Case Number: 1806815/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant:	Mr A Royston
Respondent:	Greenwood Engineering Services Limited
Heard at:	Leeds ET (via CVP) **On**: 24 March 2021
Before:	Employment Judge M Rawlinson (sitting alone)

Representation

Claimant	Mr Stuart Royston (Father)
Respondent	Mr Robert Green (Owner, Greenwood Engineering)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. A 100% reduction in the compensatory award for unfair dismissal will be made under the principles in ***Polkey v A E Dayton Services Limited*** *1988 ICR 142.*

3. The claimant contributed to his dismissal to the extent of 75%, such reduction then to be applied to the basic award for unfair dismissal.

4. The respondent is ordered to pay the claimant **£935** (being 25% of the basic award)

5. The claimant's complaint seeking damages for breach of contract (notice pay) is dismissed on his withdrawal of it.

REASONS

Introduction

1. The claimant, Mr Alistair Royston was employed by the respondent Greenwood Engineering Services Limited from October 2009 until his dismissal with one week's notice on 13 October 2020. At the time of his dismissal and during the events that led up to it, he was employed as a welder.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The respondent contests the claim. It says that the claimant was fairly dismissed for persistent absenteeism that had started in earnest in 2019 and had become progressively worse since, culminating in his dismissal in October 2020.

4. The claimant was represented by his father, Stuart Royston, and gave sworn evidence himself. Mr Robert Green appeared as the owner of the respondent company and also gave sworn evidence in his capacity as the owner of the company. Neither party had submitted a witness statement and, as a result, both sides adopted the factual narrative within their respective claim form and response form as their evidence. They then expanded upon the same before also then dealing with the various documents that they and the opposing party had produced. Each side was also subjected to brief cross-examination by the other.

5. As well as hearing live evidence, I also considered numerous documents that had been produced by both parties. On behalf of the claimant, this comprised of nine documents (A – J inclusive) which included various pieces of correspondence between the parties, letters the claimant had been provided with during the course of his employment and photographs of some text messages sent to the respondent related to his absences. It also included a letter sent by the claimant to the respondent in response to his termination, dated 11 October 2020. The claimant also latterly produced an updated schedule of loss, as well as a further document in terms of a timesheet which had been completed during the course of the claimant's new employment and had been signed by him - the relevance of which will become clear in due course.

6. On behalf of the respondent, the documents provided comprised of a bundle of documents (A – M inclusive) which contained amongst the documents the contract of employment, the claimant's absence records for 2019 and 2020, various documentation relating to a variety of discussions and warnings they alleged that the claimant had been party to and had been given in terms of his absenteeism throughout the relevant period (some of which they asserted had been signed by the claimant on receipt) and various pieces of correspondence relating to the termination, including the termination letter itself dated 5 October 2020.

7. Having heard and considered argument and submissions on the issue from both parties, I also allowed Mr Robert Green on behalf of the respondent to produce 5 pages of further documents by way of a one-page delivery note signed by the claimant, and four further pages of a register confirming the receipt of various pieces of PPE/safety equipment by the claimant and bearing his signature.

8. In the course of his cross-examination of Mr Green, for the first time on behalf of the claimant, Mr Royston explicitly alleged that somebody at the respondent company had retrospectively forged or fabricated the claimant's signature on various documents that appear, on the face of matters, to have been contemporaneously signed by the claimant himself as having been received. Mr Green made clear that, had he had prior notice of such allegations, he would certainly have wished to put these further documents before the Tribunal in order to refute the allegations, highlight the similarity between the signatures/initials on the new documents, and to evidence what the claimant's signature/initials ordinarily looked like.

9. In the circumstances, I concluded that given the nature of that allegation, allied to the way that the issue had arisen unexpectedly in the hearing, it was fair, in the interests of justice and in accordance with the overriding objective that Mr Green be permitted to produce and to rely on the said documents.

Preliminary Matters

10. At the start of the hearing, before I heard any evidence, I clarified with the parties the information given in the claimant's ET 1 form to the effect that the issue surrounding notice pay had been resolved. Both parties confirmed that it had been and therefore, in that regard, the claimant's claim for notice pay as originally made in his ET 1 was withdrawn.

Issues for the Tribunal to Decide

11. Having dealt with that preliminary matter, I went through and agreed with the parties the issues for me to decide. In simple terms, these were:

    i. What was the reason or principal reason for dismissal? The respondent says that the reason was the claimant's persistent absenteeism.
    ii. Was it a potentially fair reason?
    iii. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant? This included, in these particular circumstances, whether the respondent adequately warned the claimant and gave the claimant a chance to improve, as well as the procedural aspects relating to the dismissal.

12. Although the ***Polkey***, ACAS Code and contributory conduct issues concerned remedy and will only arise if the claimant's complaint of unfair dismissal succeeded,

I agreed with the parties that I would consider them at this stage and invited them to deal with them in evidence and in submissions.

Facts

13. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

14. The claimant was employed by the respondent for a period of just over 11 years from October 2009 until his dismissal in October 2020. He was employed as a welder. The respondent was and is a small family engineering company who provided welding and fabrication services to other industries. One significant part of their business was the manufacturing of parts for the campervan industry, including "rock 'n' roll" beds i.e. beds that are back seats that double up as a bed when folded down. The company had a turnover of around £250,000 and had been established over 25 years. Including the claimant and Mr Green the owner, throughout the relevant period it had a total of five employees. These comprised one employee in the office working part-time and another employee described as a towbar fitter. The remaining three employees all worked in engineering – the owner Robert Green, his son Martin Green and the claimant, Alistair Royston.

15. The number of days that the claimant was absent from work during the relevant period was not in dispute between the parties. There was no suggestion by either party that the absences related to any underlying health condition. They can be properly characterised as a series of unconnected minor ailments incidents that led to absences.

16. In the 2019 calendar year the claimant was absent for a total of between 14 (according to the absence log) and 16.5 days (according to the evidence of Mr Green, which was not disputed) with the first absence beginning on 1 April 2019 and thereafter continuing until 11 December 2019. In general terms the absences were (except for the month of May) monthly and in increments of between one day (the majority), two days (two instances) and three days (one instance). It was not disputed that the respondent treated these absences as unauthorised and also that they did not receive self-certification documentation in respect of any of them from the claimant. It was a disputed issue between the parties as to whether any self-certification was ever asked for in respect of these absences.

17. In the 2020 calendar year, the claimant was absent for a total of 13 days from January until his dismissal in October 2020. Allowing for the interruption of work due to a period of self-isolation (March – April 2020) and furlough due to Covid 19 (May – June 2020) the absences were again, in general, monthly (except for the months of February and August). The exact details were:

i. absent from 6 – 10 January 2020 inclusive – 5 days

ii. absent from 8 – 10 June 2020 inclusive – 3 days

iii. absent 22 July 2020 – 1 day

iv. absent 17 – 21 September 2020 inclusive – 3 days

v. absent 2 October 2020 – 1 day

18. Again, it was not disputed that the respondent treated these absences as unauthorised and also that they did not receive self-certification documentation in respect of any of them. Again, it was a disputed issue between the parties as to whether any self-certification was ever asked for in respect of these absences.

19. Produced at the hearing by the respondents were five documents held by them and which purported to be records of discussions concerning, and also warning and/or caution letters in respect of, the claimant's absenteeism. These were dated:

i. 10 September 2019 (following his failure to return to work on that day at the conclusion of his 7-day holiday) – this referred to the absence being a breach of company policy, allied to his failure to supply any self-certification or similar. It stated "*absenteeism for a small company has a great impact with regard to planning of contracts and productivity. This warning will be put on file for future repercussion" (sic.)* This document bore a handwritten signature next to some typed text confirming receipt by Alistair Royston and was dated 11 September 2020.

ii. 13 January 2020 (following his absence from 6 – 10 January) – this referred to *".your last letter and meeting to discuss your persistent absenteeism was dated 11 September 2019. Since that time the position has not improved*". Following a reference to a period of 10.5 days of sickness since that date, the letter then stated that no self-certification had been provided, and that *"as already stated, both verbally and in written correspondence this situation is not tolerable to our company's expectations for employee. This is your last warning, any further failures to maintain a suitable attendance record will result in the immediate termination of your employment"*. This document bore a handwritten signature next to some typed text confirming receipt by Alistair Royston.

iii. 11 June 2020 (following his absence from 8 – 10 June) – this referred to a meeting between the claimant and Mary Green (wife of the owner). The letter also referred to approaching the claimant regarding him failing to supply self-certification and that his unauthorised absenteeism was *"a jeopardy to his employment as he had been given previous warnings. I requested that he issue one and that this would go on record as his final warning."* This document bore a handwritten signature next to some typed text confirming receipt by Alistair Royston.

iv. 23 July 2020 (following his absence on 22 July) – this referred to a meeting between the claimant and Mary Green took place at 2 PM on 23 July 2020. It had in capital letters on the 2nd line 'VERBAL WARNING' and referred to a request for self-certification and, given the claimant's failure to provide the same, the fact that this would again be classed as an unauthorised absence and placed on file. This document was not signed confirming receipt.

v. 22 September 2020 (following his absence between 17 – 21 September) – this referred to a meeting between the claimant and Mary Green on 22 September 2020 at 2:30 PM. It had on the 2nd line in capital letters 'FINAL VERBAL WARNING'. It referred to "once again" the claimant being absent and failing to provide a self-certification despite a request. It also stated this was an unauthorised absence and that "*Alistair was informed that this his (sic.) is final warning and was made aware that his job was in jeopardy (sic.).* This document was not signed confirming receipt.

20. Some of those documents were reproduced elsewhere in the respondent's bundle but those reproductions/versions did not bear the handwritten signature stating that they had been received by Alistair Royston. It was in dispute between the parties as to whether the relevant discussions had in fact ever taken place, whether the claimant had ever been warned about his attendance formally, and indeed whether he had ever been provided with or signed the various documents above.

21. Following a further unauthorised absence Friday 2 October 2020, the claimant returned to work on Monday, 5 October 2020 and was told that he was being dismissed due to his continued absences from work. He was also told that there was a termination letter waiting for him in the office to that effect. The claimant left the premises and went home without picking the letter up, albeit he returned the next day to attempt to retrieve it. The respondent by that time had already sent it to him by recorded delivery and it was received by the claimant some days later.

22. The termination letter itself, dated 5 October 2020, specified a one-week notice period which the claimant would not be required to work. It also contained various specific parts relating to the claimant's absenteeism:

"*Once again you have put me in an exceedingly difficult position. Despite all your written and verbal warnings your attendance has not improved. To date this year, you have been absent on 13 days with self-pronounced sickness, none of which have been backed up by a medical or self-certification paperwork despite repeated reminders that you must produce this paperwork.*

It has been a very difficult year for our business, your attendance record shows no sign of improvement, and as I have constantly reminded you, I can't sustain business continuity and forward planning not knowing when you feel it is convenient for you to turn up for work. I have discussed this matter with Martin in detail and we both agree that there is little alternative to this action. Taking account

of your stance to ignore the previous verbal and written warnings I have no alternative but to terminate your employment forthwith."

23. On 11 October 2020 the claimant wrote to Robert Green at the respondent company in response to his dismissal. Within that letter, he indicated that he was sure that in a majority of cases, he had messaged or contacted him in order to let him know of his illness and the reason for his absence. He also stated, *"I am also sure that I have completed at least one self-certification as requested by yourself".* The letter also requested various pieces of information including *". notes/minutes of all previous meetings regarding my attendance, showing any support offered during the disciplinary procedure including the warning structure, please also supply copies that have been signed by both parties."* It also made clear that the dismissal letter itself did not explain the appeals process and that he wanted to properly understand that process in order to enable him to understand his next steps.

24. Robert Green responded to that letter by way of a letter dated 17 October 2020. The letter stated that the claimant had decided to leave the premises without collecting his letter or giving the respondents the opportunity to discuss the action and offer the claimant an opportunity to appeal the decision. No further information was provided regarding any appeal route or process. The letter went on state *inter alia*:

"My reason for your dismissal is clearly stated in my Termination Letter to you, if you believe that your persistent absenteeism is not a justifiable cause for your dismissal, I advise you to contact ACAS and ask them for guidance as to how to proceed."

"I have not made any assumptions that you were not ill when you have been absent from work, my conclusions are based on your continual absenteeism without any paperwork from any doctor or any self-certification from you, you have been warned verbally and in writing that you must produce this paperwork, you consistently refused to do this, sometimes in an aggressive manner and with an attitude that you didn't feel you were required to comply with this request. The above means we can only count your absenteeism as unauthorised."

"It is not very difficult for anybody to understand the stress and anxiety you have put me through by not attending your work on a regular basis, there are only four people working production at our factory, you represented 25% of our workforce, every time you decided not to come to work somebody else had to complete your unfinished work, we are losing customer confidence in our ability to deliver our products, I am unable to accept work into our factory because we cannot maintain a consistent output level due to your persistent absenteeism. You are quite aware of this situation as I have constantly tried to explain the situation to you. Any stress and anxiety for both parties could easily have been avoided if you came to work regularly. By your actions you are seriously damaging my business and jeopardising your work colleagues' jobs. I have a duty to protect my business and the remaining jobs of my work colleagues, your continual absences made your

position with our company untenable, therefore I had little choice left available to me and had to make the difficult decision to remove you from our workforce."

25. The claimant's dismissal therefore stood, and he duly presented this claim for unfair dismissal to the Tribunal on 23 November 2020.

Relevant law – unfair dismissal

26. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 31 July 2020.

27. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

28. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

29. In determining whether the dismissal was fair, the Tribunal's task is to consider all of the relevant circumstances including any process followed by the respondent. The ACAS Code of Practice on Disciplinary and Grievance Procedures are also relevant.

30. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

31. In terms of the specific question concerning persistent short-term intermittent absences, in the case of ***International Sports Co Ltd v Thomson*** *1980 IRLR 340, EAT*, the EAT has previously stated that the proper approach in such cases is to:

    i. review the pattern of absences and the reason for them
    ii. warn the employee of the required improvement in attendance, giving him or her the chance to make representations;
    iii. and consider whether the required improvement in attendance has materialised. If not, dismissal is likely to be reasonable.

32. If there is no adequate improvement, then, said the EAT, dismissal will be justifiable. This will be so regardless of whether the reasons for the absences are genuine or not. In such cases there comes a time when a reasonable employer is entitled to say 'enough is enough' and, so long as warnings have been given, treating the frequent absences as a sufficient reason for dismissal is likely to fall within the band of reasonable responses — ***Post Office v Jones*** *1977 IRLR 422, EAT.*

33. In ***Lynock v Cereal Packaging Ltd*** *1988 ICR 670, EAT* it was made clear that fairness has to be judged by looking at the whole history of the employment, taking account a range of factors that include the nature of the illness and likelihood of its recurrence; the length of the absences compared with the intervals of good health; the employer's need for the particular employee and the impact of the absences on the rest of the workforce; and the extent to which the employee was made aware of the likelihood of dismissal.

34. A review of the relevant case law suggests that much will depend on the specific circumstances of the case. In some industries, and for some individual businesses, absences may be particularly damaging and employers may not be expected to tolerate high levels of absenteeism.

35. It is plain that giving an employee opportunity to make representations regarding the absences is a significant factor – even where previous warnings or cautions have been given. In ***Backhouse v Coleman's of Stamford*** *ET Case No.19865/95* the claimant was dismissed for absenteeism after being absent for 38 days in 11 months. She had received five verbal warnings and had been given a written warning six month before her dismissal. Following an absence of three weeks, the employer dismissed B without holding a meeting or giving her any opportunity to state her case. The Tribunal found the dismissal was unfair.

36. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a ***Polkey*** reduction following ***Polkey v AE Dayton Services Limited*** (1988 ICR 142). The Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so.

37. Further it is open to the Tribunal to reduce compensation if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent. This reduction can apply to both the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act.)

38. Both Mr Stuart Royston, on behalf of the claimant, and Mr Robert Green on behalf of the respondent, provided me with oral submissions with respect to the above matters at the conclusion of the evidence, which I have considered and refer to where necessary in reaching my conclusions.

Conclusions and further Findings of Fact

39. There is no dispute that respondent dismissed the claimant.

What was the reason or principal reason for dismissal?

40. In this case, both parties agree that the principal reason for the claimant's dismissal related to the claimant's absenteeism, properly characterised as intermittent short-term absenteeism. The evidence given by both parties was to that effect, and the same is clearly evident from both the termination letter sent by the respondent and indeed the claimant's letter in response to it. On the evidence I have heard and seen, I conclude that this was the principal reason for the claimant's dismissal.

Was it a potentially fair reason?

41. There can be no dispute that absenteeism, under the more general heading of capability, is potentially a fair reason for dismissal. The matter in terms of unauthorised absences could also be properly characterised as a conduct issue. It is well established by previous decisions that incapacity or persistent absenteeism for a variety of unconnected ailments, in themselves minor, may be a reason for dismissal (See for example ***Lynoch v Serial Packaging*** [1998] IRLR 510).

42. Whilst the respondent had chosen to treat the claimant's absences as unauthorised absences, I conclude on the evidence that I have heard that their primary concern was simply the fact that he was absent from work and the impact that had, rather than whether the claimant was genuinely ill (see for instance the respondent's written response to the claimant's letter – *"I have not made any assumptions that you were not ill when you have been absent from work, my conclusions are based on your continual absenteeism without any paperwork…"*) The main reason, therefore, that the absences were classified as unauthorised was the lack of any self-certification by the claimant. I conclude that the respondent has established, on the balance of probabilities, a potentially fair reason for dismissal in the form of the claimant's absenteeism. It was the principal reason for the claimant's dismissal pursuant to section 98 (2) (a) ERA.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

Did the respondent adequately warn the claimant and give the claimant a chance to improve?

43. Mr Green on behalf of the respondent gave evidence that by the time of his dismissal, the company had struggled with the claimant's persistent absenteeism for nearly two years. He was clear that his absenteeism had a direct and significant effect on both the productivity of the claimant and the wider company, including their ability to meet targets and fulfil orders.

44. Mr Green's evidence was that he had regularly spoken to the claimant about the matter and had explained to him the substantial impact this had on the business, especially given its composition and size. This effect had included a measurable reduction in productivity by the claimant himself and related complaints by customers. His wife, Mary, had also spoken to the claimant repeatedly concerning the matter. Mr Green was clear that the claimant had been warned on numerous occasions both verbally and in writing (as per the documents he had produced) that his job was in jeopardy if his absenteeism did not improve. He was equally clear that on each occasion of such an absence, the claimant was asked to self-certify and had refused. It was for this reason that the absences were classed as unauthorised. Mr Green's evidence was that since September 2019 to the date of his dismissal, the claimant had received, and in some cases, had signed in writing to acknowledge receipt of, five separate written warnings plus numerous verbal ones.

45. In his evidence the claimant, Mr Alistair Royston, painted a very different picture. He stated that the first nine years of his employment there were no issues regarding any sickness absences, but that from the end of 2019 onwards the working atmosphere changed.

46. He further stated that from the end of 2019 there were never any formal meetings at any stage regarding his absenteeism and that he was never made to understand or to appreciate how severely it was being regarded at any point, even up until when he was dismissed. Whilst he acknowledged that there were conversations regarding his absences (usually he said the day after any unauthorised absence) these were only ever informal conversations and only really ever held after multi-day absences i.e. 2 or 3 days. His evidence was he was never spoken to about single day absences and that, rather than refusing, he was never asked to self-certify his absence except on one single occasion, this relating to his self-isolation due to COVID issues. He never had any formal meetings, and never received and certainly never signed any written documents warning him or cautioning him about the matter. He also denied Mr Green's assertions that his absenteeism affected either his own or the company's productivity, or that he'd ever been told anything in that regard. His evidence was that his dismissal came as a complete shock to him.

47. On balance, I prefer the evidence of Mr Green with respect to these issues. I accept, in particular, his detailed evidence regarding others who had to work extra hours to compensate for the claimant's absence, and the detailed and specific figures he gave regarding the extent of the reduction in the claimant's output as a result of his absences.

48. Further, I also find it inherently unlikely that, as within such a small company, where the claimant comprised 20% of the total workforce and one third of the entire engineering workforce, the claimant's absences (as he asserted) had no effect upon either his own or the company's productivity. I conclude that it did. I find it equally unlikely that the matter was never discussed with the claimant, especially given how closely he worked with Mr Robert Green and his son Martin. I find that it was discussed regularly and was raised as an issue with the claimant both informally and formally. It is also inherently unlikely that the claimant was not asked at any stage to

self-certify any of the absences in question, and I also accept Mr Green's evidence that the claimant was in fact asked on each occasion - and indeed that he simply refused.

49. I also accept Mr Green's evidence that it was made abundantly clear to the claimant throughout the relevant period that, if his absenteeism continued, his job would be in jeopardy. This is borne out by the numerous documents that are in existence which I find are genuine, contemporaneous and were completed and signed for contemporaneously. They evidence the fact that matters were repeatedly discussed, and issues formally raised with the claimant regarding his absenteeism, and that he was given numerous opportunities to improve from at least September 2019 onwards.

50. I therefore find as a fact that the claimant was indeed warned or cautioned formally regarding his absenteeism on no fewer than five separate occasions between September 2019 and the date of his dismissal, as per the documents provided by the respondent. I find as a fact that he did indeed sign to acknowledge receipt of these warnings on three occasions as the face of the documents suggest – in September 2019, January 2020 and June 2020.

51. I find that the duplication of those documents as also unsigned versions, as elsewhere within the respondent's bundle, simply suggests, as Mr Green indicated in his evidence, that one version was provided to the claimant to sign and one copy was filed. It is worthy of note that Mr Green himself supplied both versions. I accept Mr Green's evidence that the signatures or initials shown on the five pages of further documentation he supplied at the hearing (which the claimant accepted were his) are virtually identical to those shown on the warning/caution documents that he says the claimant signed. It follows that I reject the claimant's evidence and I do not accept the suggestion that the claimant's signature has been forged or fabricated as was explicitly asserted. I find as a fact that it was not.

52. I am also fortified in the above view, and with respect to the claimant's credibility generally, by a marked inconsistency in the claimant's evidence. Whilst he indicated in evidence that he had only signed one piece of paper that he could remember (relating to mobile phone usage), his account as within his ET 1 form (which he adopted as his evidence) was that he had also potentially signed a second piece of paper which "*could have been a warning for timekeeping/attendance".* When specifically asked about this in evidence, his account was that the second document was not related to attendance and instead must have related to the coronavirus related absence. He maintained that despite the statement in his ET 1, he had never at any point received or signed any such warning regarding his attendance or absenteeism. I do not accept the claimant's evidence on those points.

53. It is also worthy of note that in the letter sent by the claimant to the respondent in response to his dismissal (dated 11 October 2020), the claimant specifically requested copies of *".notes/minutes of all previous meetings regarding my attendance, showing any support offered during the disciplinary procedure including the warning structure, please also supply copies that have been signed by both parties."* That is a very strange request in circumstances whereby the claimant is now

asserting that he never signed anything at any stage. Plainly, the letter itself does not say does not say that, nor in fact does it assert anywhere within it that he was never warned or cautioned formally regarding his attendance.

54. For all the above reasons, I therefore conclude that between at least September 2019 and the date of his dismissal the respondent did adequately warn the claimant regarding his absenteeism and also gave the claimant a number of chances to improve. I also find that at least prior to his absence on 2 October 2020 the claimant was given an opportunity to make representations and indeed to self-certify in respect of each separate instance of him being absent. I find that to the extent Mr Green outlined why the claimant had been dismissed, in both his termination letter and his subsequent response, he accurately summarised what had been occurring between the parties throughout the relevant period.

Was dismissal within the range of reasonable responses?

55. Aside from the significant impact on this specific business that I have already concluded that the claimant's absence had, there was also the claimant's refusal to meaningfully explain his absences or indeed to provide self-certification documents when reasonably requested to do so. I also find that given the claimant's past absenteeism, his attitude, and his failure to heed multiple warnings, a reasonable employer could properly have concluded that he was also unlikely to meet an acceptable standard of attendance in the future.

56. I find that for all of these reasons, in these circumstances and up until this point, the respondent's decision to dismiss the claimant was within the range of reasonable responses as a response to his persistent absenteeism. Put shortly, a reasonable employer could properly have taken the view that the respondent did, namely that the time has come where enough was enough.

Did the respondent otherwise act in a procedurally fair manner?

57. Having carefully considered the evidence in this case, particularly the respondent's conduct towards the end of the relevant period and especially just prior to and just after dismissal, I conclude that they did not. Indeed, Mr Robert Green in his evidence was refreshingly candid about this aspect of the case, conceding at various points during his evidence that he may well have made what he described as procedural errors.

58. Given the composition and size of the company and their relative lack of HR expertise, I do not criticise the company failing to act on earlier warnings that had been suggested to be issued as "final" e.g. January 2020. Not only did the COVID pandemic and other, legitimate absences, come to pass in the interim period, but I conclude that this was simply evidence of the company's continuing and somewhat benevolent attitude throughout the period in trying to give the claimant every opportunity to improve. I fully accept Mr Green's evidence that he never wanted to sack the claimant but in the end, in his words, was simply left with no choice. Mr

Green concluded that part of his evidence by stating: *"there was no vendetta, he just had to come to work – I didn't want to sack the lad"*.

59. In any event, given the stark terms of what was in fact his final warning, namely the September 2020 warning, I find that the claimant could have been in no doubt that by this point he was potentially very close to the end of the line ("*Alistair was informed that this his (sic.) is final warning and was made aware that his job was in jeopardy (sic.)."*

60. Nevertheless, regardless of any previous warnings or meetings, following the claimant's absence on 2 October 2020, the respondent company, effectively, moved straight to dismissal on 5 October without any further intervening steps. Whilst it may well be that they would have made no difference, in my view this was procedurally unfair. I find that an employer acting within a range of reasonable response would not have acted in that manner.

61. No final meeting, by way of what could either be called a hearing or any sort of pre-dismissal meeting, was held, and the claimant was not given any final opportunity to make any representations at all, regarding the overall, cumulative picture, his employer's interpretation of his absences overall or sanction. He was equally not afforded an opportunity to highlight any other matters that may have mitigated the outcome e.g. his length of service. Mr Green, again candidly, admitted that by this stage the decision had been made and was effectively irreversible and irrevocable regardless of what the claimant might have said.

62. In terms of matters that could have been explicitly considered at that stage, The ACAS Guide *'Discipline and grievances at work' (July 2020)* suggests that where a there is no improvement in terms of absences, the employee's length of service, performance, the likelihood of a change in attendance, the availability of suitable alternative work where appropriate, and the effect of past and future absences on the organisation should all be taken into account in deciding appropriate action. None of that was done here at this stage.

63. Further, the claimant was not at any point afforded any right or route of appeal whatsoever, this being in circumstances where he had also later specifically requested the same (in his letter of 11 October 2020). I do not find that the claimant's failure to attend to pick up his termination letter or to engage in a discussion regarding his appeal rights at that time in any way justifies that course. Again, whilst it may be the case that this would have made no difference to the ultimate outcome, in my view this was also procedurally unfair.

Conclusion on Unfair Dismissal

64. I have considered the size of the respondent's undertaking. It is a very small family business with no dedicated HR Department. However, within the range of reasonable responses, the respondent's size and resources do not excuse the unfairness in terms of the procedural failings in this case.

65. I find therefore, to the extent of the matters outlined above at paragraphs 57 to 63, that the claimant was unfairly dismissed by the respondent within the meaning of section 98 of the Employment Rights Act 1996.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced? By how much?

66. As recorded above, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in ***Polkey v AE Dayton Services Ltd [1987] UKHL 8***, ***Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;*** *and* ***Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604***. I turn to this issue now.

67. The respondent asserted through Mr Green that had a fair process been followed, then the outcome would still have been dismissal. Mr Stuart Royston on behalf of the claimant invites me to find that had a fair process been followed, it would potentially have led to the claimant not having been dismissed and that he may have *"bucked up his ideas".*

68. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer (acting reasonably) would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274 at paragraph 24.

69. ***Polkey*** reductions tend to arise in cases where there has been procedural unfairness, but not necessarily so, and in this case, where the unfairness lies in procedural failings that arose following the claimant final absence on 2 October 2020, it is appropriate in assessing just and equitable compensation as to what might have happened if they had not acted unfairly in that way.

70. I find that even if the respondent had properly considered all relevant matters following his final absence on 2 October 2020, both at first instance and again appropriately on appeal, including the claimant's length of service, his disciplinary record and any explanation for his actions, his overall performance, the likelihood of a change in attendance, the availability of suitable alternative work, the effect of past and future absences on the organisation, as well as considering alternative sanctions, the respondent company would still have dismissed the claimant.

71. In the round, I therefore consider that there is a 100% chance that the claimant would still have been dismissed if the respondent had conducted a fair procedure. As outlined above, had they properly and fairly considered at that stage his length of service, any explanation and mitigation, as well as the possibility of alternative

sanctions, any such dismissal would have been within the range of reasonable responses.

72. Further to my findings in paragraph 71 above, it follows that I do not need to go on to consider the question of any uplift to any compensatory award that would fall to be calculated pursuant to breaches of the ACAS Code.

Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

73. I also agreed with the parties that if the claimant had been unfairly dismissed, I would address the issue of contributory fault, which arises on the facts of this case. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Plainly, given my findings regarding the reduction of the compensatory award by 100%, I do not need to consider the effect upon any compensatory award.

74. In considering the issue of contribution under s122(2) ERA 1996 and s123(6) ERA 1996, a three stage approach is set out in **Nelson v BBC (No2)** [1979] IRLR 346, namely that there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy, and finally, that there must be a finding that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

75. The respondent says that the claimant's conduct was blameworthy and significantly caused or contributed to his own dismissal. The claimant initially asserted that he did not, before again frankly conceding in his evidence that it was "*perhaps 25% my fault".* Given the context of that concession, I took this to be a reference to the time he had taken off and his willingness to be absent rather than any admission of contributory fault in a wider sense.

76. I note my previous findings that that the principal reason for dismissal was capability and not misconduct , and that in his response to the termination letter, Mr Green on behalf of the respondent stated that he had made no assumptions as to whether the absence were genuine or not. In light of that fact and my previous findings, I therefore do not find that the absenteeism in and of itself, or indeed the persistent nature of it, can properly be regarded as either culpable or blameworthy.

77. However, I have already found as fact that the contents of the various letters and file notes as produced by the respondent are accurate. It follows that they are also accurate in terms of their summary of the claimant's general attitude to the absenteeism issue. I have also already found as fact that the claimant was repeatedly asked for self-certification documentation and thereafter simply refused to provide it, sometimes in aggressive terms – as per the respondent's letter: "..*sometimes in an aggressive manner and with an attitude that you didn't feel you were required to*

comply with this request.." The claimant has provided no explanation or justification with respect to that matter, simply denying in the course of his evidence that they were asked for.

78. In those circumstances, I conclude that the claimant's refusal to comply with the respondent's perfectly reasonable request for self-certification documentation, allied to the manner of that refusal, and his refusal to engage with the respondent's processes and investigations surrounding his absences generally, does amount to culpable or blameworthy conduct. Further, I find that this fact effectively compelled the respondent to treat the absences as unauthorised, and also significantly hampered them at every stage in making any proper assessment as to either the underlying reasons for the absences or the prospect that they would improve.

79. In light of the above factual findings therefore, I conclude that there was conduct on the part of the claimant in connection with his unfair dismissal which was culpable or blameworthy, and that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy. I also find that is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

80. As to the amount of any reduction, case law suggests that there are four appropriate categories:

    a. where the employee was wholly to blame – 100%;
    b. where the employee was largely responsible – 75%;
    c. where both parties were equally to blame – 50%;
    d. where the employee is to a much lesser degree to blame – 25%.

    (***Hollier v Plysu*** *1983 IRLR 260*)

81. In the circumstances, I find that the basic award should be reduced by 75% to reflect the claimant's culpability. He was largely to blame for his dismissal.

Calculation of the claimant's award

82. The claimant produced a schedule of loss which was not disputed by the respondent. He also confirmed his date of birth, how long he had worked at the respondent company and his weekly wages at the date of his dismissal in evidence. Applying the above findings to the amounts payable to the claimant, the relevant amounts are therefore as follows:

Basic Award

i. Age as at dismissal: 28
ii. Number of complete years worked: 11
iii. Entitlement: 8.5 weeks (5 years = 2.5 weeks + 6 years = 6 weeks)
iv. Weekly wage at date of dismissal: £440 per week

£440 x 8.5 = **£3,740**

Reduced by 75% for contributory conduct

TOTAL BASIC AWARD PAYABLE = £935

Employment Judge Rawlinson

Date: 26 March 2021

Judgment and Reasons sent to parties on:

Date: 8 April 2021