Case Number: 3201572/2019

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Chizzoni**

Respondent: **CT Plus**

Heard at: **East London Hearing Centre**

On: **Thursday 6 February 2020**

Before: **Employment Judge C Lewis**

Representation

Claimant: In person

Respondent: Mr D Evans (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's claim for:

(1) unfair dismissal succeeds;

The Claimant's claims for

(2) breach of contract /failure to pay notice pay; and

(3) failure to pay holiday pay

fail and are dismissed.

REMEDY

(4) The Claimant is awarded the sum of £676.33, calculated as follows:

(i) Basic award: 1.5 x a week's pay for each complete years' service: (1.5 x £208.74 x 3) = £939.35

(ii) Less the reduction of 60% to reflect contribution (£676.33 x60%)= £563.61

(iii) Plus an uplift of 20% to reflect Respondent's failure to follow the ACAS Code (£563.61 x 20%) = £676.33

REASONS

1 By a claim form received on 24 June 2019 following a period of early conciliation between 6 June 2019 and 18 June 2019 the Claimant brought claims of unfair dismissal, outstanding arrears of holiday pay and notice pay. The Respondent denies that the Claimant was unfairly dismissed. It accepted that it had dismissed the Claimant but relied upon a potentially fair reason, namely gross misconduct. The Respondent also denied that it owed the Claimant arrears of pay, holiday pay or any other payment.

Case Management

2 The Claimant indicated on his claim form that he requested the assistance of an Italian interpreter. However at the hearing he confirmed that he preferred to go ahead without an interpreter. The hearing had previously been listed 24 October 2019 and on that occasion it had not gone ahead due to lack of judicial resources. The Claimant had attended but had found it very difficult to understand the interpreter and considered that he was able to understand what the Judge was saying and would let the Judge know if there is anything that he was unclear about on this occasion. The Claimant suffers with sciatica and back pain problems; the Judge indicated that he was free to stand and move around at regular intervals if he needed to and that we would take regular breaks. The Claimant also suffers from tinnitus: he is completely deaf in his left ear and has severe hearing loss in his right ear. His hearing has now improved somewhat with the fitting of hearing aids in July 2019, the Claimant was asked to indicate if at any point he was having trouble hearing what was being said.

3 The Respondent had prepared a bundle for the hearing and the Claimant arrived with two separate bundles of papers of his own. Ms Williams, the Respondent's HR Business Partner went through the Claimant's documents and identified any that were not in the Respondent's bundle and copies were made so that those could be referred to if necessary.

4 The Employment Judge explained to the Claimant the role of the Employment Tribunal in a claim for unfair dismissal and described the relevant issues with reference to section 98 (1) and (2) of the Employment Rights Act 1996, potentially fair reasons for dismissal and the reliance by the Respondent on one of those i.e. conduct; the question for the Tribunal under section 98(4) - whether dismissal was fair or unfair in all the circumstances and the test in *BHS v Burchell* for conduct dismissal. The Tribunal has to consider whether the reason given was the genuine reason, whether the Respondent had a genuine belief in the misconduct alleged and whether that belief was based on reasonable grounds following such reasonable investigation as was necessary the circumstances, and that the decision to dismiss was a fair sanction namely that it was within the range of reasonable responses open to a reasonable employer. The Employment Judge informed the Claimant that it was not for the Tribunal (that is, the Employment Judge) to substitute her own view as to whether she would have dismissed

the Claimant in the same circumstances but to test the employer's action against the range of options open to a reasonable employer and this applies to the procedure that the employer followed in reaching the decision to dismiss as well as to the decision itself.

5 The Tribunal heard evidence from Mr Nigel Thomas who took the decision to dismiss and Ms Sian Williams, HR Business Partner. Having heard the evidence and brief submissions from Mr Evans and having heard from the Claimant the Tribunal made the following findings of fact as far as they are relevant to the claims and the issues the Tribunal had to decide.

