THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr R Potts**

Respondent: **J and J Stanley Limited**

Heard at: **Newcastle (by CVP)**

On: **6 November 2020**

Before: **Employment Judge Beever (sitting alone)**

Representation:

Claimant: **in person**

Respondent: **no attendance**

REASONS

The Tribunal's Judgment dated 6 November 2020

1. These reasons are to be read with the Judgment of the tribunal dated 6 November 2020. The Tribunal declared that the claim of unfair dismissal was well founded and made an award. The Tribunal found that the wrongful dismissal claim and the claim in respect of holiday pay were not well founded and were dismissed.

The absence of the respondent

2. The respondent did not attend the Hearing. The Tribunal has dealt with this case in the absence of the respondent. It was satisfied that it had the power to act under Rule 47 of the Employment Rules 2013 and that it was appropriate to do

so on the basis that having regard to the overriding objective it was necessary to ensure that whilst both parties had a reasonable opportunity to present their case both also were entitled to a prompt and efficient determination of their claims. The Tribunal had regard to all of the information available at the time and that included up to date enquiries of the respondent that the Tribunal made insofar as they were practicable.

3. The Tribunal concluded that the respondent was well aware of today's hearing having been sent a Notice of Hearing (CVP) on 17 August 2020. The Tribunal noted also that the Final Hearing of this matter was originally listed to take place on 15 June 2020 but that was not possible due to the current pandemic. The proposed Case Management hearing was adjourned at the respondent's request to 15 July 2020. EJ Aspden dealt with that hearing by telephone but the respondent did not attend. The Tribunal was not told why, and Judge Aspden noted that as far as she was aware nobody from the respondent had contacted the Tribunal to explain why they would not be attending.

4. Judge Aspden made case management orders including extending time for the respondent to provide further information in response to the claim and also to provide the claimant with the CCTV footage. The respondent has failed to comply and has offered no reason for its non-compliance.

5. The respondent did not thereafter communicate or update the Tribunal at all until yesterday when it sought an adjournment because unnamed relevant people were furloughed and it was said unable to take part in the hearing. That application was refused and the hearing was to go ahead today. At 9 o'clock this morning, the application to adjourn was renewed on the basis that "people that would handle this matter" are furloughed. No attempt was made to explain what preparation taken place over the preceding three months or why the applications to adjourn were made literally at the last minute.

6. The tribunal commenced the hearing at 10am today and after due consideration refused the application to adjourn. The application to adjourn was refused because having regard to the overriding objective the respondent has had a reasonable opportunity to present its case and it was necessary to proceed in order to avoid a waste of valuable judicial resource as well as the consequent likelihood of a very significant delay in the relisting of this matter should it be adjourned.

7. The tribunal indicated by email at 10.30am (copied to the claimant, who received the email) to the respondent that the hearing would reconvene at 11am and the matter would be dealt with if necessary in the absence of the respondent. The respondent was therefore fully aware of the hearing going ahead in its absence. The respondent did not reply to the email and without further explanation did not attend the reconvened hearing at 11am.

8. In those circumstances the tribunal exercised its discretion under rule 47 to proceed in the absence of the respondent.

The Issues

9. Judge Aspden had previously outlined the issues for the tribunal to deal with today and the claimant agreed with that summary. These represent the issues to be determined:

    a. Was the claimant unfairly dismissed?

    b. If so what remedy is the claimant entitled to taking into account any statutory basic award and compensatory award including any relevant ACAS uplift?

    c. Was the claimant wrongfully dismissed, namely a failure to give him adequate notice in accordance with the contract of employment?

    d. Has the claimant suffered an unauthorised deduction of wages in the form of a failure to pay accrued but undertaken holiday as at the date of termination of employment?

The Facts

10. The Tribunal heard the claimant's evidence and read a statement dated 16 March 2020 which the claimant had provided to the tribunal and to the respondent both in March 2020 and again recently in preparation for today's hearing. The Tribunal administered the affirmation. The claimant confirmed the truth of the contents of the statement.

11. The claimant informed the tribunal that he knew that the incident would have been captured on the CCTV recording because there were several cameras functioning in the work environment which the claimant could see in operation in the office. Furthermore, after the incident on 22 November 2019, when the claimant later spoke to Mr Stanley Sr, on or about Wednesday 27 November 2019, Mr Stanley Sr said that he had reviewed the CCTV footage and said that "his son was out of order" and that the behaviour was "unacceptable". The claimant said that the manager, Paul Gray, who also witnessed the assault by Mr Stanley Jr on the claimant told the claimant similarly that it was unacceptable.

12. The Tribunal takes note of the fact that the respondent has had numerous opportunities over a significant period of time to adduce evidence, whether it be by way of the CCTV footage or witness statements from those who witnessed the incident or indeed from Mr Stanley Jr himself, in order to rebut the claim that the claimant was assaulted and voluntarily left the workplace. Such is the extent of the failure of the respondent to provide any opposing evidence, the Tribunal concludes that the respondent has chosen not to do so. This choice is entirely consistent with the reality being that which the claimant alleges has taken place.

13. Secondly, having heard the evidence of the claimant, the Tribunal accepts his evidence that on 22 November 2019 he was assaulted at work by Mr Stanley Jr and that he voluntarily left the premises. The Tribunal also accepts his evidence that the next time that he spoke to the owner, Mr Stanley Sr, was on Wednesday

27 November by telephone. In the course of that telephone conversation the claimant was told that he was sacked and the reason that he was given was simply that, "it was not working out". The inevitable inference is that Mr Stanley Sr made the decision that rather than address the behaviour of his son he would instead remove the claimant from the workplace. There was no prior warning and there was no process of investigation that would have enabled Mr Stanley Sr to come to a considered view as to whether the dismissal of the claimant was reasonable.

14. The claimant considered himself dismissed and he did not return to work. In fact he continued to receive pay which covered the period up to 6 December 2019.

15. The claimant was unable to find alternative work and I find that he made reasonable attempts to do so. The circumstances of his dismissal caused him a degree of ill-health which was made worse by the stance that the respondent took within these proceedings whereby it alleged that in fact the aggressor was the claimant and that the claimant needed to be removed from the workplace because others felt threatened by the claimant. This has damaged the claimant's prospects of alternative work because he has been unable to get a supportive reference notwithstanding that Mr Stanley Sr has since assured the claimant that a correct reference would be provided. In the circumstances it is understandable that the claimant was unable to find alternative work until 8 August 2020, a period of 39 weeks after termination of employment.

16. The claimant now works as an agency HGV driver. Since 8 August 2020, he has undertaken jobs on average over 2-3 days per week. Since that time and up to the date of this Hearing (13 weeks), the Tribunal accepts that the claimant has received gross income of £7,156. The claimant recounted that from a payslip in the course of the hearing. The claimant says that the future is unpredictable and he does not know therefore whether his income will improve or in fact deteriorate.

17. The claimant believes that he is owed two weeks holiday. He was unable to identify how that is to be calculated and he told the Tribunal frankly and honestly that it was in reality an "educated guess".

18. During the time that the claimant was out of work, he received Job Seekers Allowance (JSA). The claimant does not have a Certificate to hand but he referred me to his Schedule of Loss in which he calculated his loss. He had the relevant Certificate to hand in calculating that his compensation claim should be reduced by £3,560 to reflect receipt of JSA. Doing the best that it can, the Tribunal finds that the claimant was in receipt of JSA during the Prescribed Period between the date of termination of employment and the date of this hearing in some of £3,560 and the Recruitment Regulations will be applicable.

<u>The Law of Unfair Dismissal</u>

19. The law in relation to unfair dismissal is section 98 of the Employment Rights Act 1996 (ERA). It requires the tribunal ask itself two questions: (i) the reason for

dismissal, per s.98 (1), and (ii) whether the employer acted reasonably, per s.98 (4) ERA.

