EMPLOYMENT TRIBUNALS

Claimant: **Mr M Thom**

Respondent: **Andenor Limited**

Heard : **via Cloud Video Platform** **On:** **19 and 20 October 2020**

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

Representatives:

Claimant: **Mr R Malcolm, friend**
Respondent: **Mr S Willis, Director**

JUDGMENT

1. The respondent admits that the claimant is entitled to £490.80 holiday pay. The respondent made an unlawful deduction from the claimant's wages in respect of holiday pay and the respondent is ordered to pay the sum of £490.80 to the claimant in respect of his outstanding holiday pay.

2. The claimant was unfairly dismissed by the respondent.

3. The respondent is ordered to pay to the clamant a basic award of £483.75 and a compensatory award of £1,370.28.

REASONS

Proceedings

4. By claim form presented on 4 December 2019 following a period of Early Conciliation from 25 September 2019 to 8 November 2019 the claimant brought complaints of unfair dismissal, for holiday pay and 'pension loss'.

5. The respondent defends the claim. Its response was filed one day late and was initially rejected by the Tribunal. On 18 May however, following an application for an extension of time to file the response, the response was accepted.

6. During the course of the hearing on 19 October the respondent admitted that the claimant was entitled to 7.5 days' outstanding holiday pay at a rate of £65.44 net a day, giving a total of £490.90.

7. On 9 April 2020 a Preliminary Hearing for case management purposes took place before Employment Judge Butler, at which the issues in the claim were identified.

8. Case management orders were initially made and sent to the parties with the claim form by letter dated 17 December 2019. Those orders were overtaken by events, as the respondent did not file its response on time.

9. No further case management orders were made until, on 14 December, the Tribunal wrote to the parties asking them to send witness statements and a bundle to the Tribunal by 4pm on Friday 16 December, in preparation for the hearing.

10. Neither party is legally represented, and no witness statements or bundles were sent by either party to the Tribunal.

11. At the outset of the hearing on 19 October there was, therefore, no agreed bundle or any witness statements. I suggested to the parties that, as this case was listed for two days, we postpone the start of the hearing to the morning of Tuesday 20 October to give the parties time to prepare statements and a bundle on 19 October. Both parties indicated that their preference was to proceed on 19 October.

12. This is not a case which is document heavy. The claimant's representative indicated that he wanted to rely upon a document entitled "Time line pre-word" which had been sent to the Tribunal but not to the respondent. I asked Mr Malcolm to send the document to Mr Willis, which he did, and adjourned to give Mr Willis time to consider it.

13. Mr Willis indicated that he wished, on behalf of the respondent, to rely upon an email sent to the Tribunal and the claimant on 13 October 2020 at 16.44 which set out the respondent's time line of events.

14. The claimant did not attend the hearing. Mr Malcolm explained that the reason for this was that the claimant was unwell, and that he was authorised to act on the claimant's behalf. I asked Mr Malcolm if he was seeking an adjournment due to the claimant's ill health. He told me that he was not, and that the claimant wanted the case to proceed in his absence. I explained to Mr Malcolm that, in the absence of the claimant, it was more likely that the respondent's evidence would be accepted. Mr Malcolm indicated that he understood that, and wished to proceed.

15. In light of the fact that both parties wished to proceed on 19 October, that I was ready to do so and that there was little documentary evidence, I decided that it would be in line with the overriding objective to go ahead with the hearing.

16. I read the documents referred to in paragraphs 12 and 13 above, together with the claim form, the response, and pay slips introduced by the claimant's representative during the course of the hearing.

17. I heard evidence from Mr Willis on behalf of the respondent, and from Mr Malcolm on behalf of the claimant.

The Issues

18. The issues that fall to be determined are as follows:-

    a. Was the claimant dismissed for a potentially fair reason within section 98(2) of the Employment Rights Act 12997 ("**the ERA**")? The respondent says that the claimant was dismissed by reason of his conduct.

    b. Was the dismissal fair or unfair, in accordance with section 98(4) of the ERA?

    c. If the claimant was unfairly dismissed what sums, if any, should the respondent be ordered to pay to him by way of a basic award and a compensatory award, taking account of any deductions for Polkey (i.e. the possibility that he would have been dismissed anyway had a fair procedure been followed) and / or contributory conduct?

Findings of Fact

19. The respondent is a company that designs, details, supplies, fabricates and erects steel frames and structural frameworks. It has 15 employees, 9 of whom (including the claimant) are based at its workshop in Blidworth, Mansfield, with the rest working on site. Mr Willis is the owner and managing director of the business.

20. The claimant was employed by the respondent from 19 March 2016 until 6 August 2020 as a machine operator and welder. He initially joined as a welder, but later took on the role of machine operator.

