



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100364/2018

5

Held in Glasgow on 15, 16 and 17 October 2018

Employment Judge: Shona MacLean
Members: Ms M Fisher & Mr P Kelman

10

Mr D Brown

Claimant
In Person

15

McAlpine & Company Limited

Respondent
Represented by:
Mr R Turnbull
Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are dismissed.

25

REASONS

Background

30

1. In the claim form sent to the Tribunal's office on 18 January 2018, the claimant claims unfair dismissal and direct sex discrimination in terms of section 13 of the Equality Act 2010 (the EqA). He seeks compensation.

35

2. In the response, the respondent raises a preliminary issue that the Tribunal has no jurisdiction to consider the sex discrimination complaint in so far as it relates to any act or omission that occurred before 17 October 2017. The respondent in any event denies that it directly discriminated against the claimant as alleged or otherwise. The respondent also denies that the

E.T. Z4 (WR)

claimant was unfairly dismissed. The respondent says that the claimant was dismissed for a fair reason in terms of section 98(1) of the Employment Rights Act 1996 (the ERA) being conduct in terms of section 98(2) of the ERA. The respondent says the claimant's dismissal was fair and reasonable in the circumstances of the case and in accordance with section 98(4) of the ERA. However, the respondent argues that if the dismissal was unfair, the claimant would have been dismissed in any event and seeks reduction in any compensatory award and any compensation awarded should be reduced to reflect the claimant's contributory conduct.

10

3. It was agreed that the respondent lead evidence at the final hearing. The Tribunal heard evidence from Brian Earlie, Maintenance Manager and Steven Scott, General Factory Manager. The claimant gave evidence on his own account. The respondent produced a set of productions to which was added a schedule of loss prepared by the claimant.

15

4. The Tribunal has set out its findings in fact. Every fact that could be found in the documents or oral evidence has not been set out: the Tribunal has set out the facts as found that are essential to the Tribunal's reasons or to an understanding of the important parts of evidence.

20

5. Mr Turnbull who represented the respondent helpfully prepared detailed submissions. The Tribunal has summarised the submissions and dealt with the points made when setting out the facts, the law and the application of the law to those facts.

25

6. The Tribunal read the submissions with care during its deliberations. It should not be taken that a point was overlooked, or facts ignored because the fact or submission is not in the reasons in the way that it was presented to the Tribunal.

30

7. The Tribunal's approach during its deliberations was to consider the issues that it had to determine which were as follows:

- a. Did the Tribunal have jurisdiction to consider the claimant's sex discrimination claim?
- b. If so, was the claimant treated less favourably because of his sex?
- c. What was the reason for the claimant's dismissal?
- 5 d. Was the reason for the dismissal a potentially fair reason in accordance with section 98 of the ERA?
- e. If so, did the respondent act reasonably in treating such a reason as a sufficient reason for dismissing the claimant?
- f. What remedy if any should the Tribunal award?

10 **Findings in Fact**

8. The respondent is a company that manufactures plumbing products. The respondent had no human resource function at the time of the disciplinary proceedings or when any decisions were made.
- 15 9. The respondent employed the claimant from 17 September 2001 until 19 October 2017. His normal place of work was Kelvin Avenue, Hillington Park, Glasgow (Hillington).
- 20 10. At Hillington the respondent's 200 employees include Frank Burns, Engineer and John Sullivan, Engineering Supervisor. Brian Earlie is the Maintenance Supervisor and he reports to Jim Gilmour, General Manager. Until April 2017, Steven Scott was the Assembly Dispatch Manager. He was then promoted to General Manager, of the respondent's factory in Coatbridge. The respondent also has factories in Johnstone and Thornliebank where Steven Beech and
25 David Lang are the general managers respectively.
11. The respondent has a company handbook which contains its disciplinary procedure; disciplinary rules; absence/timekeeping/holiday rules; harassment policy and grievance procedure (the Handbook).
30
12. On 10 September 2013, the claimant signed a document confirming that he had received a copy of the Handbook.

13. The disciplinary rules state that gross misconduct “includes misconduct which, in our opinion, is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between us. Gross misconduct will be dealt with under our disciplinary procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal).” Examples of gross misconduct include: “Theft, fraud or other dishonesty, (including but not limited to fabrication of expenses, claims and timesheets)”. The list is intended as a guide and is not exhaustive.
14. The absence rules state that “employees should keep in regular direct contact with management during their absence and should expect to be contacted by the company from time to time to discuss their wellbeing and likely date of return”.
15. The holiday rules state “holiday dates and arrangements are made annually following consultation with employee representatives and advise to employees thereafter”. They also state that “taking time off despite the fact that it has been applied for and refused, will normally amount to gross misconduct. When an employee happens to be absent through illness or on occasion where time off has been refused, they should be aware that the circumstances surrounding their absence will be investigated and, if appropriate, disciplinary action may be taken”.
16. Following the biannual meeting between senior management and trade union representatives for each factory site, the 2017 holiday rules were agreed. The respondent made employees, including the claimant, aware of the 2017 holiday rules by displaying them on staff notice boards from around November 2016. The procedure for obtaining approval for annual leave was known throughout the organisation. It was a requirement at all times during the holiday period, each factory had to have available at least 40 percent of each category of employee as without this cover, the factories could not operate efficiently. The 2017 holiday rules included a new element where employees required to inform the respondent of proposed holiday dates in 2017 by a

certain date. Employees were directed not to book holidays until the respondent approved the holiday dates.

17. There were four categories of leave:

- 5 a. Category A – Standard Holidays of 11 days during the Glasgow or Paisley Fair.
- b. Category B – Special Holidays of 11 or 16 days between Wednesday 31 May and Friday 25 August. If 16 days were taken the Autumn week was forfeited. The numbers of employees allowed in this category were
10 restricted in each of the factories with the exception of supervisors, chargehand engineers and toolsetters, and other categories of key personnel agreed with management.
- c. Category C – Marriages/Special Occasions which could be taken at any time of year for the duration of five, 11 or 16 days included if a marriage
15 or special occasion. If five or 16 days the Easter or Autumn week would be forfeited.
- d. Category D – Three Week Holiday – the week commencing 3 August may be added to the Glasgow Fair or week commencing 17 August added to the Paisley Fair and the Autumn week forfeited.

20

18. All employees were provided with an updated written contract of employment which the claimant signed as having received on 3 October 2017.

19. In line with the 2017 holiday rules, the claimant applied to take annual leave
25 between 28 June 2017 and 17 July 2017 which was verbally granted.