20. For the purpose of section 98(1) the burden of proof is on the respondent to establish the reason. What matters is whether the respondent has established the operative reason for the dismissal as operating in the mind of the decision maker. Abernethy v Mott [1974] IRLR 213.

21. Turning to the second question, section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (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".

22. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer.

23. The cases of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 and Iceland Frozen Foods v Jones [1983] ICR make it clear that the range of reasonable responses that applies to all aspects of the dismissal decision and the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not. These cases have general application but "the touchstone would need to be section 98(4); the tribunal would keep in mind the need not to fall into the error of substitution, but would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses". See Green v LB Barking UKEAT/0157/16, para 32-35 and 42.

24. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment. Contract Bottling v Cave UKEAT/0100/14 described the Polkey principle as an "assessment to produce a figure that as accurately as possible represented the point of balance between the chance of employment continuing and the risk that it would not".

Analysis and Conclusion

25. The burden is on the respondent to establish the reason for dismissal. The Tribunal finds that Mr Stanley Sr was the decision maker. The respondent has not put forward him or any other witness who can speak as to the decision. The claimant has stated in evidence that Mr Stanley Sr stated that the behaviour of his own son was "out of order". The tribunal finds that the respondent has failed to establish that the facts and beliefs operating on the mind of Mr Stanley Sr when he made the decision to dismiss the claimant arose as a result of the misconduct of the Claimant. In those circumstances, the Tribunal conclude that the respondent has not discharged its burden of showing a potentially fair reason for dismissal.

26. The respondent carried out no investigation process and did not involve the claimant in any discussion let alone an appropriate disciplinary process prior to the decision to dismiss. This represented a wholesale disregard of principles of fairness when proposing to discipline let alone dismiss an employee. The need to conduct a process involving at its minimum an opportunity for an employee to state his case is fundamental to the fairness of a disciplinary process and absent a compelling reason should be present in any fair process.

27. The respondent has not put forward any compelling reason why the claimant could not have been part of an investigation process if in fact there was any realistic suggestion that the respondent held a genuine view that the claimant might have been the aggressor in these circumstances. No reasonable employer in those circumstances would have proceeded to dismiss. Furthermore in the light of the Tribunal's findings above, the respondent did not hold a genuine belief that the claimant was guilty of misconduct and instead the respondent understood that the misconduct lay at the feet of Mr Stanley Jr. The dismissal of the claimant was a convenient way to deal with the situation.

28. The Tribunal went on to ask itself the question posed by section 98(4) namely: did the respondent act reasonably in treating misconduct as sufficient to dismiss the claimant? The tribunal concluded that the answer was no.

29. For completeness, the Tribunal went on to consider whether there was scope for a Polkey reduction or discount on account of the claimant's contributory fault. The Tribunal rejected the appropriateness of any Polkey reduction bearing in mind a wholesale failure of the respondent in the circumstances set out above. Further, the Tribunal has found that the claimant was not guilty of misconduct and not guilty of any conduct capable of amounting to contributory fault.

30. The Tribunal considered the position in respect of the ACAS Code of Practice which is a code of practice on disciplinary and grievance procedures. It is a statutory code breach of which does not render an employer liable to Tribunal proceedings but in the case of a successful Tribunal claim and a finding that the employer has unreasonably failed to follow the code the Tribunal has the power to increase the compensatory award by up to 25%. This is set out in section 124A of the Employment Rights Act.

31. The present case was a case of wholesale non-compliance by the respondent in this regard. It is apparent that it gave the claimant no reasonable opportunity to

address the alleged belief of the respondent. This was an unacceptable situation which the Tribunal considers gives good grounds for an adjustment under the ACAS Code. Notwithstanding the absence today of the respondent, the Tribunal concludes that the non-compliance was unreasonable. The respondent employs 32 people and it is a small owner-led business. In all the circumstances it is appropriate to make an adjustment pursuant to section 124A of the Employment Rights Act 1996 and the Tribunal hereby makes a 15% uplift in relation to the compensatory award.

