sufficiently serious to justify dismissal) and (c) states that the Claimant wants to return to his job.

83. Naturally, an independent appeal officer might have rejected the claimant's case if an appeal had taken place. However, that is a different point.

84. The combination of the facts that:
    84.1. the investigator and the chairperson were the same,
    84.2. the hearing took place in the Claimant's absence, at a time when he was known, or believed to be, out of the country, and less than two weeks after the start of the absence,
    84.3. there was no appeal hearing,
    84.4. the decision to offer no appeal hearing was taken by the dismissing officer acting alone,

    lead me to conclude that procedure as a whole was so unreasonable that no reasonable employer would have adopted it.

85. I therefore have to consider, as required by Polkey, what might have hypothetically happened had a fair procedure been adopted. This does not require me to draw a specific conclusion, based on the balance of probabilities, as to exactly what would have happened, but rather it requires me to consider a range of possibilities and to consider the respective probabilities of these various possible outcomes.

86. I think that there is a high probability that, after a fair hearing, the decision would have been made that the Claimant knew that his absence was unauthorised, and had known since June 2018, but that he went anyway because he had booked his ticket and because he expected that Mr Clark would be willing to take him back.

87. Mr Cornish made a decision that the conduct which he found to have been committed by the claimant potentially fell into the category "gross misconduct". Even though unauthorised absence is specifically listed as an example of misconduct (as opposed to "gross misconduct"), my opinion is that a fair hearing officer may very well have been persuaded that the alleged conduct in question was sufficiently serious to fall within the category of "refusal to comply with a reasonable management instruction" (ie gross misconduct within the

Respondent's procedures, and therefore something potentially meriting dismissal even in the absence of a warning for prior instances of misconduct). Of course, had there been a hearing in the presence of the Claimant and/or his representative, then the hearing officer would have had to take into account any arguments put forward as to whether Restaurant Associates' procedures had different examples of conduct that might lead to summary dismissal (and/or dismissal when there was no existing "live" disciplinary warning) and, if so, to assess the relevance of such matters.

88. I think that there is only a low possibility that a hypothetically fair hearing could have taken place before 3 December 2018. However, I have no reason to believe that 3 December would not have been a suitable date for a hearing to take place and for a decision to be made.

89. Had a fair hearing taken place, then the claimant would have had the opportunity to put his side of the story, including saying whether or not he was asserting that he had a good faith and genuine reason for thinking that the holiday had been approved.

90. The fact that Mr Cornish did decide on 7 November 2018 to dismiss the claimant is not evidence which convinces me that it is 100% likely that the claimant would have been dismissed at a fair hearing taking place on or shortly after 3 December 2018.

91. The claimant's evidence has been inconsistent and contradictory during this litigation. It is therefore very speculative indeed as to what the claimant's exact explanation would have been at a fair hearing. The more that the Claimant sought to allege that Ms Benjamin or Mr Clark were lying, the less likely it is (in my judgment) that those arguments would have found favour with the hearing officer. I also think it unlikely that a fair-minded decision-maker would have been persuaded by the argument that there was a family emergency requiring the Claimant to go to Ghana urgently, given that the flights had been booked in June.

92. However, if the Claimant had both a fair disciplinary hearing and a fair appeal then I think there is a non-zero chance that either (i) he would have not been dismissed in the first place, or else (ii) he would have been reinstated on appeal. I rate the chance of a fair dismissal (and no reinstatement) with effect from 3 December 2018 as 80% and the aggregate chance of the Claimant not being dismissed or else being reinstated on appeal as being 20%.

93. I have to consider if there was contributory fault.

94. I find that the Claimant did exhibit blameworthy conduct.
    94.1. Even if there was ever any confusion on his part as to the leave booking arrangements, that was clarified to him by no later than June 2018. Ms Benjamin did this. The Claimant was aware that there was a potential issue before he booked his flight (as mentioned in the particulars of claim).
    94.2. The Claimant had ample time to either seek to rearrange his flight, or to confirm that he would take just the shorter period of absence offered to him by Ms Benjamin or to make any other suggestions to his employer as to why the full period should be approved. For example, he could have attempted to persuade them in advance that he would terminate employment on good terms and be considered favourably for re-engagement should there be any vacancies on his return.

94.3. There is no evidence that he did any of these things, and he does not claim to have done so.

94.4. As of 10 October 2018, the Claimant had a further opportunity, handed to him by the happenstance of the TUPE transfer, to persuade the company that would be employing him from 29 October 2018 to authorise the proposed absence. On 10 October, he did not attempt to persuade the new employer that it would be reasonable for it to agree to the absence, but rather he sought to persuade the new employer that the leave had in fact already been authorised by Restaurant Associates. Based on my findings, it is not the case that the Claimant believed that the absence was actually authorised.

94.5. Between 10 October and 25 October, including in response to Mr Cornish's letter, the Claimant had the opportunity to put forward his arguments for why the leave should be approved, whether on compassionate grounds, or otherwise, but did not do so, save for providing a copy of the leave request form which he had submitted on 7 June.

94.6. On receipt of the 31 October letter informing him of disciplinary hearing, he had the opportunity to send an email with his defence and/or asking for a postponement so that he could attend in person. He did not do so.

94.7. Whether the Claimant agreed with the stance that his employers were taking or not, he knew that stance, and did not take reasonable steps to engage.

95. His taking the leave anyway, knowing it was unauthorised, and knowing that he might be dismissed for doing so, and his failure to communicate with the Respondent were all factors which contributed to his dismissal.

96. It is just and equitable in all the circumstances, to make a 100% reduction to his compensatory award. The Claimant was effectively wholly to blame for the situation, and he had been offered reasonable alternative solutions by the employer, including the possibility of taking 3 weeks' leave. Therefore, the compensatory award is nil.

97. My judgment is that the Claimant should receive the full basic award, without any deduction. Section 122(2) ERA states that I "shall reduce" a basic award because of the Claimant's pre-dismissal conduct if I think it is just and equitable to do so. My judgment is that, having reduced the compensatory award to zero, it would not be just and equitable, in this case, to make any reduction to the basic award. A further reduction to his remedy for unfair dismissal would not proportionate and would not adequately reflect the Respondent's failure to hold a fair disciplinary hearing and subsequent failure to offer an appeal hearing.

**Employment Judge Quill**

Date 2 March 2020

JUDGMENT SENT TO THE PARTIES ON

05/03/2020

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FOR THE TRIBUNAL OFFICE