EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Robson

Respondent: Collett Holdings Ltd

Heard at: Leeds Employment Tribunal (remote – CVP)
On: 2 February 2021

Before: Employment Judge K Armstrong

Representation
Claimant: In person
Respondent: Mr Nigel Thornton, Company Secretary / Compliance Director

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed. The claim is dismissed.

REASONS

Claims

1. The Claimant filed an ET1 claim form for unfair dismissal on 22 September 2021. He claims that he was unfairly dismissed by the Respondent, now correctly identified as Collett Holdings Ltd.

Conduct of the hearing

2. The claim was heard today via CVP due to COVID-19 restrictions.

3. The Claimant represented himself at the hearing, and had an individual present with him to provide support. Mr Nigel Thornton, compliance manager, represented the Respondent

4. Following a number of technical issues, all parties were able to connect to the CVP hearing by 11.00am. There were some connection issues during the day, but all parties were able to hear and engage with the proceedings

fully. Due to the time lost, there was insufficient time during the hearing to give oral judgment and therefore judgment was reserved.

Issues for the tribunal to decide

5. The parties agreed to deal with the issue of liability first, to be followed by the issue of remedy if required.

6. The issues for the Tribunal to decide were therefore identified at the start of the hearing, as follows:

6.1. Did the Respondent act reasonably or unreasonably in all the circumstances (including the size and administrative resources of the undertaking) in treating the Claimant's conduct as a sufficient reason for dismissing him? Whether the dismissal was fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

The Claimant says that the procedure was unfair, therefore the issues for the Tribunal are:

Investigation
- Investigatory meeting: Did the Claimant believe that he was being invited to attend an informal 'chat' on Monday 7 September, rather than an investigatory meeting?
- Was the Claimant laid-off as part of the disciplinary process and was this unfair?

Disciplinary meeting
- Was the Claimant handed an invitation to the disciplinary meeting at the start of the investigation meeting?
- Did the Respondent unreasonably refuse the Claimant's request to record the disciplinary meeting?

Appeal
- Was the appeal hearing held on unreasonably short notice?
- Did the Respondent unreasonably refuse to allow the Claimant to be accompanied by a friend or family member at the appeal hearing?
- Did the Respondent unreasonably refuse the Claimant's request to record the meeting? – The Respondent says that the Claimant did not ask to record the appeal hearing
- Did the Respondent 'tamper' with the minutes of the appeal hearing?
- Was the decision on appeal unfairly influenced by Mr Nigel Thornton?

6.2. The reason for the dismissal was the Claimant's conduct, therefore the Tribunal must consider:

(i) did the Respondent believe that the Claimant was guilty of misconduct;
(ii) did the Respondent have in mind reasonable grounds on which to sustain that belief; and
(iii) had the Respondent carried out as much investigation as was reasonable in the circumstances?

The Claimant submits that his actions on Friday 4 September 2020 did not amount to gross misconduct.

6.3. Did the Respondent's action fall within the band (or range) of reasonable responses open to an employer? In particular:

(i) Was the Claimant's dismissal an unfairly inconsistent sanction compared to previous occasions when holiday had been sanctioned on one day's notice? The Claimant relies on the treatment of Mr Radio and the Claimant's own treatment on previous occasions.

(ii) Was dismissal an unfairly disproportionate sanction taking into account the Claimant's record of service and personal mitigation?

6.4. If the dismissal was unfair due to the procedure followed, would it be just and equitable to reduce the compensation to be awarded due to the likelihood that the Claimant would have been dismissed in any event, had a fair procedure been followed (A *'Polkey'* reduction)?

Evidence

7. I have read electronic documents provided by the Claimant and Respondent, totalling 264 pages. I was working remotely and therefore did not have the benefit of the hard copy sent to the Tribunal. I collated the 86 documents which were sent separately in PDF format to the Tribunal by the Respondent into one PDF document. I confirmed that I had all of the documents listed in the Respondent's index. However, the pagination in my copy is different from the Respondent's list. The page references in this judgment refer to the pagination on the PDF bundle which I have. I have considered all of the documents that were provided to me, even if I do not specifically refer to them.

8. I have read three witness statements on behalf of the Respondent from Mr Nigel Thornton, Mr Michael Collett and Mr Jack Collett, who also gave oral evidence on oath and were asked questions by Mr Robson and myself.

9. The Claimant did not provide a witness statement. He said he did not realise that he had to do this and the information that he wanted to rely on was contained in four documents which were sent to the Tribunal on various dates. The documents were all sent to the Tribunal again together on 24 January 2021 and are: Paul Robson - Response 1, Response 2, Response to Queries for CH – part 3; and pay formulae. I was satisfied that it was in the interests of justice for these documents to stand as the Claimant's witness statement and the parties were content with this course of action.

Background

10. The Claimant commenced employment with the Respondent on 29 November 2012. He worked as a warehouse / FLT Driver initially, and later as a pilot / escort driver. His exact wage is not agreed but it is somewhere around £650 per week. The Claimant was dismissed for gross misconduct on 10 September 2020. He was summarily dismissed and he was not required to work his contractual notice period or paid in lieu of notice.

11. The Respondent company is a family-run business. It employs 130 people in Great Britain, including 85 at the Halifax depot where the Claimant worked. It is a transport company, specialising in abnormal loads. The management team consists of seven members of the Collett family, who are also directors, and five other members of the senior management team.

Findings of fact

12. On Friday 4 September 2020 there were two conversations between the Claimant and Mr Michael Collett, Company Secretary / Operations Director of the Respondent. In the first interaction, the Claimant requested to use four days' leave carried over from the previous leave year, which he said Mr Collett had previously authorised could be carried over. Mr Collett initially denied that the Claimant could carry them over, but then agreed for him to do so, but stipulated that they would have to be taken within the next month. The Claimant then left the office.

13. There is a dispute as to exactly what was said during this conversation regarding pay for the days' leave, which I do not consider to be relevant to my decision. There is a dispute whether the Claimant was 'argumentative' during this conversation. Mr Collett says he was, the Claimant says he was not. However, the Claimant accepted in oral evidence that 'voices were raised'. I understood him to mean both his and Mr Collett's voices were raised. I therefore find that this was to some extent at least a confrontational exchange.

14. It is accepted that the Claimant then spoke to Samantha Moody, wages clerk, and Mr Nigel Thornton, compliance manager. Again, there is some dispute as to whether or not the Claimant presented as agitated during these conversations, but it is agreed that he asked about the Company's holiday policy, and was told that the Respondent's policy did not allow for holidays to be carried over from one year to the next. I do not consider that I need to make a finding as to the Claimant's attitude during these conversations. I am satisfied that he continued to discuss the issue of his holiday entitlement before returning to speak again with Mr Collett.

15. The Claimant then spoke again with Mr Michael Collett at around 4.10pm. Again, the exact contents of the conversation are disputed, however whatever the order of the exchange the parties are broadly agreed that conversation went along the following lines: The Claimant asked if he could take the four days' leave the following Monday to Thursday. Mr Michael Collett refused the request, saying that work had been allocated to him already. Mr Michael Collett told the Claimant he could take the leave later in the week, the following week, or later that month. Mr Collett says the Claimant then said he '*would' be* taking the leave the following week. The Claimant says he asked '*if it was possible'* for him to take the time off that week. Mr Michael Collett again stated that was not authorised at such short notice. The Claimant then stated that he would be taking legal advice on Monday and would not be in work. The Claimant maintains that he said he would not be in work on *'Monday morning'*, whereas Mr Collett states that he said he would not be in on *'Monday'*.

16. There is a dispute between the parties as to whether this second part of the conversation was 'heated', or an 'argument'. Mr Collett says that *'strong*

language' was used by both parties, and accepts that he asked the Claimant why he was being *'such an arse'* about the holidays. The Claimant said during his oral evidence that the conversation was not heated, and that he *'didn't accept that at all'*. I note however that in the minutes of the disciplinary meeting held on Monday 7 September that the Claimant refers to '*calming down and unpacking his van'* after the conversation (**181**). I also note that in the text message which the Claimant sent to Mr Collett later that evening he apologised that *'the conversation became heated.*' (**158**). I consider that the Claimant's recollection of the conversation on the same day and the following Monday is likely to be clearer than his recollection today, nearly five months later. I therefore find that the second conversation between the Claimant and Mr Collett was a heated exchange, involving raised voices on both sides.

17. I do not consider that I need to make a finding as to exactly what was said by whom and in what order during this conversation, but I am satisfied that at the end of the conversation, the Claimant made an unambiguous statement that he would not be attending work at the start of his shift the following Monday morning.

18. The Claimant then left the office. He stayed on site until he clocked out at 17.01pm. During this time he spoke with other staff members including another director, Mr Mark Collett, but did not seek to raise the issue of his holiday or attendance at work the following week with anyone else.

19. Mr Michael Collett made arrangements for the work which had been allocated to the Claimant to be covered by other workers and a sub-contractor for the following Monday to Thursday.

20. At 4.28pm Mr Michael Collett sent a text message to the Claimant, as follows (**157**):

'*Paul. Further to our conversation at 16.10 today I do not authorise your holiday for 7-10 September. You have told me you won't be in work in which case you will be marked as unauthorised absence. The job you have been allocated has been reallocated to other resources and I have today marked you as unauthorised absence.'*

21. Mr Michael Collett then left the premises at 4.50pm. He accepts that the Claimant attempted to call him twice whilst he was driving home but he did not see the calls as he did not have his phone connected to his car's bluetooth. When he got home he put his work phone away as he did not want it to interfere with his home time. He accepted in his oral evidence that he did not want to get into any further conversation with the Claimant outside of his working hours, in case it became heated again.

22. The Claimant sent a message to Mr Collett at 10.41pm as follows (**158**)

'Hello Mick. I've done some reflecting and I apologise that our conversation became heated and upon reflection a month is fine. Please can I take Mon 14th. Fri 18th. Mon 21st and Fri 25th off this month. I appreciate that you have covered my job for Monday and I would like to be considered for work from Tuesday onwards. I hope these dates are acceptable and I hope we can move on from this. Thanks Paul'

23. Mr Collett did not see this message until the following day as he had put his work phone away.

24. The following morning, Saturday 5 September 2020, Mr Michael Collett attended the office for work. He contacted Mr Thornton, compliance officer, and informed him of what had transpired the previous day. In his oral evidence, he said that he had not thought to telephone the Claimant himself that day as he felt it was appropriate to pass the matter on to Mr Thornton, who dealt with Human Resource matters.

25. Mr Thornton interviewed Mr Michael Collett on Saturday 5 September. A record of the conversation appears in the bundle at **159**. A copy of this record was not provided to the Claimant until the disciplinary meeting on Thursday 10 September.

26. The Claimant did not come into work on Monday 7 September. At 12.49pm he sent a message to Chris Shaw (operations manager) stating *'Afternoon Chris. Do I have a job for tomorrow? Thanks.'*

27. At 1.00pm Mr Thornton telephoned the Claimant and invited him to attend the office. The Claimant says that he was *'duped'* into coming for an investigation meeting when he believed it was just an informal chat. Mr Thornton says he was clear in the telephone conversation that he was asking the Claimant to attend for an investigatory meeting. I accept Mr Thornton's account. I have found that Mr Thornton's recollection of events was generally consistent with the documentary evidence. I also found him to be generally an honest witness, in that he has conceded that there are points to be learned from his handling of the process (for example, in submissions he acknowledged that another time he would ensure that the investigating officer was not present at the appeal hearing), and he has accepted where his recollection is unclear (for example as to whether the Claimant was given time to read the interview with Mr Michael Collett in the course of the disciplinary meeting). Therefore, on the balance of probabilities I am satisfied that his recollection of this conversation is accurate.

28. The Claimant attended the office 30 minutes later and an investigation meeting took place. The minutes are at **162-163.** Mr Thornton and the Claimant were present, and a Mr Thomas Benn took notes. Mr Thornton asked the Claimant why he had not attended for work today. The Claimant responded '*Because MC* [Michael Collett] *signed PR* [Paul Robson] *off for unauthorised leave for Monday to Thursday'.* There was some discussion of why the Claimant did not attempt to speak to someone else in the yard after the conversation with Mr Collett, and after receipt of the message, if he was in fact willing to work on Monday. Mr Thornton asked the Claimant if he thought requesting holiday at 4.30pm on a Friday for the following Monday was acceptable, and the Claimant responded: '*PR says no he doesn't think so, but the discussion became heated and he apologised later via text'*

29. The minutes record that Mr Thornton then discussed the difficulties that had arisen for the business as a result of the Claimant not attending at work that morning. The minutes then state: '*NT* [Nigel Thornton] *confirms that a*

disciplinary is likely based on the responses from PR [Paul Robson] *today, and he will be notified formally by letter if this is the case.'*

30. Mr Thornton then informed the Claimant that because alternative resources had been allocated to cover the Claimant's work for that week, he would be laid-off, likely until the end of the week. The Claimant was handed a letter confirming this. The minutes record as follows: '*NT leaves room briefly to get the lay-off letter, and states that a disciplinary invite letter, if necessary, will be sent separately, together with a letter regarding today's investigation meeting.'*

31. The Claimant says that he was handed an invitation to a disciplinary hearing at the outset of the investigatory meeting. I note that in his ET1 the Claimant says that he received the disciplinary invitation the following day (**7**). There is an email in the bundle dated 7 September 2020 timed at 16:38 (later that day), with the attachment *'P Robson – dis inv.pdf'* and which reads as follows: *'Hard Copy in post.'* (**168**). Mr Thornton states that this email attached the disciplinary invitation, and that the hard copy would probably have arrived the following day. I also note that the minutes of the investigation meeting were discussed at the disciplinary meeting and the Claimant challenged them as inaccurate in respect of his conversation with Mr Collett, but not in respect of the statement above that the disciplinary letter would follow if necessary. Therefore I am satisfied on the balance of probabilities that the disciplinary invitation was issued about four hours after the investigatory meeting and not during it. I am also satisfied that the reason for this is because Mr Thornton waited until after the investigatory meeting before making a decision as to whether to initiate disciplinary proceedings.

32. Later in the afternoon of Monday 7 September, Mr Thornton emailed to the Claimant another copy of the lay-off letter at 3.01pm (**171**), a formal invitation to the investigatory meeting and minutes of the meeting at 2.59pm (**161**), and invitation to a disciplinary hearing on Thursday 10 September at 4.38pm (**168**).

33. The lay-off letter states that the Respondent had no option but to arrange cover for the work that was scheduled to the Claimant for the coming days, and therefore he would be laid-off on statutory guarantee pay in line with the Respondent's HR Policy and procedures (**173**). The procedures are incorporated into the Claimant's contract of employment (**48**). Within these proceedings the Claimant has queried whether the Respondent had the contractual right to lay him off. On the basis of these contractual provisions, I am satisfied that the Respondent were contractually entitled to lay off the Claimant for this period.

34. The invitation to a disciplinary hearing (**169**) states as follows:

'The Company is considering taking disciplinary action against you. You are therefore invited to attend a disciplinary meeting on Thursday 10th September 2020 at 09:00 hours at Collett Holdings Ltd., Albert Road, Halifax, HX2 0DF. This gives you a reasonable opportunity to consider your response to the Company's position.

A full investigation of the facts surrounding the complaint against you has been made by Nigel A Thornton.

Having now completed the investigation, the allegations against you are as follows: -

Refused to undertake a reasonable request from a Director, in that you refused to come into work in a discussion on Friday afternoon, the 4th September 2020, where you stated you were taking Monday thru to Thursday off as a holiday. This was immediately refused and our holiday booking requirement stated to you. Because of this we have had to employee a sub-contractor to undertake the escorting of one project, and re-allocate our own workforce to facilitate the covering of the work scheduled for you. This has caused the company to incur loss and expenses that it would not have needed to incur had you presented yourself for work.

After having stayed in the yard after the original discussion with our Mr Collett until 5.00pm when you clocked out, which despite having been previous instructed against staying in the yard with no work to do, as this is against Company procedure with regards to the companies COVID-19 social distancing guidelines (of which you are fully informed of), just so you can clock out at 5pm. On clocking out at 17:00 you did not state to the operations team, that you would be in work on Monday, so the company has assumed you would not be in work on Monday as your earlier comments and confirmed the sub-contractor to cover your work.

Our Director Mr Michael Collett sent you a text message on the evening of Friday 4th September at, informing you of the actions we were having to take due to your actions. It is noted that you responded via text message later that evening at 17:43 hours to our Mr Michael Collett who had left work by then.

Failure to comply with our Absence notification process.'

35. The letter then states:

'Depending on the facts established at the meeting, due to the serious nature of the allegations which could amount to gross misconduct, the outcome could be summary dismissal but a decision on this will not be made until you have had a full opportunity to put forward your version of events and the meeting has been concluded.'

36. Before the disciplinary meeting, Mr Thornton spoke to two other employees in the operations team who said that they had overheard the exchange between the Claimant and Mr Collett – namely Mr Leonard and Ms Moody. They informed Mr Thornton that they had overheard a heated exchange regarding holiday, and that the Claimant had said he would not come into work on Monday. They did not provide written statements until after the Claimant issued proceedings (**250, 251**).

37. The Claimant attended a disciplinary meeting at the Respondent's office on Thursday 10 September 2020 at 9.00am. He was accompanied by a colleague, Garry Grimsley. Mr Thornton was present, as the *'meeting holder'* and Mr Benn again took minutes. At the outset of the meeting the

Claimant requested to record the meeting. Mr Thornton refused this request because it was not company policy, and because he felt that it demonstrated a lack of trust. In his oral evidence, he accepted that he '*became heated*' because the Claimant repeated the request.

38. The events of the 4 September 2020 were discussed. The minutes record:

'NT states that other ops desk colleagues present during the exchange [Ms Moody and Mr Leonard] *quote PR saying 'I'm taking them [the work days] off", which is considered a refusal to work*

PR refutes this and says he stated 'he's not coming in'

39. Mr Thornton asked the Claimant whether he thought it was reasonable to request four days off for the next week at 16:10 on a Friday evening. The Claimant admitted '*that he does not think this is a reasonable request*'.

40. Mr Thornton then asked whether the Claimant stated he would not be in on Monday morning, and the claimant admitted that he did state this.

41. Although the Claimant was not given a written record of the conversations with Ms Moody and Mr Leonard, he was given two opportunities to comment on what they had said. He was provided with the written record of the investigatory interview with Mr Michael Collett at the start of the hearing. Mr Thornton in oral evidence admitted that he could not remember whether the Claimant was given time in the meeting to read those minutes. However, it is apparent from the minutes that the Claimant was fully aware of what Mr Collett had said and was able to respond to it.

42. The Claimant provided a handwritten statement to Mr Thornton during the disciplinary meeting (**187**). Within the statement he states that he was experiencing some personal family issues regarding his 12-year-old daughter at the time. He apologised for his reaction and stated that *'this will be an isolated incident.'*

43. The Claimant was informed of the outcome of the disciplinary by email at 17.32 the same day. Mr Thornton decided to terminate the Claimant's employment without notice, on the grounds of gross misconduct. The dismissal letter appears at **185-6.** The letter records:

'The reason for your dismissal relates to: -

Refused to work on Monday 7 th September 2020 to our Mr Collett for no authorised reason, during a discussion on Friday where you stated that you were taking the day of as Holiday, without obtaining approval in line with our Holiday booking procedure. This has caused a significant cost to the company and meant we have had to reschedule the workload to other operatives, due to your actions. Added to this was the fact that you have not complied with our Absence notification procedure for your non-attendance on Monday 7th September 2020.

There were other issues discussed, such as holiday booking approval, not following COVID-19 procedures, staying in yard over duty shift until 17:00

hours, which we have not been dealt with through this process, as the act of Gross Misconduct has overridden these.'

44. The letter then records the points which the Claimant disputed, and the letter which he handed to Mr Thornton during the meeting. The letter records that Mr Thornton has considered all the evidence, and decided:

'Following due deliberations on the matter, I have arrived at the conclusion that an act of gross misconduct has taken place. Your actions represent a serious breach of Company practice and procedure in that you have refused to undertake a reasonable request in that you have not attended for duty on Monday 7th September 2020, causing the company to incur loss and expense due to your actions.'

45. The letter confirms that the Claimant's last day of employment is 10 September 2020, and informs him of his right to appeal the decision.

46. The Claimant at the hearing before me wished to make it clear that he was available to work from Tuesday 8 September 2020, and this is evidenced by the text messages he sent to Mr Collett and Mr Shaw. Mr Thornton confirmed in evidence that his decision was based on the Claimant's admitted refusal on Friday 4 September to attend work at the start of his shift on Monday 7 September, and whether or not he was willing to work for the rest of the week would not have changed his decision. In his oral evidence Mr Thornton confirmed that he considered the Claimant's length of service and his personal mitigation, but '*Ultimately, the Claimant refused to come into work for a director to the company and however it's dressed up he has refused to come to work on a day that he was contracted to do with no valid reason*.'

47. On 15 September 2020 the Claimant wrote seeking to appeal his dismissal, on the basis that the outcome was disproportionate, his previous work ethic and personal issues had not been taken into consideration, and that he had been informed within 10 minutes of the conversation that he had been put on unauthorised absence. It is not in dispute that the Claimant had been employed by the Respondent for nine years, and that he had generally provided good service. He had received one written warning in February 2020, and there had been some occasions on which he had submitted claims for payment for hours which were declined, but no action had been taken in relation to these occasions.

48. There followed some telephone conversations between the Claimant and Mr Thornton regarding arrangements for the appeal hearing. The date was ultimately fixed for 18 September 2020 at 4.00pm. The Claimant has claimed during proceedings that the hearing was 'rushed' in order to accommodate Mr Thornton's availability. I am satisfied having heard evidence from Mr Thornton that the reason for the timing was due to the availability of a senior director who could hear the appeal. Mr Jack Collett was identified as a suitable director without previous involvement. He was due to be away in Scotland from the following Monday so if the appeal had not been held that date it would have resulted in delay.

49. The claimant requested to be accompanied at the meeting by his daughter or a family friend. Mr Thornton refused this request and informed the

Claimant he could be accompanied by a colleague or a trade union representative, as per the Respondent's policy and the ACAS guidelines. The Claimant has alleged in his evidence that the colleagues he approached were unable to attend because one was on leave and the other believed that the Respondent would simply put him on a shift which made it impossible for him to attend. I have seen no evidence to substantiate this claim. I note that the Respondent facilitated the Claimant being accompanied by a colleague at the disciplinary meeting. I am therefore satisfied that the Respondent did not prevent the Claimant being accompanied by a colleague or trade union representative at the appeal hearing.

50. The Claimant claims in his evidence that he asked to record the appeal hearing and was again refused by Mr Thornton. It was unclear from his written evidence when he says he made this request. In his oral evidence he said it was made during a short conversation with Mr Thornton prior to the start of the appeal hearing. Mr Thornton accepts that he and the Claimant had a brief conversation prior to Mr Jack Collett arriving for the appeal meeting, but strongly refutes that the Claimant requested to record the meeting. On balance, I accept Mr Thornton's evidence on this point. I note that he was candid in accepting that the Claimant requested to record the disciplinary meeting and that he refused this and in fact became annoyed by the request. I therefore do not consider it is likely that he would deny it if the request had been made again at the appeal stage.

51. The Claimant alleges that the minutes of the appeal hearing have been *'tampered with'.* I do not find that this is the case. The minutes are not intended to be a transcript of the meeting, but minutes of the key points. The points which the Claimant refers to as having been missed out do not alter the substance of the minutes and therefore I am not satisfied that they have been tampered with by Mr Thornton.

52. The meeting took place on 18 September 2020, commencing at 4.07pm. Mr Jack Collett heard the appeal. Mr Thornton was present as investigating officer and minute taker. Mr Robson was also in attendance, and was not accompanied.

53. The meeting was relatively brief, concluding at 4.20pm. Mr Thornton set out the objective of the meeting. The Claimant then addressed Mr Collett. He referred to his statement from the disciplinary meeting, his personal problems, and stated he had worked for the Respondent for over nine years, mostly without any problems. He stated that he believed this was *'a blip'* following a conversation which got out of hand and which he was sure both he and Mr Michael Collett were now regretting. He asked that leniency be shown and to be allowed to keep the job which he loved.

54. Mr Collett asked the Claimant*: 'did you refuse to work on the Monday 7th September in the discussion with MC on the Previous Friday evening 4th September?'* To which the Claimant responded '*Yes, I did refuse, but there were contributory factors that I have mentioned previously in this meeting.'* I note that these are minutes and may not be the exact words used during the meeting, but the key essence of what was said is not disputed.

55. The Claimant was asked if he had anything else to say to the meeting before it closed and he again re-iterated that he had worked hard for the company for over nine years and really wanted to keep his job.

56. The Claimant has alleged that Mr Collett was unprepared for the meeting, had not read the documentation, and that the decision was influenced by Mr Thornton. I am satisfied having heard Mr Collett give evidence that he had read all the relevant documentation before the hearing. It was apparent that he was familiar with the background and the decision he had to make. Mr Collett took some time to consider his decision overnight and telephoned Mr Thornton the following afternoon to ask him to communicate it to the Claimant. I am therefore satisfied that Mr Collett made the decision himself, based on the evidence before him at the appeal hearing.

57. In his evidence, Mr Collett was consistent that the key feature for him was that the Claimant admitted that he had refused to come into work on Monday 7 September when told to do so by Mr Michael Collett on Friday 4 September. He was candid that he had not really considered the Claimant's length of service or personal mitigation to be relevant, given that he had refused a reasonable management instruction.

58. Mr Collett's decision was communicated to the Claimant by Mr Thornton by email at 4.21 19 September 2020. A hard copy was also sent to the Claimant in the post. The Claimant was informed that Mr Collett had decided to uphold the initial decision and that this decision was final.

59. In the course of these proceedings the Claimant has raised the issue of inconsistent treatment. This was not a matter that was raised during the disciplinary process or appeal. He states that a Mr Radio told him that he had a holiday extended by a day on one day's notice previously. Mr Thornton's evidence is that this situation was different as Mr Radio was out of the country and his flight was delayed by 24 hours. The Respondent was able to accommodate him taking an additional day's leave on that date. The Claimant says that Mr Radio did not tell him that his flight had been cancelled but I accept that Mr Thornton is likely to know more about the detail of this request than the Claimant.

60. Mr Thornton's evidence is that the Respondent has a policy of requiring a week's notice for a day's holiday, but that the Respondent will try and be flexible about this where this can be accommodated. He acknowledges that there may have been occasions on which the Claimant has previously been granted a day's leave on less than a week's notice, but that this will have been in circumstances where it could be accommodated. He states that this situation was different because due to the workload, COVID-19 and the importance of meeting customer requirements, the Claimant's attendance was required the following working day, and he refused to attend even after his holiday request was refused. I accept Mr Thornton's evidence that this was not a comparable situation.

Relevant law and conclusions

61. It is not disputed that the Claimant was dismissed for a reason relating to his conduct. Therefore by virtue of Section 98 Employment Rights Act 1996 (ERA 1996) the issue for the Tribunal is: Did the Respondent act

reasonably or unreasonably in all the circumstances (including the size and administrative resources of the undertaking) in treating the Claimant's conduct as a sufficient reason for dismissing him? Whether the dismissal was fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

62. In determining this, I must also consider the following questions: (i) did the Respondent believe that the Claimant was guilty of misconduct; (ii) did the Respondent have in mind reasonable grounds on which to sustain that belief; and (iii) had the Respondent carried out as much investigation as was reasonable in the circumstances? (*British Home Stores Ltd v Burchell* [1978] 7 WLUK 138).

63. I must consider whether the Respondent followed a fair procedure (*Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL).

64. I remind myself that in considering whether the Respondent acted fairly I must not substitute my own decision as to what would be the right course of action for the Respondent, but I must consider whether the Respondent's actions fell within the band of reasonable responses which a reasonable employer might have taken (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91, CA; *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT).

65. Turning to the list of issues:

Did the Respondent follow a fair procedure?

66. *Investigatory meeting: Did the Claimant believe that he was being invited to attend an informal 'chat' on Monday 7 September, rather than an investigatory meeting?*

67. On the basis of my findings above, I am satisfied that Mr Thornton told the Claimant in the telephone call at 1.00pm on Monday 7 September that he was required to attend the office that day for an investigatory meeting. The ACAS code of practice for disciplinary and grievance procedures ('the ACAS code') does not specify that an invitation to an investigatory meeting should be sent in writing. The investigation should take place without unreasonable delay. The Claimant was given only very short oral notice of the investigation meeting, but I am satisfied that this was reasonable in the circumstances in order for the matter to be investigated promptly.

68. Was the Claimant laid-off as part of the disciplinary process and was this unfair?

69. I am satisfied that Respondent was contractually authorised to lay-off the Claimant for a period of time. I am also satisfied that it was necessary as a result of the Claimant's refusal on Friday to come to work on the following Monday, and the lack of clarity over whether he would be attending the following Tuesday to Thursday. I am satisfied that the Respondent acted reasonably in doing this. I am satisfied that it was not in itself a disciplinary sanction and does not render the disciplinary procedure unfair. As I have found, Mr Thornton took the decision to

initiate disciplinary proceedings after the Claimant had been laid off and therefore the lay-off was not a disciplinary sanction.

70. *Was the Claimant handed an invitation to the disciplinary meeting at the start of the investigation meeting?*

71. I have found that the invitation to a disciplinary meeting was sent to the Claimant after the investigation meeting. I have considered whether it gave the Claimant sufficient notice of the disciplinary hearing. The ACAS code provides that a disciplinary meeting should be held without undue delay, allowing the employee sufficient time to prepare for the hearing. The Respondent's code of practice provides that ideally two working days' notice would be given. I am satisfied that the notice of Monday until Thursday was sufficient. I remind myself that the ACAS Code provides that it would normally be appropriate to provide written copies of evidence before the disciplinary hearing. The Claimant was not provided with a written copy of the conversation with Mr Michael Collett until the meeting itself, and was not provided with written copies of the statements of Ms Moody and Mr Leonard until Tribunal proceedings were initiated. However, as set out above, I am satisfied that the Claimant was informed of the substance of these conversations and had an opportunity to put his version of events. Therefore whilst not entirely best practice, I am satisfied that this did not render the procedure unfair.

72. I also remind myself that the ACAS Code provides that ideally someone different should undertake the investigation and disciplinary meetings. I accept that, taking into account the size and administrative resources of the senior management team of the Respondent, as well as the fact that two directors (Mr Michael Collett and Mr Mark Collett) had already been involved in the original incident, it was in the circumstances within the band of reasonable responses for Mr Thornton to undertake both stages.

73. *Did the Respondent unreasonably refuse the Claimant's request to record the disciplinary meeting?*

74. Mr Benn was present and took minutes of the meeting. The Claimant did not challenge the substance of those minutes. In the circumstances I do not think the Respondent acted unfairly in refusing the Claimant's request to record the meeting

75. *Was the appeal hearing held on unreasonably short notice?*

76. Again, the ACAS code provides that an appeal hearing should be held without undue delay. As stated above, I accept Mr Thornton's evidence as to the reason for the date and time that was agreed. The Claimant agreed to the arranged date and time. In the circumstances, I am satisfied that the Respondent acted reasonably in holding the appeal hearing at an agreed date and time, without undue delay

77. Did the Respondent unreasonably refuse to allow the Claimant to be accompanied by a friend or family member at the appeal hearing?

78. The Claimant had a right under s.10 Employment Relations Act 1999 to be accompanied by a trade union representative or another employee of the

Respondent. He did not have a statutory right to be accompanied by a friend or relative. The Respondent therefore was entitled to refuse the Claimant's request, and in the circumstances I am satisfied that it was reasonable to do so. For the reasons set out above, I do not accept that the Respondent prevented the Claimant from being accompanied by either a Trade Union Representative or a colleague. I am therefore satisfied that the fact the Claimant was not accompanied at the appeal hearing is not unfair.

79. *Did the Respondent unreasonably refuse the Claimant's request to record the meeting? – The Respondent says that the Claimant did not ask to record the appeal hearing*

80. For the reasons set out above, I find that the Claimant did not request to record the appeal meeting. In any event I find that the minutes are reasonably accurate and it would not have been unfair to decline to agree to the Claimant recording the meeting.

81. *Did the Respondent 'tamper' with the minutes of the appeal hearing?*

82. For the reasons set out above, I find that the minutes of the appeal hearing have not been tampered with and represent a reasonably accurate record of the appeal hearing.

83. *Was the decision on appeal unfairly influenced by Mr Nigel Thornton?*

84. For the reasons set out above, I am satisfied that Mr Jack Collett made his own decision on the basis of the evidence before him. He was aware of the Claimant's version of events and the mitigation which he wanted to be considered. I am satisfied that Mr Collett genuinely considered in his own mind whether the decision to dismiss was appropriate and was satisfied based on what he had heard during the appeal hearing that it was a fair sanction. In light of the size and resources of the Respondent, I am satisfied that it was not unreasonable for Mr Thornton to be present at the appeal hearing to take minutes and to answer any questions Mr Collett might have had about the investigation or disciplinary process.

85. *The Claimant submits that his actions on Friday 4th September 2020 did not amount to gross misconduct.*

86. I remind myself that I must not substitute my own decision for that of the Respondent. I am satisfied that the Respondent had evidence on which to found a reasonable belief that the Claimant had committed gross misconduct, in that he refused to follow a management instruction, namely the requirement to attend work at the start of his shift on 7 September 2020. The Claimant himself had accepted that he failed to do this. I am satisfied that the refusal of his holiday request and the requirement for him to attend on that date was a reasonable instruction. I am satisfied that the Respondent acted reasonably in treating this as gross misconduct. I note that the Respondent's disciplinary procedure lists failure to comply with reasonable instructions as an example of gross misconduct (**53**). I am satisfied that the Respondent considered the text messages exchanged between the Claimant and Mr Collett, and the telephone calls made by the Claimant, following the conversation on 4 September, and that the

Respondent reasonably concluded that in light of these, the Claimant's actions still amounted to gross misconduct.

70. Was the Claimant's dismissal an unfairly inconsistent sanction compared to previous occasions when holiday had been sanctioned on one day's notice? The Claimant relies on the treatment of Mr Radio and the Claimant's own treatment on previous occasions.

71. As set out above, I am not satisfied that the situation of Mr Radio or the Claimant on previous occasions are truly parallel, such as to lead me to conclude that dismissal was an unfair sanction in this case. The Respondent was entitled to apply its own procedure with leniency and flexibility where possible, and to require it to be adhered to in circumstances where a holiday was requested at very short notice at a particularly busy time when work was already allocated to the Claimant.

72. Was dismissal an unfairly disproportionate sanction taking into account the Claimant's record of service and personal mitigation?

74 I remind myself that I must consider whether dismissal was within the band of reasonable responses. I am satisfied that Mr Thornton and Mr Jack Collett both had in mind the Claimant's length of service and personal mitigation, but that it was within the band of reasonable responses for them to consider that the refusal to comply with a direct management instruction overrode both of these factors.

75 In conclusion, having considered the statutory test and the applicable case law, the overall procedure followed and decisions taken, as well as the specific matters with which the Claimant raises an issue, I am satisfied that the Claimant was not unfairly dismissed by the Respondent.

76 I therefore did not need to consider whether to make a *Polkey* reduction.

Employment Judge **Kate Armstrong**

4 February 2021