21. The claimant was employed to work a basic working week of 38 hours. His normal working hours were from 7 am to 3 pm Monday to Friday. He would also regularly work overtime until 5pm during the week, and from 7 am until 12 noon on Saturdays.

22. The claimant reported mainly to the Works Foreman, Adrian Brandham, but also on occasion to Mr Willis.

23. During the course of his employment the claimant was late for work or did not attend work on a number of occasions:-

    a. On 16th July 2018 he was late or did not attend work;

    b. On 25th July 2018 he failed to attend work;

    c. On 6th August 2018 he failed to attend work;

    d. On 5th September 2018 he was late to work then texted to say he was going to see his doctor;

    e. On 9th September 2018 the claimant, who was due to start work at 7 am, did not contact the respondent until10.40 am that day, did not attend work and was then off until 8th October;

f. On 24th October 2018 the claimant did not come into work. He sent a text message at 6 am saying that he had to 'sort his car out';

g. On 19th December 2018 he was absent due to ill health. He did however inform the respondent in a timely manner of his absence;

h. On 10th March 2019 the claimant did not come in to work and informed the respondent the night before that he would not be in;

i. On 19th March 2019 the claimant texted Mr Willis to say he would not be in work the following day because his partner was unwell. He also texted Mr Brandham to say he would not be in the following day;

j. On 14th May the claimant asked, by text, for a half day holiday that day. Mr Willis agreed;

k. On 20th May the claimant texted Mr Willis saying "overlaid not be long". Later that day he sent a further text to Mr Willis saying that he had a doctor's appointment at 2pm and would be back in the following day. The claimant did not attend work at all that day;

l. On 4th July the claimant told the respondent he would not be in the following day because his car wouldn't start;

m. On 15th July the claimant 'overlaid';

n. On 18th July the claimant told the respondent that his car was 'not well' so he would not be in the following day;

o. On 29th July the claimant sent a text message to Mr Brandham at 6 am saying that he had a bad chest so would not be in. This was the third consecutive Monday that the claimant had either not attended work at all or been late. Mr Willis texted the claimant saying 'another Monday and you are not in';

p. Later on 29th July the claimant sent a message to Mr Brandham saying that he would not be in for the rest of the week;

q. On Saturday 3rd August the claimant was seen by colleagues at Mr Malcom's stag do, drinking heavily;

r. On Monday 5 August the claimant did not attend work. He sent a text message 45 minutes after he was due to start work to say he was not coming in and would send in a 'sick note';

s. On Tuesday 6 August the claimant did not attend work or contact the respondent.;

t. The claimant did not submit a sick note covering his absence.

24. Mr Willis gave evidence, which I accepted, that he had spoken to the claimant on several occasions about his time keeping and his non-

attendance at work. There would then be a short improvement, but this was not sustained.

25. The respondent did not however take any formal disciplinary action against the claimant. The claimant was not given any formal warnings, or warned at any time that non-attendance or showing up late could lead to his dismissal.

26. The claimant's unexpected absence had an impact on his colleagues and on the respondent's business. The respondent would plan work on the assumption that the claimant would be working and then, when the respondent was absent unexpectedly, that work would have to be picked up by his colleagues to avoid the respondent missing customer deadlines.

27. There was no evidence before me that the claimant was apologetic for his behaviour or recognised the impact it had on others. Rather there is a history of him not turning up for work or turning up late, and on more than one occasion not contacting the respondent to let them know that he would not be in, either in a timely manner or at all.

28. At times the reasons given for the claimant's absence were ones which should not have prevented the claimant from attending work. On 3 occasions the reason given was problems with his car. There was no evidence of the claimant having made any effort to get to work by alternative means, for example, getting a lift, walking or cycling, or taking a taxi or public transport.

29. The claimant has a history of alcoholism and depression. There was no medical evidence before me, including any evidence that his absences were due to depression. Until 29 July, when he told the respondent that he had a 'bad chest' the respondent had no knowledge that the claimant suffered from chest problems.

30. On a number of occasions, when the claimant was absent from work at short notice, he asked the respondent if he could use holiday to cover his absence, and the respondent agreed to this.

31. On 6 August Mr Willis discussed the situation with Mr Brandham. He decided that he had had enough of the claimant's behaviour and 'could not keep going like this'. Mr Willis decided to dismiss the claimant and asked Mr Brandham to send a text message to the claimant telling him of this. The reason Mr Willis decided to dismiss the claimant was because he was repeatedly late for work or did not turn up at all. He did not believe that the claimant would change his behaviour, as he had spoken to him about it repeatedly in the past, but to no long term avail.

32. On the afternoon or early evening of 6th August, Mr Brandham sent a text message to the claimant telling him that his services were no longer required. The following day, on the advice of Mr Malcolm, the claimant sent a text message to Mr Brandham asking for confirmation of the term "your services are no longer required" to which Mr Brandham replied that the claimant had been sacked.

33. The claimant asked Mr Brandham why he had been dismissed and Mr Brandham told him that Mr Willis would write to the claimant to tell him why he had been dismissed. Mr Willis did not write to the claimant.

34. The claimant also asked for a copy of the respondent's disciplinary policy. The respondent did not send him a copy.

35. No disciplinary process was followed before the claimant was dismissed and the claimant was not offered a right of appeal. When Mr Willis was asked why no procedure had been followed, he replied that he had not taken employment law advice and didn't know he had to offer an appeal. He told me that he had only heard of the ACAS Code of Practice on Disciplinary and Grievance Procedures after dismissing the claimant. He recognised and accepted that things should have been done differently.

36. The claimant was aged 55 when his employment terminated. His gross weekly pay was £430 a week. His net weekly pay was £383.20. This was the net weekly figure contained within the claimant's Schedule of Loss and which was not disputed by the respondent. I am therefore willing to accept this figure.

37. The claimant was also a member of a defined contribution pension scheme and the respondent paid an average of £11.50 a week by way of employer pension contribution into the scheme.

38. The claimant has not worked since he was dismissed by the respondent due to ill health. He has received statutory sickness benefits only since then.

The relevant law

39. The relevant law in an ordinary unfair dismissal case is set out in sections 98(1), (2) and (4) of the ERA.

40. Sections 98 (1) and (2) provide that:-

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this section if it – …

(b) relates to the conduct of the employee"

41. Section 98(4) states as follows:-

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case

42. In a case in which conduct is relied upon as the reason for dismissal, the key questions are those set out in the case of *British Home Stores Ltd v Burchell* [1978 IRLR 379], namely:-

    a. Did the employer have a genuine belief in the claimant's guilt;
    b. At the time it formed that belief, did the employer have reasonable grounds upon which to do so; and
    c. Had the employer carried out as much investigation as was reasonable.

43. In addition, the Tribunal must consider whether the procedure followed by the respondent was a fair and reasonable one, taking account of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

44. Finally the Tribunal must consider whether dismissal was within the range of reasonable responses open to the employer, taking care not to substitute its view for that of the employer.

45. If the Tribunal finds that the dismissal was unfair, then it must consider whether to order the respondent to pay a basic award in accordance with the provisions set out at sections 119 – 122 of the ERA, and a compensatory award under section 123 of the ERA.

46. Section 122(2) of the ERA states that:-

    "*Where the Tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

47. Section 123 provides that:-

    "*(1)…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer…*
    (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding….

48. If the dismissal was procedurally unfair the Tribunal may make an adjustment to the compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles set down in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.

Conclusions

49. I am satisfied that the claimant was dismissed for a reason related to his conduct, within section 98(2) of the ERA. I accept Mr Willis' evidence that

his decision to dismiss the claimant was made because he could no longer tolerate the claimant repeatedly being absent from work at short or no notice, sometimes without even contacting the respondent. The final straw was that, despite having told the respondent that he was too unwell to work, the claimant was seen drinking heavily on the evening of Saturday 3 August, but then called in sick again on the following Monday and did not call in at all on Tuesday 6 August. I find therefore that the claimant was dismissed for a potentially fair reason, namely his conduct.

50. I also accept that the respondent had a genuine belief that the claimant was guilty of misconduct. Mr Willis formed his belief based on the pattern of behaviour demonstrated by the claimant over the weeks and months leading up to his dismissal. In particular on the fact that the claimant was repeatedly absent on a Monday and that the reasons he gave for his absence appeared, on occasion, to be ones that could have been overcome. For example, on 3 occasions in July the claimant did not attend work because of problems with his car, and apparently made no attempt to get to work through alternative means.

51. I consider that the respondent did have reasonable grounds upon which to conclude that the claimant was guilty of misconduct. There was clear evidence before Mr Willis in the form of the claimant's repeated absence from work and the reasons the claimant gave for his absence. I am concerned that the respondent did not give the claimant the opportunity, through a proper disciplinary investigation and hearing, to respond properly to the respondent's claims and put forward an explanation. On balance, however, it seems to me that the respondent had reasonable grounds to conclude that the claimant was guilty of misconduct.

52. The respondent did not however carry out a reasonable, or indeed any investigation whatsoever into the claimant's misconduct before dismissing him. That is just one of the reasons for which the dismissal in this case was unfair.

53. Of greater concern however was the total lack of a fair procedure by the respondent. Not only was there no disciplinary investigation, but the claimant was not told of the 'charges' against him, or given the opportunity to put forward his side of the case and present evidence either at an investigation meeting or at a disciplinary hearing.

54. He was not offered the right to be accompanied, was not informed of the reasons for his dismissal in writing, and was not given the right of appeal.

55. It is hard to conceive of a case where the employer could have got the procedure more wrong, than in this one. It was quite simply not appropriate for the respondent to inform the claimant of his dismissal, after more than 3 years' service, in a text message. I have taken account of the size and administrative resources of the respondent, which is a small business with just 15 employees, but that does not in my view excuse the total lack of any fair or reasonable procedure.

56. Not only was the dismissal procedurally unfair, but it was also substantively unfair. The claimant was in my view guilty of serious misconduct in the way he was repeatedly absent from work, on what appeared at times to be spurious reasons (for example his car 'being

unwell') and demonstrated a lack of respect towards his employer. The claimant's behaviour had an impact on his colleagues, who had to pick up the work that he was unable to perform due to his absence, so that the respondent did not miss customer deadlines.

57. I have considered carefully whether dismissal as a sanction was within the range of reasonable responses, and have reminded myself that I must not substitute my view for that taken by Mr Willis. On balance I find that dismissal was out with the range of reasonable responses. At the time he was dismissed the claimant had received no formal disciplinary warnings, and there was no evidence before me of a disciplinary policy which classified the type of behaviour demonstrated by the claimant as gross misconduct.

58. The claimant's behaviour was certainly culpable, but dismissing the claimant at a time when he was purportedly off sick, albeit that he had failed to submit a fit note as he told the respondent he would, was in my view outside the range of reasonable responses.

59. For the above reasons I conclude that the dismissal of the claimant was unfair.

60. I do however find that the claimant contributed significantly to his dismissal through his behaviour in the months leading up to his dismissal, and in particular in July 2019. He was off or late to work on every one of the 4 consecutive Mondays leading up to his dismissal. On Monday 15th July he overlaid, on Monday 22nd July he did not come in because his car was playing up and didn't tell the respondent until almost 2 and a half hours after his shift had started. On 29th July he gave 'bad chest' as the reason for not coming in, and on 3 August he texted 45 minutes after the start of his shift to say he wouldn't be in and would send a sick note. He did not do so, and the following day neither attended work nor contacted the respondent.

61. This behaviour in my view was culpable and it was the reason why the claimant was dismissed.

62. I have therefore concluded that it would be just and equitable to reduce the size of both the basic and compensatory awards by 75% to reflect the claimant's contributory conduct.

63. I have also considered whether to make a reduction in the compensatory award to reflect the chance that the claimant would still have been dismissed had a fair and reasonable procedure been followed ("a Polkey reduction"). Given the total lack of any fair or reasonable procedure in this case, it would in my view be pure speculation for me to make a finding as to the likelihood that the claimant would have been dismissed in any event. I therefore make no Polkey reduction to the compensatory award.

64. The claimant had three complete years' service at the time he was dismissed and was aged 55. His basic award is calculated therefore using a multiplier of 4.5 times his gross weekly pay of £430, which gives a total of £1,935. To this I have applied a 75% reduction to reflect the claimant's contributory conduct, leaving a final basic award of **£483.75**.

65. The claimant's net weekly pay was £383.20 to which must be added weekly employer pension contributions of £11.50, giving a total weekly loss of £394.70.

66. Mr Malcolm argued, on behalf of the claimant, that his current ill health was caused by the respondent's decision to dismiss him. He also however gave evidence that the claimant had a long history of mental illness and alcoholism. The claimant did not attend the hearing to give evidence, and there was no medical evidence suggesting that the claimant's current period of ill health is caused or contributed to by the respondent.

67. Mr Willis submitted on behalf of the respondent that it would be unfair to penalise the respondent for something over which it had no control, namely the fact that the claimant is now too unwell to work.

68. Section 123 of the ERA provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. I have therefore had to consider what loss the claimant has suffered as a result of action taken by the respondent.

69. In the circumstances I have concluded that the period in respect of which it would be just and equitable to award loss, is a period of 3 months from the date of dismissal. 3 months' loss at £394.70 a week comes to £5,131.10, to which have added £350 loss of statutory rights.

70. This gives a total compensatory award of £5,481.10 to which I have applied a 75% reduction to reflect the claimant's contributory conduct. This results in a total compensatory award of **£1,370.28**.

71. The respondent is therefore ordered to pay to the claimant a basic award of £483.75 and a compensatory award of £1,370.28 by way of remedy for his unfair dismissal.

Employment Judge Ayre

Date 20 October 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE