EMPLOYMENT TRIBUNALS

Claimant: Mr S J Asher

Respondent: Queniborough Aluminium Services Limited

Heard at: East Midlands Region via CVP **On:** 25 June 2021

Before: Employment Judge Brewer

Representation
Claimant: Mr M Anastasiades, Solicitor
Respondent: Mr A Beall, Director

JUDGMENT having been sent to the parties on 29 June 2021 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

Introduction

1. This case came before me having been listed for a one day hearing. The claimant was represented by Mr Anastasiades, Solicitor. The Respondent was represented by Mr Beall a director and 51% shareholder in the respondent.

2. The claimant and Mr Beall gave evidence. They both had written witness statements which they affirmed. There was an agreed bundle of documents. At the end of the evidence I adjourned to consider my judgment which I delivered verbally. In the circumstances a judgment only decision was sent to the parties. The claimant has now requested written reasons and these follow below.

Issues

3. The claimant is making the following claims.

    a. Automatic unfair dismissal s.100(1)(e) Employment Rights Act 1996 (ERA 1996);
    b. Unfair dismissal;
    c. Breach of Contract – notice pay.

4. The issues which fall to be determined in each of the above clams are as follows.

5. For the claim under s.100(1)(e) ERA 1996:

    a. What were the circumstances of danger?
    b. Did the claimant reasonably believe these to be serious and imminent?
    c. Did the claimant take appropriate steps to himself from the danger?
    d. Was he dismissed for that reason?

2. For the ordinary unfair dismissal claim:

    a. What was the reason for dismissal?
    b. Was it potentially fair?
    c. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
    d. In misconduct cases:
        i. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
        ii. there were reasonable grounds for that belief;
        iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
        iv. the respondent otherwise acted in a procedurally fair manner;
        v. dismissal was within the range of reasonable responses.

3. Remedy issues in unfair dismissal claims:

    a. If there is a compensatory award, how much should it be? The Tribunal will decide:
        i. What financial losses has the dismissal caused the claimant?
        ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
        iii. If not, for what period of loss should the claimant be compensated?
        iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (see **Polkey v AE Dayton Services Limited** [1987] UKHL 8)?
        v. If so, should the claimant's compensation be reduced? By how much?
        vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
        vii. Did the respondent or the claimant unreasonably fail to comply with it?
        viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
xi. Which capon compensation, if any, applies?

b. What basic award is payable to the claimant, if any?

c. 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?

4. For the breach of contract claim:

a. Did the respondent breach the terms of the claimant's contract by failing to give notice or payment in lieu of notice?
b. What was the claimant's notice period?
c. How much was the claimant's notice pay?

Law

5. The relevant statute law in respect of unfair dismissal is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A ERA 1996. I need not set out the text of those sections here.

6. In terms of case law, the relevant test I have applied is as follows:

a. Did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:

i. Did the respondent genuinely believe in the claimant's guilt;

ii. Were there reasonable grounds for the respondent's belief in the claimant's guilt;

iii. At the time the belief was formed the respondent had carried out a reasonable investigation;

iv. Did the respondent otherwise act in a procedurally fair manner;

v. Was dismissal within the range of reasonable responses?

(see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588 - I refer to other relevant case law below)

7. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

8. In relation to the claim under s.100 ERA 1996, By s 100 of the ERA it is provided as follows:

> ***'100 Health and safety cases.***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.'*

9. In relation to the breach of contract, this is a claim for notice pay. The issues are as follows.

    a. What was the claimant's notice period?

    b. Was the claimant paid for that notice period?

    c. If not, was the claimant guilty of gross misconduct so that the respondent was entitled to dismiss without notice?

10. The burden of proof is on the clamant to prove that the respondent acted in breach of his contract.

11. Gross misconduct is an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

Findings of fact

12. I make the following findings of fact.

13. The claimant was employed by the respondent latterly as a fabricator, from 1 January 2008 until his dismissal on 6 April 2020.

14. The claimant had received two disciplinary warnings in the past. One in 2012 over his conduct, and one in 2018 for failing a drug test.

15. On 24 March 2020 the government announced restrictions relating to the pandemic.

16. On that day the claimant arrived for work as usual at 7.30. The claimant worked in the Door Shop. There were 3 benches and only 2 were occupied, 1 by the claimant and 1 by a colleague, Shaun. Only 2 were being used because of the need for social distancing.

17. There is an office adjacent to the Door shop, but it is separated by a glass wall.

18. The claimant worked normally from 7.30 am until 9.30 am. He worked alongside and, as normal, chatted to Shaun as they worked.

19. At 9.30 the claimant took his 15 minute break. He then returned to work for around 15 minutes. The claimant then says that he got a call to say his son had been sent home from work because of an apparent cough. The claimant said in his oral evidence that he then left work because "it just wasn't right". This was a reference to two things.

20. First the claimant said that Shaun was supposed to be self-isolating. The claimant said he knew this before he started work on 24 March 2020.

21. Second, the claimant said that an employee called Emma turned up to work in the office. She had her child with her who had apparently been off school because of the pandemic. The claimant confirmed that he did not go into the office at any point.

22. In his written witness statement the claimant had a different version of events which I shall return to below.

23. The claimant left site sometime around 10.00 am.

24. Mr Beall and the claimant had a telephone conversation later on 24 March 2020.

25. The claimant sent Mr Beall a text message on 1 April 2020 about him being offered a job by one of the respondent's clients by way of an April Fool.

26. The claimant sent Mr Beall a text message on 6 April which said:

> *"Just leave last week as holiday as it was booked anyway. Hopefully see you next Monday if things have settled down"*

27. Later on 6 April Mr Beall rang the claimant. During that call Mr Beall decided to dismiss the claimant. He did so with immediate effect, without notice or any payment in lieu of notice.

28. The claimant wrote to Mr Beall on 17 April 2020.

29. Mr Beall responded to that on 23 April 2020.

30. The claimant commenced Early Conciliation on 25 June 2020. The Early Conciliation certificate was issued on 8 August 2020.

31. The ET1 was presented on 18 August 2020.

Discussion

32. In this case there are some fundamental disputes on the evidence. Rather than give an overarching view on witness credibility I have dealt with credibility in resolving each of those disputes.

S.100(1)(e)

33. I start with the allegation of automatic unfair dismissal.

34. The first point to note is that in his oral evidence the claimant conceded that he did not consider that there were in fact circumstances of danger. I agree with Mr Anastasiades that the test of whether there is danger is in fact objective.

35. The claimant alleged that the danger was the risk of catching Covid 19. The claimant says he has asthma. There was no evidence on what in fact the risk was of the claimant catching Covid 19 in his workplace. However, in practice it is difficult to tease out the question of whether there was a 'danger' in this case from the question of 'serious and imminent' even though the second part of the test is subjective.

36. Given the claimant's evidence I find that even if there was a danger, the claimant did not reasonably believe it was serious and imminent. The timeline of events from the claimant's own evidence shows that despite apparently being aware that his colleague, Shaun, should have been self-isolating, the claimant, without any complaint or apparent concern, worked alongside Shaun, chatting to him for two hours and then returned to work after his break on 24 March 2020.

37. In those circumstances I cannot accept that even if the claimant thought there was a risk of him catching Covid 19 at work, he considered that to be a serious and imminent danger. If he had, then given what he knew he would not have worked alongside Shaun without apparent concern or complaint.

38. For that reason the claim under s,100(1)(e) ERA fails.

Unfair dismissal

39. The starting point here is the reason for dismissal. I have to consider what the reason was in the light of the evidence. I am not bound by the label given to the reason for dismissal by the respondent (breach of contract).

40. In his witness statement the claimant says that he left work for two reasons. First because he received a call that his son had been sent home from work displaying Covid 19 symptoms and he believed he too had to self-isolate. Second, he says was concerned about the lack of action taken by the respondent to protect the workforce.

41. As set out above, in his oral evidence the claimant said he left work because "it wasn't right". When pressed about what that meant he said it

meant two things. First that Shaun should not have been working, and second that Emma had turned up for work with her child.

42. I do not consider that the claimant was credible about this. First his reasons altered in his oral evidence from his previously pleaded case. But more significantly, if the claimant was concerned about Shaun, why was he working with him for over two hours before he left site? Second, why would the presence of Emma's child matter? The claimant conceded that Emma and her child were behind a glass wall, inside an office into which he, the claimant, did not go. Neither of these things are credible reasons why the claimant would have left site. If they were then he never would have started work on 24 March 2020 as he said he knew, before he started, that Shaun should have been self-isolating.

43. Given the above, I find the version of events given by Mr Beall more credible. That is that the respondent was required to remain working being part of the key building sector and thus took great care to deal with the requirements for social distancing, and indeed I note that the claimant accepted that, for example, only two of the three benches in the Door Shop were being used because of that very reason.

44. The claimant sought to imply that the respondent agreed he could go home on 24 March 2020 and take time off. He referred a number of times to having spoken to his line manager, Mr Strong. In his letter of 17 April 2020 to Mr Beall, the claimant says that he "told [Mr Strong] that I was going home". He does not in fact say Mr Strong agreed. He says nothing about what Mr Strong said. On the other hand, in his witness statement the claimant's evidence subtly altered because he added that "Mr Strong raised no objection and told me that it was my choice if I wanted to go home". Given that this left the respondent with only one Door Fabricator, Shaun, I consider that most unlikely. I consider that had this happened the claimant would have mentioned it in his letter to Mr Beall of 17 April 2020. I do not find the claimant credible on this point and prefer the evidence of Mr Beall. Mr Beall's evidence was that as part of his investigation into what had happened on 24 March 2020 he spoke to Mr Strong who confirmed that he had not had any conversation with the claimant. This is corroborated by Mr Beall's own evidence, which I accept, that he heard through an open window the claimant shouting, or using a raised voice, to the effect that no-one should be working as he was leaving the respondent's site.

45. I turn then to the phone conversation between the claimant and Mr Beall on 24 March 2020.

46. In his witness statement the C says that "from what I can recollect, there appeared to have been an agreement" that he could remain off work. Again I find the evidence of Mr Beall more credible on this point. He was running a business which is part of the building trade and therefore in a key sector. He had to marshal his human resources to both meet the needs of his clients while ensuring that the workplace was Covid secure. With the claimant's absence he had only one trained Door Fabricator and I

do accept Mr Beall's evidence that he would not have willingly put himself in that position. I accept the thrust of his evidence that he felt that the claimant was going to take the time off irrespective of anything Mr. Beall said, and rather than deal with the matter during that conversation he decided that he would take some time to think about his response given the many other priorities he had at that time.

47. We then come to the telephone conversation on 6 April 2020. It is accepted that Mr Beall dismissed the claimant summarily either during or immediately following the call. The dismissal letter confirms that dismissal was for 'breach of contract'.

48. Considering the evidence in the round, it seems to me that Mr Beall's evidence was that the claimant was in breach of contract by walking off site without authority. If he is correct, then that seems to me to have been a breach of contract as alleged.

49. As I have set out above, the claimant alleged that Mr Strong knew that the claimant was leaving site and he alleged that Mr Strong said words to the effect that if he did want to leave site "we cannot stop you", and he wished to imply that this amounted to an agreement. He says that Mr Beall expressly agreed to the claimant taking the time off. I do not accept the latter point for the reasons set out above. As to the former, the claimant's evidence actually falls short of saying that Mr Strong agreed he could take the time off and to that extent it is immaterial, other than in relation to credibility, which I have dealt with above, whether or not the claimant in fact spoke to Mr Strong.

50. As to the fact that one week of the time off was pre-booked holiday, that seems to me to be entirely beside the point. The claimant was not dismissed for the time that was authorised holiday. He was dismissed for the unauthorised time off, the time off in breach of contract.

51. That brings me to the question of self-isolation. This is somewhat problematic *absent* any detailed evidence from the claimant on the point. Taken at its highest, his case is that he has asthma which requires occasional use of an inhaler. He says his son was sent home because he coughed at work. But he also said in evidence that his son did not take a Covid 19 test and that his son showed no ongoing symptoms of Covid 19, which were well publicised and well known. The claimant says he did not bother to take a Covid 19 test. He does not say that he exhibited any symptoms of the disease.

52. In the absence of the claimant or his son exhibiting any Covid 19 symptoms they were not in fact required to self-isolate, and even if the claimant's son was required by his employer to stay at home for 10 days that, in and of itself, did not give the claimant the right to take time off. But the fact is that he insisted that he was going to remain off, and this attitude during the phone conversation on 6 April 2020, led to Mr Beall to dismiss him. Further, I refer to the text message from the claimant to Mr Beall on 6 April 2020 which says "Hopefully see you next week…", which rather suggests that a return at that point was not certain. The claimant's

evidence on what he meant by "if things have settled down" was remarkable for its opacity.

53. I find that the potentially fair reason for the claimant's dismissal was conduct – that is taking unauthorised time off work.

54. Given the above, I turn to the test I have to apply:

    a. Did the respondent genuinely believe that the claimant was guilty of the misconduct?
    b. Was that belief reasonably held?
    c. Did the respondent carry out as much investigation as was reasonable in all the circumstances?
    d. Was the procedure overall within the band of reasonable responses?
    e. Was the dismissal within the band of reasonable responses?

55. I am in. no doubt that the respondent genuinely believed that the claimant had left work, and remained off work without authorisation, save for his week of pre-booked holiday.

56. As to the reasonableness of that belief, to some degree the facts speak for themselves. Having found that neither Mr Strong nor Mr Beall agreed to the time off, then it was, by definition unauthorised. There is no evidence that anyone else did or even could have authorised the time off. In any event I find Mr Beall's evidence about the steps he took to ascertain what had happened on 24 March 2020 credible. That is that he spoke to Shaun, Mr Strong and Emma. Given the size and administrative resources of the respondent and the circumstances of the pandemic I do not consider that it damages the respondent's case that these conversations are not noted down in writing. In any event, for the reasons set out above, nothing material turns on that evidence.

57. That said, I accept that the procedure overall falls short of one that would be considered reasonable because the respondent ought to have set out its concerns to the claimant in advance of a disciplinary hearing, and should have given him an opportunity to have a hearing at which he could have, if he wished been represented. That did not take place.

58. I accept the point made by Mr Anastasiades that the claimant's letter of 17 April 2020 amounted to an appeal. If I accept that then I see no good reason not to accept that the letter from Mr Beall of 23 April 2020 to the claimant is a response to that appeal, albeit that there was no appeal hearing.

59. For those procedural failings the claimant's dismissal was unfair.

60. Having said all of that, given all of the circumstances, I find that had there been a fair procedure the claimant would still have been dismissed. Furthermore, given all of the circumstances I find that dismissal was well within the band of reasonable responses that is that I cannot say that no employer could not have acted reasonably in dismissing an employee in

not materially different circumstances to those faced by the respondent in this case.

61. Thus the dismissal is procedurally, but not substantively unfair.

62. I turn to two matters. First **Polkey**. I find that had the respondent followed a fair procedure the claimant would still have been dismissed. I accept that he may have remained in employment for a period beyond 6 April, to take account of the time needed to set up and undertake a disciplinary hearing. I consider that the setting up of the hearing would have been undertaken before the claimant was due to return to work on 13 April 2020. I find that therefore that the claimant would have been dismissed on 13 April 2020. He is therefore entitled to pay for the period 7 April 2020 to 13 April 2020 at the level he was in fact in receipt of given that he was off work, not his normal pay as if he was working.

63. The above sum shall have applied to it an uplift of 25% for the respondent's failure to hold both a formal disciplinary hearing and appeal hearing, albeit I find that would have made no difference.

64. As to the basic and compensatory awards, given my findings above I find that the claimant was wholly to blame for his dismissal and therefore reduce both his basic award and any compensatory award by 100% pursuant to sections 122(2) and 123(6) ERA 1996. In those circumstances I do not need to consider the question of an uplift for failing to follow the ACAS Code in respect of the period post-13 April 2020.

Breach of contract

65. Finally I turn to the breach of contract claim, that is the claim for notice pay.

66. It is for the claimant to prove that the respondent acted in breach of contract. That question turns on whether the claimant committed an act of gross misconduct. I have found that the reason for dismissal was unauthorised absence. Gross misconduct means a wilful repudiation of the contract or breach of a fundamental term of the contract. It may also be by reason of gross negligence.

67. I have found that the claimant's stated reasons for leaving work were not true. He did not have an issue with working with Shaun and the fact that Emma's child was in the office was not an issue. Further, I accept the evidence of Mr Beall that he ran a Covid secure workplace and had even, by the morning of 24 March 2020, put in place significant measures to deal with the threat of Covid 19. In the absence of any, or of any good reason for leaving work, Mr Beall was entitled to find that the claimant had breached his contract of employment, the fundamental basis of which is pay in return for a willingness to work. For the period he took off the claimant was not willing to work and in dismissing the claimant for this reason the respondent was not acting in breach of contract.

Conclusions

68. In short:

    a. The claim for unfair dismissal under s.100(1)(e) ERA 1996 fails and is dismissed;
    b. The claim for breach of contract fails and is dismissed;
    c. The claim for ordinary unfair dismissal succeeds.

69. For the reasons set out above the claimant is awarded pay for the period 7 April 2020 to 13 April 2020 by way of compensation with an uplift to that figure for the respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures of 25 %.

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Employment Judge Brewer

Date: 1 July 2021

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE