EMPLOYMENT TRIBUNALS

Claimant: Mr. M Jedrzejczak

Respondent: Cast Iron Radiators Limited

HELD AT:	Leeds Employment Tribunal (By CVP)	**ON:**	4, 12 February 2021
BEFORE:	Employment Judge Buckley		

REPRESENTATION:

Claimant:	Miss Skelton (Lay representative)
Respondent:	In person (Mr. Messenger)
Interpreters:	Ms Sikorska and Ms Samus

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

REASONS

1. The claimant makes the following claims:
    1. Wrongful dismissal
    2. Failure to provide a s 1 statement
    3. Unlawful deductions (holiday pay)

2. The claim was heard at the same time as the claim of Mr Przyborowski. Separate reasons have been provided to each claimant but the substantive content is identical because I have dealt with both claims together.

Issues

3. The issues for me to determine are:

    1. Did the claimant commit gross misconduct?
    2. When was the start of the claimant's leave year?
    3. Did the claimant have any unpaid accrued leave at the date of termination?
    4. If any of the other claims are successful was the employer in breach of its duty to provide a s 1 statement at the time the claim was issued?
    5. If so, what award should be made?
    6. If any claims are successful was the employer in breach of the ACAS Code and should any uplift be made?

The relevant law

Gross Misconduct

4. When deciding if the claimant's conduct amounts to gross misconduct I must determine what happened, on the balance of probabilities, and then whether or not the conduct was sufficiently serious and injurious to the relationship to justify summary dismissal. The conduct must undermine the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. This depends on all the circumstances, but generally disobedience has been held to amount to gross misconduct where it has the quality of wilful disobedience or is of such a grave an weighty character as to amount to a breach of mutual trust and confidence.

5. The following passage is from *Neary v Dean of Westminster* [1999] IRLR 288:

> 22. What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry* [1906] AC 122. That case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698], where Lord Evershed MR, at p.700 said: 'It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. In *Sinclair v Neighbour* [1967] 2 QB 279, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager'. Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment … and claiming that he had been dismissed'. This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should not longer be required to retain the servant in his employment."

6. The conduct amounting to gross misconduct can be a single act or several acts over a period of time (*Mbubaegbu v Homerton University Hospital NHS Foundation Trust* (UKEAT/0218/17/JOJ, UKEAT/0306/17/JOJ), unreported).

S 1 statement

7. Under s 30 of the Employment Act 2002, where the tribunal makes an award to a claimant for certain listed proceedings, and, at the time proceedings were commenced, an employer has not given the claimant a written statement of particulars of employment in accordance with s 1 Employment Rights Act 1996 ('ERA') the tribunal must make an award of 2 weeks pay and may, if it considers it just and equitable, make an award of 4 weeks pay.

Unlawful deductions

8. Under s 13 ERA a deduction is made if the amount of wages paid by the employer is less than the total amount properly payable on that occasion. There is no issue in this case as to whether or not such a deduction, if made, was unlawful.

9. A claimant is entitled on termination of employment to be paid the amount of any accrued untaken holiday.

Evidence

10. For the claimant I heard evidence from Mr Jedrzejczak and Mr Przyborowski. For the respondent I heard evidence from Mr Messenger. I found all witnesses to be giving honest evidence to the best of their recollection, although sometimes that recollection was not accurate. Both Mr Jedrzejczak's and Mr Przyborowski's evidence as to what they had been told about wearing masks was sometimes vague, suggesting that they did not have a clear recollection of exactly what had been said and when. Where there was a conflict of evidence I have determined the facts on the basis of the balance of probabilities taking account of any documents, the most likely version of events and the clarity of a witnesses' recollection.

Findings of fact

Contract of employment and leave year

11. The claimants were employed by the Respondent at its factory from 28 October 2019 (Mr. Jedrzejczak) and 4 November 2019 (Mr. Przyborowski) until 2 July 2020. Mr. Jedrzejczak had been engaged previously as an agency worker. I find that there was a conversation whilst Mr Jedrzejczak was an agency worker between Mr Jedrzejczak and Mr Messenger about being provided with a contract of employment. I accept Mr Messenger's evidence that when he said that the company did not provide contracts of employment he was referring to agency workers not employees.

12. I was provided with copies of various documents in the bundle that had been signed by the claimants at the start of their employment. Mr Messenger also produced a copy of two documents headed 'Contract of employment', one with each claimant's details on and signed by Pam Messenger. Mr. Messenger states that these were kept on the claimants' files in the office.

13. Mr Messenger's evidence was that the claimants were given a further copy to take away and sign on the same date that they signed the other documents. He stated that they did not return the signed copy and it was never followed up.

14. Both claimants' evidence was that they had signed a number of documents in the office, but had not been given a contract of employment to take away.

15. On the balance of probabilities I find that the claimant's were given a copy of the contract of employment and they have simply forgotten this. The fact that the respondents did not chase up the claimants' failure to return a signed copy is unremarkable. Mr Messenger's explanation as to why the date on the document was incorrect and had been corrected was entirely credible and I do not accept that this mistake supports the claimant's assertion that the documents have been fabricated. Further, it seems inherently unlikely that the respondents have fraudulently fabricated an entire contract of employment for the purposes of defending a fairly modest claim. It seems much more likely that the claimants have simply forgotten that they took away this entirely unremarkable and standard document.

16. I find therefore that the claimants, having received a copy of the terms and conditions and continued to work, agreed to the terms set out in that contract. The contractual leave year therefore ran from 1 April to 31 March.

17. The respondent's calculations of the holiday due are set out in letters to the claimants dated 8 July 2020. The letter to Mr. Jedrzejczak states that he had accrued 7 days holiday and had taken 4 days. He was paid for the remaining 3. The letter to Mr. Przyborowski states that he had accrued 7 days and taken 6 days. He was paid for the remaining days.

18. Presumably because the case had not been prepared on the basis of an April to March holiday year, the claimants were unable to tell me how many days holiday they had taken during the final holiday year, and they did not assert that the letters were inaccurate. On that basis I find that the letters dated 8 July 2020 set out accurately the amount of holiday that the claimants had taken in the relevant period. I find that those letters also set out the amount of days holiday for which the claimants were paid on termination.

Gross misconduct

19. Mr Ross is the respondent's factory charge hand. He is referred to by the claimants as 'Bill'.

20. Mr. Przyborowski does not understand much English. Where I find that matters had been communicated to Mr. Przyborowski, this is either directly or through Mr. Jedrzejczak who acted as an informal interpreter.

21. I find that when the claimants returned from furlough on 18 May 2020 they were told at a staff meeting with Mr Ross and at a staff meeting with Mr Messenger about the rules on social distancing. I find that they were told that it was very important that everyone followed the rules. I find that it was was clear to the claimants that it was against the company rules to work closely together without wearing masks, and that they were not allowed to share tools.

22. When asked about 20 May 2020, when the respondent states that he spoke to the claimants about wearing masks, Mr Jedrzejczak's evidence was not clear. For example he stated 'There were instances where the attention was drawn to us by Bill… not sure exactly what was said' He also said that he was 'not certain'. When asked if they were told that the claimants could lose their jobs and given a clear verbal warning he said that he was told 'something along those lines' but could not remember if it was Mr Messenger who said that. Mr Jedrzejczak translated this for

Mr Przyborowski. Mr Przyborowski remembered being spoken to by Mr Messenger on this date, but said that he was not told that they could lose their jobs.

23. I find that the claimants were lifting a radiator less than a metre apart without masks. Mr. Messenger spoke to the claimants on 20 May 2020. Mr Messenger states that he told the claimants that this was company policy and a legal requirement. I find that the claimants were told that they might lose their jobs if they did not follow the rules. I also find that the claimants understood that working closely together without masks was a breach of the rules.

24. On 29 May the claimants were again working closely together without masks in breach of the rules and Mr Messenger shouted over a warning.

25. On 3 June Mr Przyborowski was again not wearing a mask when working in close contact with others in breach of the rules. He was seen by Mr Ross who reported it to Mr Messenger. Mr Messenger reviewed the CCTV footage and instructed Mr Ross to issue Mr Przyborowski with a final warning and send him home early from work.

26. Mr Przyborowski accepted that it was 'possible' that he had been sent home and I find as a fact that he knew that he had been sent home for breaching the covid rules. I accept that Mr Przyborowski did not understand that he was being given a final warning.

27. On 23 June Mr Messenger was working from home. The claimants, on several occasions, were working close to each other without masks and sharing tools in breach of the rules. Mr Ross saw this and called Mr Messenger at home. Mr Messenger reviewed the CCTV and thought the behaviour was unacceptable. He instructed Mr Ross to issue a final warning to both claimants and to 'double and triple check' that they both understood that it was formal although it could not be processed in the usual way.

28. After this conversation Mr. Ross spoke to both the claimants. Mr. Jedrzejczak recalled that Mr. Ross spoke to them. When I asked him if Mr. Ross had given the claimants a final warning about not wearing masks and socially distancing he accepted that Mr. Ross 'may well have' said something like that, but that he could not be certain. He later stated that he remembered receiving a warning from Mr. Ross, but that he was never told that it was a final warning. He also remembered Mr. Ross stating that normally they should be going upstairs to the office and writing the warning down.

29. On the basis of the above evidence I find that Mr. Ross spoke to both claimants. He gave them a warning. I find that the claimants did not understand that they were being given a final warning, but that they knew it was a formal warning which would, in ordinary circumstances, have been given in the office and written down. I find that the claimants were aware that they had been given a formal warning for breaching the respondent's rules on covid.

30. On 30 June the claimants breached the rules again in relation to social distancing and wearing masks. Mr. Ross reported to Mr. Messenger that they were not social distancing or wearing masks. Further Mr Ross reported that a member of staff had told him that they were uncomfortable with the way that the claimants were acting. Mr. Messenger reviewed the CCTV, which I accept clearly showed that they were not following the rules.

31. Given the number of previous incidents within this relatively short period of time, the number of previous reprimands and the amount of publicity surrounding these sort of requirements, it is not credible that the claimants were simply making repeated mistakes. I find that they were wilfully disregarding the orders that they had been given.

32. Mr. Messenger instructed Mr. Ross to suspend the claimants and tell them to wait for a letter.

33. I have not heard evidence from Mr. Ross and I accept the claimants' evidence as to what they were told. I find that they were told that as a form of punishment for not wearing masks they would have an unpaid day off work the next day and that they should go home early.

34. The claimants did not come to work the next day. In the meantime Mr. Messenger had decided that they should be dismissed for gross misconduct. The claimants were not informed of this until they returned to work on the next working day (2 July 2020). When they arrived at work, Mr. Ross was surprised to see them because he assumed that they would have been notified by Mr. Messenger that they had been dismissed. He asked them what they were doing in work and asked if anyone had rung them or sent them any letters. Mr Jedrzejczak replied 'no'. Mr. Ross then informed them that they had been dismissed. Mr. Jedrzejczak asked if that was really the decision. He was told that it was. The claimants then changed out of their work clothes, gave back their locker keys and went home.

35. The claimants each received a letter dated 8 July 2020 enclosing their final payslips and their P45s.

36. The CCTV cameras were clearly visible, there were notices about them around the workplace and at least Mr. Jedrzejczak was aware that 'random checks' were carried out.

Application of the law to the facts

Wrongful dismissal

37. Having determined what the conduct of the claimants was on the balance of probabilities, I have to decide if that conduct was serious enough to amount to gross misconduct. The procedures adopted by the respondent clearly fall short of those that would be expected by employers in an unfair dismissal claim but that is not the issue I have to determine when deciding whether or not the claimants have been wrongfully dismissed.

38. It is not relevant that Mr. Messenger viewed the claimants' conduct over CCTV. The conduct was also witnessed in person by Mr. Ross. I therefore do not need to consider Ms Skelton's submissions on the effect of relying on CCTV evidence.

39. I find that the conduct of both claimants over the period between 18 May 2020 and 30 June 2020 amounted to gross misconduct. They were aware of the workplace rules in relation to wearing masks, social distancing and sharing tools. This had been made clear to them in two staff meetings when they returned from furlough. It was common knowledge that the purpose of those rules was to reduce the risks to the health and safety of fellow employees and to reduce the spread of coronavirus in society in general. Those risks were significant, particularly if fellow employees or their close contacts were vulnerable for one reason or another. An employer has a legal duty to take care of the health and safety of employees.

40. The claimants breached these rules repeatedly and continued to do so despite being told not to on multiple occasions. The final act followed three previous occasions on which Mr. Jedrzejczak had been reprimanded for breaking the rules, and four previous occasions for Mr. Przyborowski.

41. In the light of the potentially serious consequences for the safety of fellow employees, of which the claimants, along with everyone else, would have been aware, and the fact that both claimants had been reprimanded on multiple occasions I find that their failure to alter their behaviour has the quality of wilful disobedience.

42. Taking into account all these factors, and in the light of the employer's duty to take care of his employees, I find that the claimants' conduct over this period was of such a grave and weighty character as to amount to a breach of mutual trust and confidence.

43. On this basis I find that the claimants' actions amounted to gross misconduct and the respondent was entitled to dismiss them without notice.

Unlawful deductions – holiday pay

44. The claimants' case was put on the basis that there were no agreed contractual terms on the holiday year, and therefore they had accrued more holiday than the respondent asserted. I have found that the holiday year started on 1 April 2020. The basis on which the claim was put in the ET1 has therefore fallen away.

45. The respondent's calculations of the holiday due are set out in letters to the claimants dated 8 July 2020. The letter to Mr. Jedrzejczak states that he had accrued 7 days holiday and had taken 4 days. He was paid for the remaining 3. The letter to Mr. Przyborowski states that he had accrued 7 days and taken 6 days. He was paid for the remaining day.

46. The claimant's representative submitted that I should be able to check whether or not the full entitlement had been paid by looking through the payslips that had been submitted by the claimant. It is for the claimants to prove their claim. In the absence of any submissions that, on the evidence before me, the respondent did not properly calculate and pay the holiday pay owed based on the leave year beginning on 1 April, I accept that the payment was correctly calculated as set out in the letter of 8 July 2020. The unlawful deductions claim is dismissed.

ACAS Code

47. As none of the claims have succeeded I do not need to consider any breaches of the ACAS Code.

_____

Employment Judge Buckley
Date 18 February 2021