20. On 13 February 2017, realised that he had made a mistake. He mentioned this to Mr Sullivan and then wrote to Mr Gilmour asking to change his summer holidays to 27 July 2017 to 14 August 2017. Mr Graham discussed the request with Mr Earlie who mentioned that during the second week of the amended
30 leave request there was a concern about cover. Mr Graham refused the request because holidays could not be changed after original holiday requests were put in. Mr Earlie confirmed this to the claimant in writing on 20 February

2017. The claimant indicated that he was not happy and would speak to Mr Graham. He did not do so.

- 5 21. On 26 March 2017 (Mothers' Day) Jeanette Finnan, General Operative, Quality Control received a surprise holiday from her son for her 60th birthday. She spoke to her manager Brian Patterson to ask if she would be allowed to change her holiday. Mr Patterson approached Mr Graham who asked for proof of the date booking. This was provided and Mr Graham was satisfied that it was a Category C holiday, which he granted.
- 10 22. Around April 2017, the claimant became aware that Ms Finnan, had been allowed to change her holidays after the holiday had been entered into the system because her son had booked a holiday.
- 15 23. The claimant spoke to Mr Graham around 11 May 2017. The claimant told Mr Graham that his brother had booked his holiday and produced a printout detailing the flights that had been booked online. The flights were departing from Glasgow at 14.20 to Fuerteventura and returning on 11 August 2017 from Fuerteventura at 20.05 to Glasgow. Mr Graham understood that the flights had been booked on 10 May 2017. There was no suggestion that the holiday was for a special occasion.
- 20 24. Mr Graham was on annual leave from 16 to 19 May 2017. He refused the claimant's renewed request to change his holiday. On 24 May 2017 Mr Graham spoke to the claimant. Mr Graham mentioned that it was possible to change the flights to his original requested dates from 28 June 2017 to 17 July 2017 for £35 per person and asked the claimant what he was going to do. The claimant indicated that accommodation was booked. It could not be changed as it was too expensive. The claimant said that he would go on sick leave if required. The claimant did not raise a grievance about the refusal or any less favourable treatment.
- 25 30 25. The claimant went on annual leave from 28 June 2017 to 17 July 2017.

26. On 27 July 2017, around 7.30am Mr Sullivan asked the claimant if he would be available for overtime on Sunday 30 July 2017. The claimant said that he would “not be here”. Mr Sullivan accepted this and formed the impression that the claimant was away for the weekend but would be at work on the Monday.
5 Mr Banks was present when this discussion took place.
27. On Friday 28 July 2017, the claimant finished his nightshift around 7.45am. He left work and went home. The claimant attended his general practitioner around 9.30am. The claimant’s general practitioner issued a fit note stating
10 that because of “exacerbated mechanical back pain” the claimant was advised that he was not fit for work from 28 July 2017 until 11 August 2017. The general practitioner did not need to reassess the claimant’s fitness to work at the end of this period.
- 15 28. The claimant contacted Mr Earlie around 10am to advise that he had hurt his back and had consulted his general practitioner. The claimant told Mr Earlie that he would not be attending work on 31 July 2017 and would hand in a sick line.
- 20 29. That afternoon, the claimant boarded the 14.20 flight from Glasgow to Fuerteventura. The claimant arranged for the fit note to be provided to the respondent.
30. On 31 July 2017, Mr Earlie told Mr Banks that the claimant had spoken to him
25 and would not be in work as he had a sore back. Mr Banks commented that he had overheard the claimant making a comment to colleagues when his leave request had been refused around May 2017 which Mr Banks had understood to mean that the claimant intended to take time off in any event.
- 30 31. Mr Earlie also told Mr Sullivan about the claimant’s absence. Mr Sullivan mentioned the discussion that he had had with the claimant about overtime.
32. On 10 August 2017, Mr Graham sent an email to Mr Earlie asking him to undertake an investigation into the claimant’s whereabouts between 27 July

2017 and 11 August 2017. Mr Graham explained that he had previously understood from the claimant that a holiday over this period had been booked on 10 May 2017, after his request for holidays in the period was refused. Mr Graham was concerned that the claimant may have gone on holiday to Fuerteventura but reported that he was not well enough to attend work. Mr Graham instructed Mr Earlie to take reasonable and proportionate steps to ascertain the claimant's whereabouts. Ultimately the investigation was a matter for Mr Earlie. The email continued:

“In fairness to Drew we should, for example, seek to ascertain whether he is at home. That can involve attending at his home and seeing if he answers the door, but you should not do anything intrusive such as looking in windows or letterbox. You must take the reasonable minimum reasonable steps to ascertain his whereabouts in a way which is reliable but does not necessarily intrude into his private life. If he is at home, that will remove my concerns and the investigation can stop. I have no difficulty with you explaining my concerns and the purpose of your visit in the event he does answer the door. If he does not answer the door today (Thursday) or tomorrow (Friday) I will remain concerned and would like you to then continue the investigation. You may also wish to contact him by telephone today and tomorrow as he may be able to let you know his whereabouts if he does not answer the door and that may remove any concerns.

I hope my concerns prove to be unfounded but, just in case, I believe it necessary to appoint you to investigate them under the disciplinary procedure. Ultimately the investigation is a matter for you and what is set out in this letter is a suggestion for how we might be able to remove any question marks about his whereabouts both for his benefit and for that of the company.”

33. On 10 August 2017 and 11 August 2017, Mr Earlie called the claimant's mobile and left voicemails telling him to call the respondent.

34. Around noon on 10 August 2017, in Mr Sullivan's presence Mr Earlie telephoned the claimant from his office landline on loudspeaker to the claimant's mobile telephone number. Mr Earlie noted that the ringtone was not standard and was a type of ringtone that would be heard if a mobile telephone is abroad. Mr Earlie left a voicemail message. Around 1pm Mr Earlie called the claimant's landline as noted on his personnel file. The number was not in service.
35. Mr Earlie and John Gordon, Assistant General Manager, visited two addresses which the claimant had previously given the respondent as home addresses. There was no reply.
36. Mr Earlie telephoned the claimant's mobile telephone number around noon on 11 August 2017. Mr Sullivan was present. The ringtone was the same as the previous day. There was no answer so Mr Earlie left a voicemail message.
37. The claimant returned to work on 15 August 2017. Mr Earlie held a return to work meeting with him. Mr Sullivan was also present. Mr Earlie asked the claimant to confirm that he had called in sick due to a sore back for the period of his absence. The claimant confirmed that this was correct. The claimant was asked if he had visited the doctor during his time off. The claimant said that he had not but had visited a back specialist. The claimant could not confirm the dates. The claimant was asked if he had received any calls from Mr Earlie on his mobile telephone. The claimant said yes but did not recognise it as a work number and that there were no messages left so he did not reply. The claimant said that he did not know it was standard protocol to call Mr Earlie when he was returning to work. He also confirmed that his back injury was not work related.
38. On 21 August 2017, Mr Earlie held another meeting with the claimant at which Mr Sullivan was present. The claimant was again asked when he had visited the back specialist. The claimant indicated that it was the first Monday of his time off. Mr Earlie said that there were concerns that the claimant might have

been abroad during his time off. The claimant was asked if he had any comments. The claimant said that he was not abroad. He was also not sure where he was when Mr Earlie called his mobile telephone on 10 and 11 August 2018. He had noticed missed calls.

5

39. On 23 August 2017, Mr Earlie wrote to the claimant enclosing notes of the return to work interview on 15 August 2017 and a note prepared following the meeting on 21 August 2017. He also enclosed a copy of the documents previously provided by the claimant indicating that he was booked onto a flight at 14.20 on Friday 28 July 2017 to Fuerteventura and then booked on a return flight which was scheduled to leave Fuerteventura on Friday 11 August at 20.05. As the claimant denied being abroad during that period and he could not say where he was when he missed Mr Earlie's telephone calls on 10 and 11 August 2017 the claimant was asked if he could provide any other evidence which might demonstrate that he did not travel abroad during that period. It was suggesting that he might to provide contact details of the back specialist or any other evidence of activities that he undertook in the United Kingdom or show that he had cancelled or changed the flights to Fuerteventura. Mr Earlie indicated that he would be willing to consider anything that the claimant felt was relevant and provide assistance. The claimant was invited to provide evidence within seven days and offered a further meeting if that would assist.

10

15

20

25

40. The claimant did not ask for a meeting with Mr Earlie or seek any assistance. On 30 August 2017, the claimant handed Mr Earlie a bank statement which Mr Earlie considered. The statement appeared to show transactions occurring in the relevant period, none of which appeared to be abroad.

30

41. Subsequently Mr Graham was told by an individual who wished to remain anonymous that they had overheard the claimant saying that he had met two individuals at Glasgow Airport who worked for a supplier of the respondent. Mr Earlie contacted the two individuals concerned both of whom said that they had seen the claimant at Glasgow Airport while they were all queuing to board

a flight to Fuerteventura. Mr Earlie prepared notes of his telephone conversations.

- 5 42. As part of the investigation, Mr Earlie interviewed Mr Banks and took a statement in which Mr Banks his conversation with Mr Earlie on 31 July 2017. Mr Earlie also interviewed Mr Sullivan and took a statement in which Mr Sullivan confirmed the discussion that he had with the claimant on 27 July 2017 regarding overtime.
- 10 43. Mr Earlie then prepared an investigation report in which recommended a disciplinary hearing take place because there was evidence that the claimant may have gone to Fuerteventura on 28 July 2017 despite reporting as unfit for work on that date and despite advising that he had not gone abroad. The investigation report concluded that there was evidence that the claimant may
15 be guilty of dishonesty in relation to his activities during his absence and/ or the reasons for his absence. There was evidence to suggest that, regardless of whether he did have a bad back over the period in question, he had intended to take the time off in any event despite his request to do so having been refused.
- 20 44. The investigation report was sent to Mr Graham. He considered that it was not appropriate for him to deal with the matter given his involvement. He asked Mr Scott if he would deal with the matter. Mr Scott agreed and was sent the investigation report and supporting documents. Mr Scott considered the
25 investigation report and sought some clarification about dates and other minor details from Mr Earlie.
45. On 6 October 2017, Mr Scott wrote to the claimant enclosing a copy of the investigation report along with the documents of which reference was made
30 in the investigation report. A copy of the Handbook was also enclosed.
46. In the letter Mr Scott explained that Mr Graham had advised:

“You will see that Brian Earlie has investigated concerns regarding the whereabouts of Drew Brown. As I am named a number of times in the investigation report and some appendices, it may be appropriate that you consider the matter from here. I can confirm however, that the parts of the investigation report relating to me accurately reflect what happened.”

5

47. Mr Scott invited the claimant to attend a disciplinary hearing on 10 October 2017 at which he was entitled to be accompanied by a trade union representative or a colleague. The claimant was advised that Mr Scott would be accompanied by Michelle Mullen who would take notes. Mr Scott explained that while the Handbook envisaged that the investigator attends the disciplinary hearing, Mr Scott did not have any particular comments or questions for Mr Earlie. Accordingly, if the claimant wished Mr Earlie to attend he should tell Mr Scott who would make the arrangement. Mr Scott also advised that if there were any further witnesses that the claimant would like him to speak with, he should let Mr Scott know before the disciplinary hearing.

10

15

48. The letter set out the allegations which were:

- a. The claimant went to Fuerteventura on Friday 28 July 2017, despite reporting as unfit for work on that date and despite advising that he had not gone abroad.
- b. The claimant is guilty of dishonesty in relation to his activities during his absence and/or the reason for your absence.
- c. Regardless of whether he had a bad back over the period in question, the claimant had intended to take the time off in any event, despite his request to do so having been refused.”

20

25

49. The letter also stated that the allegations included allegations of gross misconduct which if proven may result in dismissal without notice.

30

50. The claimant told the respondent that the disciplinary hearing on 10 October 2017 was unsuitable. It was therefore rearranged to take place on 12 October

2017. The claimant did not ask for Mr Earlie to attend nor did he suggest that the respondent speak to any other witnesses.

51. At the disciplinary hearing conducted by Mr Scott, David McGurk, Trade Union Representative accompanied the claimant and Ms Mullen and took notes. The claimant was invited to make representations.

52. The claimant said that he felt he was being discriminated against. The claimant admitted to going on holiday and that what he had previously told the respondent was incorrect. He then said that when he had come back from his Easter holiday, he learned that another employee had been granted a holiday change after their holidays had been entered into the system. The claimant said that it had been granted as it was a 60th birthday and it was the employee's son who had booked the holiday. The claimant said that his brother had booked his holiday and that he spoke to Mr Graham in May 2017 and asked why his holiday dates could not be changed. The claimant said that he was asked to bring in proof that his brother had booked the holiday which he provided. The claimant said that it had taken Mr Graham two weeks to say that his holiday could not be changed. Mr Graham had also said that it would only be £35 to change his flights as Mr Graham had done that previously himself. The claimant said that the accommodation was booked separately and that could not be changed and it would work out too expensive. The claimant said that Mr Graham asked him what he was going to do and that the claimant had replied that he would go on the sick if required.

53. The claimant again said that he felt discriminated against. Another Hillington operator had changed their September holiday recently and that the claimant was never given the option to change his holiday dates. Mr Scott explained that the claimant was attending the disciplinary hearing to address his conduct and not that of others. The claimant maintained that there was no difference in his situation to the other employees who were granted changes. The claimant said that he could not understand why he was refused a holiday change of dates when he had asked in February.

54. Mr Scott explained that his understanding was that all employees had requested more notice regarding holiday dates. It was agreed and implemented by the respondent which was why all holidays are agreed with management and entered into the system in advance. The claimant was uncertain as to who had made the decision not to grant his holiday request and he did not see the problem in doing so – the change of date would help with the cover. Mr McGurk said that the claimant had worked for the respondent for 17 years and had no live disciplinarys. He asked that the outcome be classed the first stage disciplinary rather than gross misconduct. Mr McGurk said that the rules seemed to vary between employees and that there may have been a breakdown in communication. The disciplinary hearing was adjourned.
55. Mr Scott considered the information provided by the claimant at the disciplinary hearing and the investigation report. In relation to the allegations, Mr Scott believed the claimant went to Fuerteventura on Friday 28 July 2017 as he admitted to doing so. He also believed that the claimant was guilty of dishonesty as the claimant had not disclosed to Mr Earlie at the return to work interview on 15 August 2017 that although he had a bad back, he had gone on holiday. Instead the claimant had inferred that he was at home and had deliberately lied about being abroad when specifically asked on 21 August 2017. Also in response to additional information sought by Mr Earlie in his letter of 23 August 2017, the claimant produced a bank statement inferring that he was in the United Kingdom rather than advising that he was in fact in Fuerteventura. Mr Scott believed that the claimant had been dishonest in relation to his activities during his absence.
56. Further while Mr Scott did not question whether or not the claimant had a bad back, he had nonetheless indicated to Mr Graham and other colleagues that he was intending to take sick leave during the period when his annual leave had been refused. There was no evidence to suggest that he had cancelled or transferred the flight bookings but rather had indicated before his back injury that he would not be available for overtime on Sunday 30 July 2017 and

had consulted his general practitioner following his shift, returned home, packed, travelled to the airport and boarded a four-hour international flight.

57. Mr Scott believed that the claimant was aware that his application to change his holiday dates had been refused. Although the claimant did not specifically mention Ms Finnan by name, Mr Scott was aware of who she was and her leave under Category C. Mr Scott considered that the claimant had made no application under Category C but sought to change the dates of his holiday under Category B. The claimant provided no further detail regarding any other employee which would allow Mr Scott to investigate the matter.

58. Mr Scott concluded that the claimant was guilty of dishonesty and that he had intended all along to take the time off. He believed that the claimant was deceitful in the following respects:

- a. His intention to take the holiday regardless of whether he had a sore back or not despite being told he was not allowed to.
- b. Not admitting to the respondent of having such an intention from May to August.
- c. Lying that he had been abroad while absent.
- d. Lying that he had seen a back specialist on 31 July.
- e. Lying that he had been at home resting.
- f. Saying that he was not sure where he was on 10 and 11 August when he was called.
- g. Being vague about the dates when he visited a back specialist.
- h. Saying there was no message left so did not reply to the call from work.
- i. Saying that the reason why he did not call Mr Earlie back was because he did not know it was standard protocol.
- j. Providing a bank statement to support his lie that he was in the UK over his absence period.

59. Mr Scott considered that the claimant had also been given ample time to be honest about his whereabouts during his period of absence but chose to rely and provide false information in support of his position. Mr Scott felt that the

claimant showed no remorse during the disciplinary hearing and rather sought to justify his behaviour by saying that it was unfair that his holidays had been refused in the first place. There was no indication from the claimant that he regretted what he had done and that he would not repeat the behaviour or lie in the future. In all the circumstances notwithstanding the claimant's length of service, Mr Scott concluded that the claimant should be dismissed without notice.

5

10

60. On 19 October 2017, the claimant was handed a letter advising him of the decision to dismiss without notice and that his employment had been terminated with immediate effect. The letter stated that the "decision is based on the following:

15

- You went to Fuerteventura on Friday 28 July 2017 despite reporting as unfit for work on that date and despite advising that you had not gone abroad;
- You are guilty of dishonesty in relation to your activities during your absence and other reason for your absence;
- Regardless of whether you did have a bad back over the dates in question, you intended to take time off in any event despite your request to do so having been refused."

20

61. The claimant was advised of his right of appeal which he did by letter dated 25 October 2017. His grounds of appeal were:

25

- a. He was not given a contract until August 2017
- b. The respondent had a fit note. The claimant's doctor had advised him he needed to take time off as strenuous work within the workplace would add to his extortionate pain. The claimant was advised by the doctor that the time away would reduce his stress levels. The claimant had been with the company for 17 years.

30

- c. The claimant had been declined holidays whereas a female employee was granted change after hers had already been submitted. Additional employees after this time were allowed their holidays to be amended. This was discrimination.

d. There was a breach of confidentiality as Mr Earlie spoke to external contractors and turned up at his parents' house and his own flat.

5 62. On 8 November 2017, the claimant was invited to attend an appeal hearing on 15 November 2017 chaired by Steve Beech, General Manager, Johnstone and Mr Lang, General Manager, Thornliebank. The claimant was advised of his right to be accompanied.

10 63. By letter dated 10 November 2017, the claimant expanded upon his grounds of appeal stating he was under severe stress. He was a loyal employee with 17 years of service. He was sorry for not telling the truth. He considered that being dismissed was harsh.

15 64. The appeal hearing took place on 15 November 2017. Mr McGurk accompanied the claimant. The claimant admitted that he had lied and had been dishonest. He said there were mitigating circumstances. He explained that he had asked for the wrong holidays by mistake and was then unable to change them despite someone else being able to do so which he felt was discriminatory. The claimant did not name the individual but asked the
20 respondent to change the sanction of dismissal to a final written warning.

25 65. By letter dated 23 November 2017, the respondent advised the claimant of the decision not to uphold his appeal. The letter enclosed the notes of the appeal hearing. The letter dealt with each ground of appeal in the following way:

30 a. Ground 1: A contract of employment had not been received until August 2017. The respondent considered the date that the claimant received a contract to be irrelevant. The reason for dismissal was dishonesty. The fact that dishonesty may amount to gross misconduct does not have to be set out in writing. In any event the Handbook did explain that dishonesty may amount to gross misconduct.

b. Ground 2: The claimant was certified as unwell at the time of absence. The respondent considered this to be irrelevant because the claimant

was dismissed for being dishonest as opposed to being absent on sick leave.

5 c. Ground 3: Favouritism given to other employees in relation to holidays amounted to sex discrimination. The respondent considered that regardless of whether the decision to refuse the claimant's holiday request was reasonable, the claimant's dishonesty amounted to gross misconduct and warranted dismissal.

10 d. Ground 4: Breach of confidentiality. The claimant complained that the respondent had breached his confidentiality by discussing his employment case with external contractors and going to the claimant's home address without permission. The respondent considered this was irrelevant to the question of whether the claimant was guilty of the conduct alleged and whether the dismissal was the appropriate sanction. In any event the respondent concluded that the claimant had
15 not suffered any unfairness and that the respondent had acted reasonably in seeking to make contact with the claimant at his home after he had failed to answer the telephone.

20 66. At the termination of his employment the claimant was 32 years of age. He had been continuously employed by the respondent for 16 years. His gross weekly wage was £650 which equated to £550 net pay.

25 67. The claimant was in receipt of benefits following the termination of his employment but found new employment on 5 December 2017 where he received £440 per week.

Observations on witnesses and conflict of evidence

30 68. The Tribunal considered that Mr Earlie sought to assist the Tribunal and gave his evidence honestly and candidly. The Tribunal's impression was that he had no animosity towards the claimant. Mr Earlie in the Tribunal's view approached the investigation with an open mind. He endeavoured to obtain a fair and balanced view of the facts.

69. The Tribunal considered that Mr Scott was an honest and reliable witness. The Tribunal felt that he was fair minded in his approach to the disciplinary hearing and endeavoured to deal with matters thoroughly and independently. The Tribunal was satisfied that he reached his own conclusion.

5

70. The Tribunal considered the claimant was evasive and his evidence was confused. The Tribunal agreed with the respondent's submission that the claimant tended to say what he believed to be helpful to his position rather than what was in fact true. For example, he told the Tribunal that when his application to change his holiday was refused he planned for his sister to go in his place. However, he took no action to cancelled or transfer the flights which remained in his name. Accordingly, where there was a conflict of evidence the between the claimant and the respondent's witnesses the Tribunal preferred the latter.

10

15

71. The claimant said that Mr Graham lied to him in May 2017 as he did not divulge the reason for refusing the claimant's request to change leave and took a fortnight to tell the claimant that it was refused. Mr Graham did not give evidence. The Tribunal therefore considered Mr Earlie's evidence and his investigation report which Mr Scott said that Mr Graham had confirmed was an accurate record.

20

25

72. Although the claimant said to Mr Earlie around 20 February 2017 he was going to speak to Mr Graham the claimant was not sure if he did so. There first reference in the investigation report to the claimant speaking to Mr Graham about his holidays was around 11 May 2017. The Tribunal therefore considered that it was more likely than not that the claimant did not speak to Mr Graham until May 2017.

30

73. The claimant said that his brother booked the flights around 3 February 2017 and accommodation that day or the day later. At the disciplinary hearing the claimant said that he told Mr Graham that accommodation was also booked. Mr Graham's email sent on 10 August 2017 which was produced as part of the appendix to the investigation report stated that the flights were booked on

10 May 2017. There was no mention of accommodation. The claimant did not say at the disciplinary hearing that Mr Graham was mistaken about the timing. The Tribunal considered it highly unlikely that the holiday was booked before 20 February 2017. Has that been so the Tribunal felt that the claimant would have spoken to Mr Graham at that stage. The Tribunal considered that before speaking to Mr Graham in May 2017 the claimant would know that Ms Finnan had been asked to provide proof of the booking and therefore the claimant's booking would have been made around that time.

10 74. The claimant considered that the Tribunal should draw inferences from Mr Graham's delay in responding to the claimant. The Tribunal found the claimant's evidence confusing. At the disciplinary hearing the claimant said that he spoke to Mr Graham in May 2017. The claimant was told to provide proof that his brother had book a holiday which he did. The claimant said it took Mr Graham two weeks to say that the holidays could not be changed but the flights could be change for £35. The claimant then referred speaking to Mr Graham on 16 May 2017 and telling him that he would go on the sick if required. The investigation report referred to the request on or around 11 May 201. The request was refused. There is reference to Mr Graham being on leave from 16 to 19 May 2017 and to a discussion about changing flights on 24 May 2017.

25 75. While the dates were confusing there was no reference to there being any specific discussion between the claimant and Mr Graham about Ms Finnan's holiday request. In any event the Tribunal was mindful that Mr Graham was the General Manager responsible for around 200 employees. It was therefore not surprising that he would not remember the detail of every employee's holiday requests. The Tribunal's impression was that Mr Graham considered the claimant's renewed request and did not reject it in a capricious manner.

30 76. During the final hearing, the Tribunal heard evidence about a number of employees about whom the claimant sought to compare with his own circumstances either by reference to his sex discrimination claim or inconsistency in treatment in relation to his dismissal.

77. The Tribunal noted from the case management preliminary hearing that the claimant's position was that he was treated less favourably because of his sex by being denied the opportunity to change his annual leave. His comparator was Ms Finnan. The claimant said that Ms Finnan was allowed to change her annual leave in the same circumstances as his own when she discovered a relative had booked a holiday on different dates to those which she had requested and had been granted by the respondent. Mr Earlie and Mr Scott were both aware of Ms Finnan's circumstances. They confirmed that Ms Finnan was informed by her son on Mother's Day (26 March 2017) that he had booked a surprise holiday as a gift for her 60th birthday. On 27 March 2017, Ms Finnan asked her manager, Mr Patterson, to change her annual leave to allow her to go on the surprise holiday for her birthday. Mr Patterson informed Mr Graham of the request. On 29 March 2017, Ms Finnan was asked to provide proof of this. On 30 March 2017, Ms Finnan provided proof and Mr Graham allowed Ms Finnan to change her annual leave because it was for a special occasion (Category C) under the 2017 holiday rules and was made eight weeks before the commencement date of the annual leave. The Tribunal considered that the evidence of Mr Earlie and Mr Scott was reliable and convincing and had no difficulty in accepting their evidence in this regard.

78. The claimant also said at the final hearing that Lewis Marchetti was allowed to change his holiday to attend a family wedding. The claimant said that Mr Marchetti was not in fact attending a family wedding. Mr Earlie denied that he was aware Mr Marchetti's holiday was not for a family wedding. Mr Earlie said that Mr Marchetti did not seek to change his original leave but sought additional leave to attend a family wedding. Mr Earlie said that this was treated as an application under Category C and he was therefore forfeiting his autumn holiday. Mr Scott did not know about Mr Marchetti or the circumstances of his leave. The Tribunal found Mr Earlie's evidence convincing.

79. The claimant said at the final hearing that Pauline Gilmour had her holidays refused in January 2017. She then said that she was taking unpaid leave. Mr

Earlie did not know the circumstances involving Ms Gilmour's holiday and the claimant did not ask Mr Scott about Ms Gilmour's situation. Again, the Tribunal had difficulty making any findings but on the basis of the information available it appeared Ms Gilmour's application was not under Category B as the leave was in January. However, both were not allowed to change their holidays after the deadline for making the application for holidays had passed.

- 5
80. The claimant also referred to Thomas Hansen. The claimant alleged that Mr Hansen lied to the respondent because he said that he acted in self-defence during an altercation but was subsequently convicted. Neither Mr Earlie or Mr Scott were involved in the investigation or disciplinary proceedings involving Mr Hansen. In the circumstances, the Tribunal was unable to make any findings in relation to the incident involving Mr Hansen. However, from the information that was available, the Tribunal struggled to understand on what basis Mr Hanson's case and that of the claimant were on truly parallel circumstances.
- 10
- 15

Submissions

The Respondent

81. The Tribunal has no jurisdiction to consider, in terms of section 123(1)(a) and (3) which failing section 123(1)(b) of the EqA, the claimant's complaints of discrimination insofar as they relate to any act or omission said to have occurred prior to 17 October 2017. The alleged discrimination of the request to grant holidays in February 2017 and May 2017 is therefore time barred and the discrimination claim should be dismissed.
- 20
- 25
82. If the Tribunal accepts that the claim is out of time in terms of section 123(3) (b) or (4) (a), it will require to consider whether the time limit ought to be extended on just and equitable grounds in terms of section 123(1)(b).
- 30
83. The claimant believed he was discriminated in April 2017; he had the benefit of being able take advice; he was a member of a union and had access to the internet and telephone. There were not sufficient grounds for it to be just and

equitable to allow these acts complained of based on the facts. The claim is out of time and Tribunal does not have jurisdiction for this claim.

- 5 84. In terms of section 13 of the EqA, direct discrimination occurs where because of a protected characteristic, in this case sex, A treats B less favourably than A treats or would treat others. The claimant alleges he was subject to direct discrimination from declining his holiday request.
- 10 85. The Tribunal was invited to find that the reason why the holiday request was declined was because such a holiday in those circumstances could not be changed, on the basis that it could impact on production and the shifts cover.
- 15 86. The whole point of having a deadline to get holiday requests in from all staff was so that shifts could be planned altogether in order that sufficient cover was provided for production. That meant requests for holidays or changes to holidays after that deadline could not be done. Only if the holiday was for a special occasion could this rule be changed and that was within the discretion of the manager. Those holidays were Category C holidays under the 2017 holiday rules, which was subject to the discretion of the manager, hence why
20 the individuals the claimant compares himself with were given more leniency.
- 25 87. The claimant was not told the reason for why the holidays could not be changed at the time was because it could impact on shifts. But that was the reason nonetheless. The fact that he was told that holidays could not be changed, was not wrong or false information, it was just that a further reason lay behind why that was. For that kind of holiday, they could not be changed. Only for special holidays, could they be changed. However draconian the Tribunal considers that reason and rule to be, that was the reason for it.
- 30 88. On the balance of probabilities, sex had nothing to do with the decision. It was not the reason for the decision. The difference in treatment between the comparator the claimant relies upon was not because of their sex. It was down to Ms Finnan's holiday being for a special occasion

89. The other comparator the claimant relies on is Ms Gilmour. The little evidence heard was that she had a different manager and her holiday was not granted by the respondent just in the same way as the claimant. The rules were applied in the same way as the claimant.
- 5
90. The Tribunal should ask what was the motivation behind the decisions? It was down to the rules, which was based on trying to ensure sufficient cover with minimal fuss for the intended benefit of the whole workforce. While the Tribunal may think it was unfair not to have done more and unfair to not grant the request because it was technically possible under their new contractual terms to force a change in shift, that is not the issue to be determined. There was no evidence that sex was the motivating factor for Mr Earlie or Mr Graham's decision. Therefore, this claim must fail and be dismissed.
- 10
91. Turning to the unfair dismissal claim. The respondent has discharged its obligation under section 98(1) of the ERA. The reason for the claimant's dismissal was his conduct.
- 15
92. The next question the Tribunal is required to consider is whether the respondent's decision to dismiss the claimant and the procedure by which the decision was reached fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted in accordance with section 98(4) of ERA?
- 20
93. Under the section 98(4) test, the Tribunal may view an employer's decision to dismiss as harsh but it will nevertheless be fair. For the decision to dismiss to be unfair, it effectively has to be a decision that no employer, acting reasonably in the circumstances, would have taken.
- 25
94. In determining fairness in gross misconduct cases, all the circumstances of the case will be important, including whether the conduct was listed as being gross misconduct in a disciplinary policy and whether the employee was warned that the conduct may result in dismissal.
- 30

95. Mr Scott genuinely and reasonably held the belief that the claimant was guilty of the alleged gross misconduct. That was clearly a reasonable belief to come to. Even the claimant admitted that given the evidence.
- 5 96. Mr Scott believed that: the claimant went to Fuerteventura on Friday 28 July despite reporting as unfit for work on that date and despite advising that he had not gone abroad; he was guilty of dishonesty in relation to his activities during his absence and/or the reason for his absence; regardless of whether he did have a bad back over the period in question, he had intended to take the time off in any event despite his requests to do so having been refused.
- 10
97. Mr Scott was justified in that view given the investigation and the claimant's admission. The sore back was a red herring. The claimant was always going on holiday. The claimant offered no explanation for lying. His focus was on his repeated explanation that he thought it was unfair to be refused the holiday.
- 15
98. The claimant knowingly wasted manager's time in continuing to investigate his honesty and/or misled the investigation. The respondent could not rely upon him to tell the truth in any circumstances where he might consider that there was a disadvantage to him in doing so. How can it be unfair that when somebody says to you, "I'll go off sick if necessary", a stated intention to lie, and later does lie about absence. Taken those together, that gives Mr Scott, a reasonable belief that the claimant planned to always be off, regardless of a sore back. For the avoidance of doubt, the lie about his sick absence was not the lie Mr Scott believed he told. However, taken together that gives Mr Scott a reasonable belief that the claimant: intended to take the time off in any event; and is somebody that cannot be trusted.
- 20
- 25
- 30 99. Mr Scott considered the mitigating circumstances including the disciplinary record and length of service. He also took into account that the claimant had not admitted fully to the allegation and shown remorse for it. Mr Scott was not convinced that the claimant accepted responsibility for his misconduct, and did not ascertain any expressions of culpability or regret. That is a reasonable

approach to dealing with mitigation. Instead, Mr Scott considered that the claimant just lay blame on others.

100. The decision to dismiss falls within the range of reasonable responses.
5 Through the disciplinary hearing and the appeal hearing there has not been a dispute that: he had been dishonest; and that dishonesty amounted to some form of misconduct.
101. The only question that the Tribunal ought to be dealing with is whether the
10 sanction of dismissal was within the range of reasonable responses.
102. The respondent recognises that dismissal is a significant step to take and we
have heard that Mr Scott considered alternatives to dismissal. Mr Scott
considered that a warning would not have been appropriate in the
15 circumstances given the very serious nature of the conduct which amounted to various examples of gross misconduct as detailed in the respondent's disciplinary policy contained in the Handbook. The claimant still failed to evince an understanding of his actions and admit to his wrongdoing. Mr Scott also considered moving the claimant to another factory, but quickly dismissed
20 that option since it was not an option under the Handbook and not appropriate since it did not deal with the issue of simply not trusting the claimant and the risk that he would lie again.
103. The lies amount to "dishonesty"- and they were repeated and blatant and he
25 even produced fabricated evidence designed to avoid having to tell the truth after being told he was subject to an investigation. There was a whole course of conduct which started from May 2017 that Mr Scott took into account in his decision.
- 30 104. Of course not every minor lie or untruth that is immaterial will amount to gross misconduct. Mr Scott recognised that. However, the lies the claimant told were material. They were material and supported by fabricated evidence, which was only relented when there was overwhelming evidence was presented by the respondent. Mr Scott took into account all of the evidence

gathered in the investigation included what the claimant said, and did not say, and concluded he was not someone he could be trusted from his actions. He was someone who had committed serious dishonesty.

5 105. What is clear is, if the claimant has a motivation to do something, if he believes he has something to gain from not telling the truth, that is something he would not tell the truth about. The claimant, for whatever reason, thought there was something to gain by not telling the truth. It echoes what was said back in May to Mr Graham. At that time, what might have been seen as a simply an idle threat, 10 can no longer be dismissed as an idle threat, because the respondent knew, and reasonably so believed, that he is somebody that will lie.

106. It cannot be said that no reasonable employer would dismiss an employee who tells repeatedly blatant lies when there is something to be gained from doing so, and then take steps of fabricating evidence. These were not heat of 15 the moment lies, but steps taken that were calculated and continuous. Mr Scott's evidence was that it was significant that the claimant had planned to go on holiday all along. It is significant because his actions were calculated and planned for months and he was prepared to do and say anything to allow 20 him to go on holiday and not be caught.

107. Only when confronted with incontrovertible evidence, did this employee admit to his repeated lies – in the future, he could not be trusted (whether in connection with sickness, holidays or otherwise). His position collapsed only 25 after receiving the appendices of evidence against him. There was nothing to suggest that he would tell the truth here until then. In those circumstances, Mr Scott is entitled to view the claimant as a dishonest person. He stated to Jim Graham in advance that he had an intention to lie (about whether he was sick) and, while that might have been an overreaction to the refusal, he then 30 proceeded to lie (about his whereabouts and activities, if not his health) which shows that, in fact, what he said to Mr Graham was not necessarily a simple overreaction but his intention throughout. Whether his absence happened to coincide with a period of sickness in the end, is not relevant – he was always going to lie, he did lie and he cannot be trusted for the future.

108. The respondent acted reasonably and fairly in treating the claimant's conduct as amounting to gross misconduct warranting summary dismissal. The claimant's actions fundamentally breached the standards of conduct expected of him.

109. The respondent has shown that it sought to investigate the claimant's complaints and concerns, and it took reasonable steps to consult with the claimant.

10

110. In relation to the potential failure by the respondent to investigate that other people had been granted holiday and the inconsistent treatment of that the claimant only made reference to one particular employee's circumstances and that was Ms Finnan which Mr Scott happened to have knowledge about. No names or other circumstances to identify other individuals were provided by the claimant or his trade union representative. That was despite the claimant being given an opportunity during the investigation to provide any evidence or ask the respondent to look into certain areas. He was satisfied that there had been no inconsistent treatment or discriminatory treatment as her holiday came under Category C, which was the exception to the 2017 Holiday Rules. The claimant did not provide specifics or any details of why it amounted to direct discrimination. On the face of it, it was reasonable not to believe that he had been discriminated and not to have investigated it further. It was reasonable to think that the claimant was clutching at straws and had no basis for his allegation.

25

111. It was also reasonable not to have conducted further investigation into other requests despite the claimant's trade union representative raising that "usually there is a wee bit of come and go on these matters". No specifics were provided and Mr Scott had his own general experience of dealing with holidays requests.

30

112. It was reasonable not to have investigated this further in circumstances where even if it had been found there had been inconsistent treatment, it would not

have impacted on his decision to dismiss. It did not change the fact or excuse the claimant's dishonesty and the fact that he had planned to take the holiday from at least May 2017 anyway.

5 113. It was not reasonable to have investigated this given the particular timing that it was raised. Discrimination or inconsistent treatment had never been raised to the respondent informally or through the formal grievance process. This was not the right time to raise these issues. They should have instead been raised through a grievance. The claimant and his union was aware at the time
10 of the refusal of his request that this was the process to challenge a decision by any manager.

114. It was within the range of reasonable responses not to have explored this further, bearing in mind that an employer's duty is to carry out a reasonable
15 investigation and it is not to leave no stone unturned.

115. The respondent reached the decision to dismiss after a reasonable investigation, following a fair procedure. In all the circumstances the dismissal process was procedurally fair.
20

116. The claimant has raised the issue of another employee, Thomas Hansen. The claimant alleges that "there is no way that case is any different from this one". However, the Tribunal was invited not to accept this argument – the relevance seems to have been to consistency of treatment.
25

117. The respondent has satisfied the requirements of section 98. The Tribunal was invited to find that its dismissal of the claimant was fair in terms of section 98 and should dismiss the claim.

30 118. If the procedure followed by the respondent was unfair any procedural errors by the respondent made no difference to the outcome and the claimant would still have been dismissed, and accordingly any compensatory award should be reduced to nil to reflect the chance that the claimant would have been dismissed in any event, had a fair procedure been followed.

119. What is abundantly clear and beyond doubt is that the claimant told lies and provided no explanation for them. For that reason he is 100 percent to blame for his dismissal. There is no reason to otherwise. Regardless of what view
5 the Tribunal may or may not have about the sanction or the process, no award is appropriate here as any compensation should be reduced to nil for 100 percent contributory fault

120. If the Tribunal finds that the decision to decline the holiday was discriminatory,
10 it did not relate or contribute to his dismissal so there is no financial loss from the decision. There has been no evidence of any injury to feelings and therefore no award for it. The claimant had not raised any grievance or issues around the time of the alleged discrimination. There is no medical evidence relied upon for any hurt feelings and the cause of those feelings.

15 *The Claimant*

121. The claimant considered that other than his comments at the return to work interview and meeting on 21 August 2017 there was no evidence to show that he had acted dishonestly. The claimant considered that the comparator in the case (Thomas Hansen) showed that the decision was harsh.
20

122. The claimant felt that there was uncertainty as to who had decided not to allow to change his holiday. He also considered that Mr Graham was vague in not divulging information in May 2017; Mr Graham was lying to him and being dishonest.
25

123. The claimant said that the respondent had not followed its duties about asking for time off and it had not investigated matters properly because all of his claims of discrimination had been ignored.

30 124. The respondent had discriminated by allowing others to change their holidays at different times. He had applied for his holidays in good faith and been denied them.

The Law

125. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).
126. Section 123(1) of the EqA provides that the time limit for a discrimination claim to be presented to a Tribunal is normally at the end of “the period of three months starting with the date of the act to which the complaint relates” or such other period as the Tribunal thinks is “just and equitable”
127. Section 94(1) of the Employment Rights Act 1996 (the ERA) provides that an employee has the right not to be unfairly dismissed by their employer.
128. Section 98 of the ERA provides that in determining if a dismissal is fair it is for the employer to show the (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.
129. A reason falls within subsection (2) if (a) it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee, (c) redundant, or (d) contravention of an enactment. “Capability”, in relation to an employee, means her capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which she held. If the employer shows the reason or principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons section 98(4) requires the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer and (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.

5 Discussion and Deliberation

130. The Tribunal started its deliberations by referring to the claim and response as it was mindful that was the case of which the parties had notice and was before the Tribunal.

131. The claimant brought a direct discrimination claims based on the protected characteristic of sex. He claimed that the alleged act of discrimination was the refusal to allow him to change his holiday dates.

132. The Tribunal felt that it was appropriate to ask first whether it had jurisdiction to consider the sex discrimination complaint. Mr Graham refused to grant the claimant's request to change his holidays on 20 February 2017. Mr Graham granted Ms Finnan's holiday request in March 2017. The claimant considered that he had been treated less favourably than Ms Finnan on the grounds of sex. He renewed his request to change his holiday and this was refused by Mr Graham on or around 11 May 2017. There was no continuing conduct. The claimant presented his claim to the Tribunal on 17 January 2018.

133. The Tribunal concluded that the discrimination claim was presented out of time. The Tribunal then asked if it was "just and equitable" in the circumstances to extend the time limit for so doing.

134. The Tribunal was mindful that there was no presumption in favour of exercising its discretion to extend time; it was the exception rather than the rule. It was for the claimant to convince the Tribunal that it is just and equitable to do so.

135. The claimant believed around 11 May 2017 that he had been discriminated against because Mr Graham still refused his request to change his holiday dates yet had granted Ms Finnan's request. The claimant was a trade union

member but sought no advice on this issue despite being accompanied by a full-time trade union official at the disciplinary and appeal hearings. The claimant uses email and has a smartphone. His brother has access to a computer and booked flights online.

5 136. The claimant did not raise a grievance about the alleged discrimination. It was only mentioned at the disciplinary hearing when he was aware that his employment might be terminated. The claimant initiated the early conciliation process on 6 November 2018. He presented the claimant form and conducted the Tribunal proceedings on his own account.

10 137. There was no evidence provided by the claimant why he did not act when he believed that he was discriminated against or why he did not lodge the discrimination claim earlier. The fault for the delay lay with the claimant and there were no exceptional circumstances. The Tribunal therefore concluded that it was not just and equitable to extend the time for the claimant to present
15 his sex discrimination claim.

138. In any event the Tribunal did not consider from its findings that the claimant and Ms Finnan were in the materially the same circumstances. Ms Finnan's request, and that of Mr Marchetti, were treated as applications for Category C leave. The claimant did not make any request under Category C or suggest
20 that his change of holiday request was for a special occasion. Ms Gilmour's application related to leave in January and was therefore not under Category B either and in any event her application to change holidays like the claimant's application was refused.

25 139. The Tribunal considered that the deadline for holiday requests was of mutual benefit to allow employees to book holidays as early as possible and for the respondent to plan shifts to ensure shifts that sufficient cover was provided for production. It therefore seemed entirely plausible that once the dates were confirmed the arrangement would only be changed for a special occasion that was within the discretion of the General Manager.

140. The Tribunal next asked what was the reason for the claimant's dismissal? It is for the respondent to show the reason for dismissal and that it is a potentially fair reason. At this stage the Tribunal noted that it was not considering the question of reasonableness.
- 5 141. Mr Scott said that he dismissed the claimant because of his conduct. Mr Scott confirmed his belief that the claimant went to Fuertaventura on 28 July 2017 despite reporting unfit for work that day and despite advising that he had not gone abroad. Mr Scott also believed that the claimant was dishonest about his activities during his absence and the reasons for his absence and
10 regardless of whether the claimant had a sore back he intended to take the time off despite his request having been refused. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was misconduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason under section
15 98(2) of the ERA.
142. The Tribunal then asked if the respondent act reasonably in treating such a reason as a sufficient reason for dismissing the claimant? The Tribunal noted that it had to determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question
20 depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the substantial merits of the case.
- 25 143. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right course to adopt for that with the respondent.
144. The Tribunal applied the range of reasonable responses approach to whether the respondent had carried out a reasonable investigation and had
30 reasonable grounds for its belief that the claimant was dishonest.

145. The Tribunal found that the investigation in this case was prompted by Mr Graham's email because he was worried that the claimant had deliberately gone on holiday. The Tribunal considered that Mr Graham had not predetermined the matter. From the tenor of the email the Tribunal felt that Mr Graham was hoping that his concerns were misplaced and the claimant would answer his telephone or be at home and that would be the end of the matter.
146. Mr Earlie endeavoured to establish the facts. In the Tribunal's view Mr Earlie was not trying to entrap the claimant but rather assist the claimant by offering support and suggesting what the claimant might provide to establish that he was not abroad.
147. The claimant was given three opportunities to be candid about his actions but did not do so. He produced a bank statement in support of his position that he was not abroad.
148. The investigation continued throughout the disciplinary hearing with Mr Scott. The claimant admitted that he had been abroad and what he had said during the investigation had been incorrect. The claimant confirmed that he had told Mr Graham in May 2017 that it would be too expensive to change the flights and accommodation and he would "go off sick if necessary".
149. The claimant said that he felt discriminated against. He did not say on what grounds. This was the first time that he mentioned discrimination. He referred to Ms Finnan although not by name. Mr Scott was by chance aware of her circumstances; he had been based in Hillington until April 2017. The claimant also referred to "another Hillington operator" who had changed "their September holiday recently". The claimant provided no further details. The Tribunal understands that this was a reference to Mr Marchetti.
150. The claimant was accompanied by a trade union representative. In preparation for the disciplinary hearing the claimant was asked if he wished Mr Earlie to attend or if there were any further witnesses he wished the respondent to speak to. The claimant did not respond. Given Mr Scott's awareness of Ms Finnan's circumstances the Tribunal considered that it was

reasonable not to investigate this further particularly as the claimant did not raise a grievance at the time. The claimant's position was that he only decided to go on holiday on 28 July 2017 while he was on sick leave. In any event the circumstances surrounding the refusal to grant leave did not explain why the claimant lied about his whereabouts when he was on sick leave.

5

151. The Tribunal was satisfied that before the disciplinary hearing the claimant was aware of the case against him. He had been provided with the investigation report, the appendices and Handbook. The claimant confirmed that he had been abroad while on sick leave and had lied during the investigation.

10

152. The Tribunal was satisfied that Mr Scott accepted that the claimant had a fit note certifying that he was not fit to attend work. Mr Scott did not question the medical evidence.

153. What Mr Scott believed was that in addition to lying during the investigation the claimant intended to take the time off in any event. This belief was based on what the claimant said during the disciplinary hearing about what he said to Mr Graham, what was overheard by Mr Banks and his comment to Mr Sullivan about overtime and the claimant willingness to lie to Mr Earlie during the investigation. The claimant offered no explanation; his focus was on the unfairness of his request being refused.

15

20

154. Mr Scott accepted that the claimant had 17 years of service and that he had an unblemished disciplinary record.

155. The Tribunal acknowledged that while other employers may have acted differently it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within a reasonable band of responses to the situation.

25

156. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

157. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation.
158. The claimant was aware of the case against him and at the disciplinary hearing he was given an opportunity to explain his position or any mitigation circumstances. The claimant was represented throughout the internal process.
159. Mr Scott believed that the claimant had been guilty of dishonesty. He believed that the claimant was deceitful in several respects. The Tribunal observed that the letter inviting the claimant to the disciplinary hearing referred to gross misconduct. The claimant and his representative did not take issue with that at the time although Mr McGurk asked if it could be classed as a stage 1.
160. The lies that the claimant told were material; were supported by fabricated evidence during an investigation onto his conduct. These lies were not in the heat of the moment but were calculated and continuous. Mr Scott believed that the claimant planned to go on holiday all along and he was prepared to do or say anything to allow him to go on holiday and not be caught. The only reassurance that the claimant gave Mr Scott at the disciplinary hearing was "I lied but...". The claimant sought to explain why his lying was warranted. Mr Scott felt that in the future the claimant could not be trusted. This was also against the backdrop of the claimant showing no remorse or understanding of his actions.
161. The Tribunal concluded that Mr Scott's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.
162. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.
163. The Tribunal then considered the appeal process. It was satisfied that Mr Beech and Mr Lang had no earlier involvement. While the claimant raised

various grounds of appeal at the appeal hearing he focused on discrimination and referred to “another boy had his September holiday changed”. The claimant was asked why he had not raised a grievance when he was aware of the procedure. The claimant said that he thought his manager would bring it to his attention.

5

164. From the notes of the appeal hearing and the letter advising of the outcome of the Tribunal considered that Mr Beech and Mr Lang thought about the points raised and set out their reasoning for reaching the conclusion that they did.

10 165. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

15 166. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

167. The Tribunal therefore dismissed the claimant’s claim for unfair dismissal.

Employment Judge: Shona MacLean

Date of Judgement: 24 October 2018

20

Entered in Register,

Copied to Parties: 26 October 2018