32. Turning to the wrongful dismissal claim, the Tribunal finds that the respondent had no grounds for terminating the claimant's employment without notice. However, the claimant was in fact paid beyond the date of the assault and the telephone dismissal because he tells me that he continued to receive pay and payslips which covered the period up to 6 December 2019. The claimant had two years' service and he tells me that he did not have a written contract of employment. By section 86 of the Employment Rights Act 1996, he would have been entitled to 2 weeks' notice. The tribunal concludes that in fact the claimant received pay equivalent to his notice, whether by design or otherwise, whereby the respondent complied with its contractual obligation. The claim for wrongful dismissal is not well founded and is dismissed.

33. Finally, in respect of the claim for holiday pay, the Tribunal is mindful that the claimant has not to date (despite a case Management order to do so) particularised the nature of his claim. The respondent would not to date have been aware of the calculation of the claim. When asked today to identify the detail of the claim, the claimant was very open and honest in saying that he was unable to do so and that he was making an "educated guess". In those circumstances there is insufficient evidence to establish the claim. The tribunal finds that the claim for accrued but undertaken holiday as at the date of termination of employment is not made out and is dismissed.

Remedy

34. Turning to the claim for unfair dismissal which has succeeded, the claimant is entitled to a basic award: Given his 2 years' continuous service (over the age of 41yrs), he is entitled to a basic award of 2 x 1.5 x his gross weekly wage which the tribunal accepts was £720pw, but which is capped at £525 by statute: the award is 2 x 1.5 x £525 = £1,575.

35. So far as the compensatory award is concerned the Tribunal must have regard to what is just and equitable, having regard to the effect of the respondent's conduct in unfairly dismissing the claimant. The Tribunal finds that the claimant had tried sensibly but unsuccessfully to obtain alternative employment and he has identified some of the factors which were against him notwithstanding his efforts, particularly, a damaging employer reference from the respondent and ongoing mental ill-health resulting from the circumstances of the dismissal.

36. The claimant sustained a complete loss of earnings (£720 gross: £471.48 net) for 39 weeks until he was able to obtain HGV driving agency work 8 August 2020.

The Tribunal finds that the claimant is entitled to loss of earnings to 8 August 2020, which the Tribunal assessed as 39 weeks. £471.48 net pay plus £18.08 employer pension amounts to £489.56 per week: 39 weeks' loss amounts to £19,092.

37. Between 8 August 2020 and the date of the Hearing (13 weeks) the claimant received gross income of £7,156, which is an average of £550.46 gross per week. Doing the best it can, the Tribunal calculates that the figure equates to £374 net per week. The claimant therefore has sustained an ongoing partial loss of £115.56 per week.

38. The Tribunal finds that this loss may reduce or indeed may increase over the coming months. It is just and equitable to balance the same by applying an ongoing partial loss of £115.56 per week. The claimant has no specific plans and the tribunal is aware that future holds many unpredictable features. Therefore the tribunal concludes that it would be just and equitable to limit the claimant's ongoing future partial loss to a period of 26 weeks after the date of this Hearing.

39. The Tribunal finds that the claimant is entitled to loss of earnings from 8 August 2020 to the date of the Hearing (13 weeks) at the rate of £115.56, amounting to £1,502.28. The Tribunal also finds that the claimant is entitled to loss of earnings at the same rate from the date of the Hearing for a further period of 26 weeks (5 May 2021), amounting to £3,004.56.

40. The Tribunal awards the sum of £500 in respect of loss of statutory rights.

41. The total of the compensatory sums above amounts to £24,098.66. Applying the 15% uplift pursuant to section 124A of the Employment Rights Act 1996 results in an uplift of £3,614.82.

42. The resulting total Compensatory Award is £27,713.66.

43. The claimant received JSA in the sum of £3,560. The Tribunal declared that the Prescribed Period for the purpose of the recoupment regulations is 6 December 2019 to 6 November 2020 and the Prescribed Amount is £3,560 and the balance of the Compensatory Award payable to the claimant is £24,153.66.

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EMPLOYMENT JUDGE BEEVER

REASONS SIGNED BY EMPLOYMENT JUDGE ON

6 November 2020

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