Findings of fact

6 The Claimant started working for CT Plus as a professional bus driver, originally through an agency Integrated Solutions in February 2016, and soon after became directly employed by CT Plus on 9 May 2016. The Respondent is a social enterprise in the transport industry. It delivers a range of transport services including London Red Buses, Social Services Transport, School Transport and Community Transport. The Claimant was employed by the Respondent as a driver working from the Respondent's Ash Grove Depot in Mare Street, Hackney. The Claimant, along with all other new employees of the Respondent, was subject to a probationary period and on 8 November 2016 he received a letter confirming that he had successfully completed his six months' probation. The Claimant started to have problems with his painful back in 2018 and had to take some period of time off sick. He explained that when this happened he was in constant contact with his manager Ms Joyce Ojudun to keep her updated and that he attended a few Care and Concern meetings with her. The Care and Concern meeting is a reference to the name given under the Respondent's absence management procedure. The procedure was at pages 37 – 42 in the Respondent's bundle, and under absence over 7 days provides [page 38 of the bundle]:

> "If your absence persists over 7 days the company may require you to attend a Care and Concern meeting with your manager. Should be unable to attend your usual place of work then a home visit may be appropriate, this will be discussed and arranged with your manager if necessary. At this meeting your manager may ask you for authorisation to contact your doctor to obtain information in relation to your current absence which may include any longer term effects on your ability to return to work and/or require you to attend an Occupational Health review appointment. Failure to attend Care and Concern meetings and/or refusal to authorise a company to speak to your doctor or attend an Occupational Health meeting may be classed as failing to follow a reasonable request and could result in a formal interview."

7 At page 4 of that document, [page 40 of the bundle] under the heading "meetings/home visits" it states the following:

> "During any absence it is important that the employee keeps in touch so that their manager is kept informed of the employee's health and likely return to work date. The employee will therefore be periodically asked to attend meetings with their manager on work premises, for the purpose of providing information which would allow the company to offer support to facilitate an effective return to work. There is no set frequency for scheduling such meetings these are wholly at management

discretion and availability.

If the employee is too unwell/physically unable to attend the office, the organisation reserves the right to visit him/her at home".

8 Also at page 4 of the document under "dealing with absence issues" is the following paragraph:

"Absence issues which remain unresolved or uncorrected by the employee will be dealt with under the scope of conduct and capability as detailed within the company disciplinary policy. Failure to address absence issues raised by your manager may ultimately result in the termination of your employment."

9 At the end of document, page 5 – 6 is the following:

"Failure to follow or meet the expectations detailed within our absence policy.

Failure to follow the requirements of this policy may result in action being considered within the guidelines and scope of the company disciplinary policy."

The Claimant's contract set out the entitlement in respect of paid sick leave, the relevant parts being at:

"14.3.5: Between 2 and 4 years post probationary employment, the employee will be entitled to six weeks sick pay.

…

14.2.7 The employer reserves the right to seek a second medical opinion, in which case the employee must cooperate with such medical practitioner as the employer may require for the purpose of providing such an opinion."

10 At pages 110 – 111 in the Respondent's bundle is a print out of the Claimant's sickness absence records, Ms Williams explained that this spreadsheet was attached behind its sage payroll system and recorded the Claimant's absences. Ms Williams explained that the six weeks' full pay in respect of sickness absence was based on a rolling 12 month period. The data was inputted by Denise Down, one of the Respondent's payroll clerks, based on the information provided by the depot. The Claimant was recorded as being off sick from 14 December to 27 December 2016. The Claimant did not dispute that he was off sick on these dates. Ms Williams explained when the Claimant went off sick in March 2017 he was still within the 12 months period triggered by his absence in December 2016 (due to entitlement to sick pay being calculated on a rolling 12 month period) and had already used up some of his six weeks' pay (in December). The Claimant was off from 11 March to 16 April and then again from 26 October to 30 October and from 4 December 2017 to 20 May 2018. The Respondent's records show that he went on to half pay in the week 21 March 2017 and that he went on to SSP-only from 11 December 2017, the periods being noted as being linked periods of sickness. The Respondent's records note that as at the week of 26 March 2018 to 1 April 2018 the Claimant had received 80 days statutory sick pay and that as at 20 May 2018 he had

received 120 days statutory sick pay. Next to the week of 8 October to 14 October 2018 is a note, “statutory sick pay only from here”; against the week from 28 January 2019 to 3 February 2019 is a note, “17 weeks SSP to here” ; against 24 March 2019, the note states “24 weeks SSP been paid” and next to the week of 13 April to 19 April 2019 a note that “SSP entitlement used up and SSP1 form sent on 25 April”.

11 On 22 May 2018 the Claimant attended a meeting with John Bachelor, then Head of Operations for CT Plus, to discuss his periods of absence; at that meeting it was agreed, at the Claimant’s request, that he return to work for two days a week. This was confirmed in a letter of 19 June 2018, which stated that the arrangement would persist for three months from 26 May until the end of August 2018. I find that the Claimant’s hours of work were varied accordingly.

12 On 12 September 2018 the Claimant wrote to Mr Bachelor, referring to a meeting the previous week with his union representative, making a formal request to work one day a week on the late shift from 5.00pm due to his personal circumstances until further notice.

13 On 21 September 2018 John Bachelor replied asking the Claimant to let him know his availability to attend a meeting to discuss his request and noting that he was still working on 2 days a week even though the date for that arrangement to end had now passed.

14 On 6 October 2018 John Bachelor recorded a file note which was passed to Joyce Ojudun in respect of an incident on 5 October in which the Claimant had allegedly been swearing at another driver down the phone asking where his sick pay was, and using aggressive and insulting language and continued to do so when John Bachelor took the phone. As a result of this incident the Claimant was invited to attend an investigatory meeting with Joyce Ojudun on 15 November 2018 (although the Claimant later refers to this as having been a Care and Concern meeting, it was in fact an investigatory meeting). As the Claimant was leaving the Respondent’s premises after this meeting he suffered a fall. The Claimant had mobility problems and was walking with crutches, he described the fall in a report in support of an industrial injury claim as having been caused when his crutches caught on a fire extinguisher in the corridor and he fell to the ground and banged his head on the floor. He was taken directly by ambulance to hospital and his attendance summary from the emergency medicine department was included in the bundle, at pages 69 – 71. It is as a result of this fall that the Claimant developed tinnitus and hearing problems. The Claimant told the tribunal that his doctor advised him that he would need to wait six weeks to see if the tinnitus and hearing issues went away or were going to become permanent. The Claimant continued to provide fit notes from his doctor certifying that he was unfit to attend work due to low back pain.

15 The Claimant complains that Joyce Ojudun then started to bombard him with new meetings to attend. Ms Ojudun emailed the Claimant on 15 November 2018 with the minutes from the fact-finding meeting and expressed the hope that he had been discharged from hospital. The Claimant responded on 27 November confirming his daughter had told him that Ms Ojudun had called, he informed Ms Ojudun that he was not able to speak on or answer the phone and that an email would be better.

16 On 27 November Ms Ojudun emailed the Claimant to inform him that she had

scheduled an appointment for him to see the Occupational Health doctor at the Ash Grove depot on 28 November at 4 pm. She pointed out that following the incident on 15 November he had not updated the Respondent as to his condition, apart from a message from his partner on 16 November informing Ms Ojudun that he was resting, and that she had not heard any further. Ms Ojudun informed the Claimant that at the meeting on 28th they could discuss his current condition with the company doctor and also go through any relevant paperwork in relation to the incident. The Claimant had asked for information in respect of making an industrial injuries claim or insurance claim.

17 Mr Chizzoni emailed at 17 minutes past midnight on 28 November 2018 to inform Ms Ojudun that he would not be attending the medical appointment on 28th due to his health condition and pointing out that he had provided a medical sick note. He accused Ms Ojudun of aggravating his health conditions by continuously calling him. In response Ms Ojudun referred him to the absence procedure and informed him that the company doctor is a medical professional who carries out Occupational Health assessments on behalf of the company and provides a report on his fitness to work, helpful adjustments and so on. Ms Ojudun advised the Claimant that should he fail to attend the Occupational Health assessments and the Respondent was unable to get medical information/advice about his condition from their company doctor a decision could be made on his employment which may include termination of his employment on capability grounds.

18 Mr Chizzoin's response is at page 78 of the bundle. He did not accept that he needed to attend and Ms Ojudun indicated that she would reschedule another appointment to be sent in a separate email. She sought to allay Mr Chizzoni's concerns but also referred him to the terms and conditions of his employment which stated that he may be required to attend meetings while he is absent from work due to sickness. She attached a copy of the absence policy for his convenience. [The Claimant accepted that he had received the policy attached to this email]. Ms Ojudun informed the Claimant she was not aware he was off for a work-related injury, she provided details of the company's liability insurance and suggested the Claimant seek independent legal advice if he wished to bring a claim of work-related injury. She informed the Claimant that he was required to meet with CT Plus Management for Care and Concern meetings, to review the incident on 15 November and for Occupational Health reviews with the company doctor. She referred him to the company's absence policy and pointed out that the invitation to attend the meeting with the company's doctor is part of that company policy.

19 The Claimant replied on 30 November taking issue with the contents of Ms Ojudun's email and expressing his belief that he was entitled to six weeks of sick pay in full and stating that he had not received that.

20 On 14 December 2018 Ms Ojudun emailed the Claimant with a second invitation by letter inviting him to an Occupational Health assessment, this invitation had previously been sent on 6 December however the Claimant failed to attend and failed to contact anyone to inform them of his non-attendance. He had also failed to attend the previously scheduled appointment on 28 November. The Claimant responded to Ms Ojudun's email repeating his belief that he was entitled to six weeks' sick pay and informing her that after his fall his mobility had deteriorated and that was taking pain killers which affected his concentration; he asked that any papers or questionnaires that needed to be filled in be sent by post or email.

21 On 11 February 2019 Ms Ojudun emailed a letter to the Claimant headed "current absence from work" pointing out that he had been absent since September 2018 and refused on two occasions to attend Occupational Health appointments. The letter stated:

> "I must make you aware that under our absence policy you are required to attend both Care and Concern meetings and any required any Occupational Health assessment in order for us to gain updates on your progress."

She requested that he contact her by 3 pm on 15 February to make arrangements to attend an Occupational Health assessment, which she offered could be conducted at his home if necessary. The letter contained the following warning:

> "Should you fail to do so on this occasion I may be left with no alternative but to consider taking this matter via the formal disciplinary route for "failure to follow a reasonable request"."

22 Ms Ojudun then left the Respondent's organisation and her role was taken over by Mr Thomas.

23 Mr Thomas noted that the Claimant had been absent from work due to sickness for a period of almost six months. He also noted that there was no sign of improvement, or of a return to work, or engagement with the Respondent to assist his return to work. He concluded that as a result the business was unable to consider accurately their staffing levels, budgets and rotas and they had no idea when the Claimant would be coming back. Having reviewed the email correspondence between the Claimant and Ms Ojudun he considered that the Claimant was blankly refusing to engage with her during his period of absence and he felt that there was sufficient evidence to proceed to a disciplinary hearing given the Claimant's conduct. He considered that the Claimant's conduct required addressing formally and that it was clear from the absence policy what was expected and also that failure to follow the requirements of that policy could result in the disciplinary process being followed.

24 On 6 March 2019 the Claimant was invited via email to attend a disciplinary hearing on 14 March, [page 83 in the bundle]. The letter informed him that following his failure to attend two Occupational Health assessments on 28 November 2018, 18 December 2018 and subsequent request to contact Joyce Ojudun by 15 February 2019 Mr Thomas was left no alternative but to request that he attend a formal disciplinary hearing in regards to failure to follow a reasonable management request as per the company's disciplinary procedure. At that hearing he would have the opportunity to comment on the allegation as to why he consistently refused to contact the company. He was informed of his right to be accompanied by a trade union representative or a work place colleague and also informed that if the company upheld the allegation disciplinary action might be taken up to and including dismissal. The Claimant was told if he was not able to attend he should contact Mr Thomas as soon as possible stating the reasons for his non-attendance.

25 On 6 March 2019 the Claimant responded by emailing Mr Thomas asking whether the letters about health assessments had been sent because he had not received anything about it. He said it was important because he is not checking his emails daily after his work-related injury that he had reported to Joyce. Mr Thomas responded on 12

March pointing out the Claimant had informed Ms Ojudun that he preferred to be contacted by email, which was what had then been done. The Claimant did not attend the disciplinary meeting scheduled for 14 March 2019.

26 Mr Thomas wrote to the Claimant on 1 April 2019 asking that he make contact by 8 April which the Claimant again failed to do. Following this failure Mr Thomas invited the Claimant to a rescheduled disciplinary hearing on 25 April and informed the Claimant that his failure to attend the hearing would result in a decision being made in his absence. He pointed out that the company viewed his refusal to engage as gross misconduct, i.e. a failure to follow a reasonable management request. The Claimant was given a further 7 days to reconsider his decision but should he still refuse to either attend an Occupational Health assessment at the depot or at home then Mr Thomas would be left with no alternative but to proceed with disciplinary action. For the avoidance of doubt Mr Thomas scanned and copied all of the correspondence from Ms Ojudun and sent it to the Claimant.

27 On 9 April Mr Thomas wrote to the Claimant again, inviting him to a disciplinary hearing on 25 April [page 90]. He referred to his email of 1 April and invited the Claimant to contact him in respect of the failure to attend an Occupational Health assessment, noting that it was disappointing that he had failed to make contact with him or any member of management at CT Plus. Mr Thomas stated that he was left with no option but to invite him to a disciplinary meeting to discuss his failure to follow reasonable management instructions to attend Occupational Health on more than one occasion and failure to respond to his letter of 1 April 2019. He repeated that the Claimant had the right to be accompanied at the meeting and pointed out that if the allegation was upheld disciplinary action might be taken up to and including dismissal. He concluded by informing the Claimant that if he was not able to attend he should contact him as soon as possible stating reason for non -attendance.

28 The Claimant did not attend the hearing. Mr Thomas told the Tribunal that he felt that he had no alternative but to conduct the hearing in his absence. He believed the Claimant had been given every opportunity to engage with the Respondent over his absence from the workplace; he had been given several alternative options as a means of doing so and provided with detailed explanations as to why he is required to do so. Despite all of this he flatly refused and failed to turn up to meetings when they were arranged and declined to engage with the offer of a visit at his home. Given the evidence that was before Mr Thomas and in the absence of any alternative input from the Claimant Mr Thomas made the decision to terminate the Claimant's employment for gross misconduct due to his refusal to attend meetings and engage with his employer during his period of absence. He considered that the Claimant's refusal to engage was covered under the disciplinary procedure of gross misconduct [page 33] at X "wilful refusal to carry out a reasonable instruction given by a manager"; and (d) deliberate or grossly negligent contravention of company rules and procedures.

29 Mr Thomas wrote to the Claimant to inform him of the decision and his right of appeal. Having decided that the Claimant was guilty of gross misconduct Mr Thomas did not consider that he was entitled to notice pay and he was dismissed summarily.

30 The Claimant emailed an appeal against the decision to Mr Darren Rees on 15 May he stated that he was not able to attend Occupational Health meetings due to his

health condition after a work-related injury and had informed the person on duty about his impediment providing medical certificate from his General Practitioner. He also complained that he had not received payment in full and had only been receiving SSP payments. He stated that he had never been informed about Care and Concern meetings and it was a new policy that he had not agreed.

31 Unfortunately, in May 2019 the Respondent suffered several severe malicious IT attacks and the London Metropolitan Police Cyber Crime Unit had to become involved. Ms Williams told the Tribunal that one of the effects of the cyber-attack was that from around 20 May to 30 June 2019 the company server shut down. It was taken offline for emergency quarantine and repair. During this period the company lost much of its IT infrastructure including email communication capabilities. All the data relating to emails sent or received prior to the attacks and much of the data received up to the point of full restoration after 30 June was lost and was not able to be recovered. Ms Williams could not explain why Mr Rees had not responded to the Claimant's email. The Claimant also sent his appeal on 25 May, by Signed For post, and the Respondent has not provided any explanation as to why the letter was not received or dealt with. Ms Williams told the Tribunal that she was first aware the Claimant had appealed against the decision when she saw his appeal letter in the disclosure he provided on 19 September 2019.

Sick pay

32 Ms Williams explained that the spreadsheet [at page 110 of the bundle] setting out the absences and sick pay paid to the Claimant stated that he had been paid all that he was entitled to under the policy and his entitlement to statutory sick pay expired on 19 April 2019, after that he would have to make a claim for ongoing benefits via the Department for Works and Pensions and a form SSP1 was sent to him on 25 April so that he could do this. The Claimant confirmed he received the form and completed it and made a claim for personal independence payments which was backdated to 26 April and he received that payment sometime in September 2019.

33 The Claimant confirmed that he remained unfit for work and was unable to carry out driving responsibilities due both to his lower backpain, which persisted, and to his hearing loss which meant that he would not be able to hear what was said on the driver's radio. He accepted he was not fit for work and he told the Judge that he hoped that he would be able to find alternative work when his PIP payments run out in 2021, he was hoping that he would be able to carry work such as repairing phones by that time. In the meantime he has been in receipt of Personal Independence Payments, at the standard rate from 26 April 2019 to 11 July 2021 and the enhanced rate for the same period. The Claimant had also applied for industrial injuries disablement benefit and was informed on 17 October 2019 by the Department for Works and Pensions that it had decided the accident on 15 November 2018 was an industrial accident and that his claim for industrial injuries disablement benefit was being considered. The Claimant told the Tribunal that he had not yet received a decision on that claim.

Holiday Pay

34 The Claimant claims that he was not paid for holidays that he accrued during his period of sickness absence. Ms Williams told the Tribunal that the Respondent was well aware of the its employees' entitlement to accrue their sick pay during any periods of

sickness absence and that this was recorded by the depot. She contended however that the Claimant had received holiday pay during the relevant holiday year for leave that he had taken and that the failure to pay him on termination for outstanding holiday pay was as a result of the difficulties experienced by the Respondent following the cyber attack when all their records were in disarray. When this was brought to her attention she ensured that the Claimant was paid his remaining outstanding holiday pay and that this was sent to him together with the payslip on 25 October 2019 which showed that he was paid £601.75 in respect of annual leave which related to 6.28 days holiday accrued but not taken, she referred to a Leavers from completed by the depot [p.126] showing that the Claimant had accrued 6.28 outstanding days. The holiday year ran from 1 April to 31 March, clause 10.4 of the contract of employment [p 53]. The contract stated that all leave was normally to be taken within the leave year and provided that a maximum of 5 days could be carried over to the next year in exceptional circumstances, at the employer's discretion, and to be taken by 30 April.

35 The Claimant claimed that he was entitled to 28 days holiday per year and disputed that he had been paid holiday pay and said there are no references to holiday pay being paid in any of his payslips. However, he was taken by Mr Evans to a payslip [page 61] from 27 July 2018 which showed he was paid £502.41 in respect of annual leave which equated to 6.27 days' holiday pay. The Respondent pointed out that the Claimant reduced his working hours from 5 days a week to 2 days a week from 26 May 2018 and he accrued his holiday entitlement from 26 May 2018 onwards pro rata to these two days a week. The Respondent's calculation included the days accrued in the leave year up to 31 March 2019 not just the period 1 April to 16 May 2019. The Respondent therefore maintained that it had paid the Claimant for all outstanding holiday.

36 The Claimant disputed that his holiday should be reduced pro rata to reflect his two days a week working and did not recall taking any holiday at all in the period July 2018 but did not dispute that it was a copy of his payslip in the bundle. He did not produce any further documents to support his claim.

The Law

Unfair Dismissal

37 The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) did the employer genuinely believe that the employee had committed the act of misconduct?

(2) was such a belief held on reasonable grounds? and

(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

38 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial

merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

39 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses.

40 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

41 The range of reasonable responses test applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. The extent of investigation reasonably required will depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effects upon the employee. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case.

42 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

43 In **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112 Lord Bridge of Harwich observed, at 24

> " A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal. By the same token, a dismissal may be held to be unfair when the employer has refused to entertain an appeal to which the employee was contractually entitled and thereby denied to the employee the opportunity of showing that, in all the circumstances, the employer's real reason for dismissing him could not reasonably be treated as sufficient. There may, of course, be cases

> where, on the undisputed facts, the dismissal was inevitable, as for example where a trusted employee, before dismissal, was charged with, and pleaded guilty to, a serious offence of dishonesty committed in the course of his employment. In such a case the employer could reasonably refuse to entertain a domestic appeal on the ground that it could not affect the outcome. …"

44 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers should allow an employee to appeal against any formal decision made.

45 In deciding whether or not the dismissal was fair, the Tribunal must consider the facts known to the employer at the date of dismissal. After-acquired evidence is not relevant to fairness, although it may be relevant to remedy, **W Devis & Sons Ltd v Atkins** [1977] IRLR 314, HL.

46 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

47 Holiday pay

Working Time Regulations 1998
Regulation 16 Payment in respect of periods of leave

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3) [and the exception in paragraph (3A)].

…

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

48 The case of *HM Revenue and Customs v Stringer [2009] UKHL 31*, *[2009] IRLR 677*, *[2009] ICR 985*) is a unanimous decision that claims for non-payment of holiday pay due under WTR SI 1998/1833 reg 16(1), or for non-payment of pay in lieu of holiday not taken, under reg 14(2), can be brought either under reg 30 or as claims of unlawful deductions from wages under ERA 1996 Part II.

Conclusions

Unfair dismissal

49 I am satisfied that at the time of reaching his decision to dismiss Mr Thomas genuinely believed that the Claimant was failing to follow reasonable management instructions and that his belief was based on reasonable grounds; he had before him clear evidence that the Claimant was not engaging with Ms Ojudun or with himself. He set out very clearly the potential consequences to the Claimant of failing to engage or failing to attend the meetings. I am satisfied that it was within the range of reasonable responses open to a reasonable employer to proceed with the disciplinary hearing in the Claimant's absence in the light of his repeated failure to engage with the Respondent and with the disciplinary process.

50 I note that the Claimant before me put forward different reasons to those he presented to his employer at the time for not attending either the Occupational Health meetings or the disciplinary meetings. I have to assess what was in the mind of the decision maker at the time and I am satisfied that Mr Thomas had reasonable grounds for his belief and that based on the information before him the decision to dismiss was one that was open to a reasonable employer and is not one that I should interfere with. However, the Claimant was denied his right of appeal. The Respondent has not been able to put forward any explanation for failing to deal with the Claimant's appeal letter. I am satisfied that the dismissal was unfair dismissal in the circumstances, the appeal being an essential part of the overall procedural fairness (see **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112 above).

Remedy for unfair dismissal

Polkey

51 The Respondent suggested that if there had been a procedural failing this made no difference to the outcome and the Claimant would have been dismissed in any event, if not for misconduct then for capability, he was not going to be able to attend to work within a reasonable timeframe. If the Claimant had attended any Occupational Health meetings the most likely outcome would have been that the Claimant was found to be incapable of performing his duties for the foreseeable future, which may well be what the Claimant had in mind when he said in his evidence to the Tribunal that he did not wish to attend the Occupational Health meetings (1) because he said he was being bullied but (2) because he believed it was simply an excuse to dismiss him.

52 Mr Evans also submitted that there was no financial loss to the Claimant in any event. He did not make that submission lightly or with no basis but because the Claimant had reached the end of his period of statutory sick pay and based on his evidence to the Tribunal, there was no likely prospect of him returning to work in the near future: either when the decision to dismiss him was made, or even at the date of this hearing. The Claimant had exhausted his statutory sick pay and had become eligible for Personal Independent Payments which he duly received. His financial position would have been the same whether he was still in employment or not.

53 Having heard from the Claimant as to his reasons for not engaging with the Respondent's instructions and having considered the contents of his appeal letter I do not find that there is any realistic basis for suggesting that the appeal would have made any difference to the Respondent's decision. I find the likelihood of the Claimant's dismissal being upheld had he been afforded his right of appeal is 100%. The accept the Respondent's submission that it would have most likely dismissed the Claimant for capability in any event. I therefore would have been minded to reduce any compensatory award by 100% had there been an award to make. However, I am satisfied in the circumstances of this case that Mr Evans' submission is correct and that there is no financial loss to the Claimant for the reasons he gave. The Claimant was in receipt of SSP but had exhausted his statutory sick pay entitlement and had moved on to PIP as from 26 April 2019 prior to the date of his dismissal.

Basic award

54 The Claimant was employed by the Respondent from 9 May 2016 until his dismissal on 14 May 2019. He had 3 complete years' service during which he was over the age of 41. He was paid £13.38 per hour for 7.8 hours days and prior to his dismissal had reduced his days to 2 days per week. His gross weekly pay was therefore £208.74 The Claimant's basic award is calculated as follows: 1.5 x a week's pay for each complete years' service: 1.5 x £208.74 x 3 = £939.35

Contribution

Reduction to basic award

55 S 122 (2) whether the claimant's conduct before dismissal was such that it would be just and equitable to reduce the basic award, and s 123(6) ERA where the Claimant's action(s) caused or contributed to the dismissal. I remind myself that I would need to be satisfied that his conduct was culpable or blameworthy and that it is just and equitable to reduce the basic award as a result. I am satisfied that the Claimant's conduct was blameworthy, he had no reasonable explanation for his failure to engage with the Respondent, or to comply with the instruction to attend meetings. I do not find that it was reasonable for him to perceive the Respondent's actions as bullying, nor did he have any reasonable basis for disputing that the provisions of his contract, including care and concern meetings and attendance at occupational health appointments, applied to him. I find that the Claimant mistakenly considered that the Respondent had failed to pay him full sick pay that was due to him and that as a result he was aggrieved at them and became unco-operative. I find that his conduct caused the dismissal. I consider that it is just and equitable reduce the basic award by 60% to reflect this contribution. The award after reduction is £563.61

Holiday pay

I accept the evidence of Ms Williams in respect of the payments made to the Claimant and I am unable to find that there are any outstanding payments based on the evidence presented to me.

Notice pay

56 The Claimant had reached the maximum entitlement of 28 weeks' SSP from the Respondent particular employer (Social Security Contributions and Benefits Act 1992 s 153(2)(b)), in respect of any one period of entitlement. This is the case where SSP has been paid for 28 weeks in a row, or where there have been two periods of sickness separated by less than eight weeks (so that, they can be linked) and the employee has been paid 28 weeks' SSP in total. He was duly provided with form SSP1 by the Respondent and claimed benefits. He therefore did not have an entitlement to any further pay during any notional notice period that might arise.

Uplift for failure to follow the ACAS Code

57 The Respondent failed to provide the Claimant with an appeal which is contrary to the provision of the ACAS Code, I accept the Respondent's explanation in respect of the emailed appeal which it did not receive or act on due to the cyber attacks, however, as found above there is no explanation for not having addressed the posted appeal and no explanation of why this was able to go astray or be overlooked. I am satisfied that in the circumstance it is appropriate to increase the award by 20% to reflect the Respondent's failure. (the sum of the uplift is £112.72).

Total award

58 The total award after reduction for contribution and uplift for failing to follow the ACAS Code is £676.33 and that sum is payable to the Claimant by the respondent forthwith.

ADDENDUM:

Following the hearing and after the decision had been made but before the Judgment had been sent to the parties, the Claimant sent a bundle of pay slips to the tribunal in support of his claim that he had not received all his holiday pay. The Respondent has not had an opportunity to address the tribunal in respect of those payslips. On their face the documents do not necessarily support the Claimant's claim. The pay slips show separate payments for bank holidays in addition to payments for annual leave. Since the decision has already been made it is not appropriate to reopen the decision and further delay the judgment. It is open to the Claimant to apply for a reconsideration of the judgment, within the time limit provided in the Employment Tribunal Rules of Procedure 2013, if he does so the Responded wil have an opportunity to make representations.

Employment Judge C Lewis

Date: 23 April 2020