EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100294/2021 (V)

Held on 26, 27 and 28 May 2021 (By CVP)

Employment Judge: B Campbell

Mr Charles Bryden	**Claimant** **Represented by:** **Ms Deirdre Flanigan – Solicitor**
Boots Management Services Ltd	**Respondent** **Represented by:** **Mr Daniel Brown – Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that:

1. the claimant was not unfairly dismissed contrary to section 94 of the Employment Rights Act 1996;

2. the respondent did not breach the claimant's contract of employment by electing not to provide notice or payment in lieu upon dismissing him; and

3. the claims are therefore dismissed.

REASONS

GENERAL

1. This claim arises out of the claimant's employment by the respondent which began on 6 August 2010 and ended with his dismissal on 31 August 2020.

2. The Tribunal heard evidence from Ms Denise Lowe, PDC Manager; Ms Wendy Addison, PDC Operations Manager and Mr Brian Hunter, Head of Pharmacy Delivery and Collection, all on behalf of the respondent, as well as the claimant himself.

3. All of the witnesses were found generally to be credible and reliable. The parties were not in direct conflict over much of the evidence and the case turned more on matters such as the parties' positions on the adequacy of the process followed and the severity of the sanction imposed.

4. An indexed joint bundle of documents was provided and pages within it are referred to below in square brackets. The parties' representatives helpfully provided skeleton submissions in note form which were considered in reaching the various conclusions below.

LEGAL ISSUES

5. The legal questions before the tribunal were as follows:

    5.1. Was the claimant's dismissal on 31 August 2019 by reason of his conduct, a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ('ERA'), and if so did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall; and

    5.2. It being agreed that the claimant was contractually entitled to ten weeks' notice of termination of his employment, by giving no notice of dismissal or payment in lieu, did the respondent breach the claimant's contract of employment?

    5.3. If yes to either, what compensation or damages should be awarded?

APPLICABLE LAW

6. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a Tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

7. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment Tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

8. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA, whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay notice.

FINDINGS OF FACT

9. The following findings of fact were made as they are relevant to the issues in the claim.

Background

10. The claimant was an employee of the respondent from 6 August 2010 to 31 August 2020. He co-signed a statement of particulars of employment on 126 July 2012 [124-125] which was updated by letter in December 2018 [126].

11. The respondent maintained a number of policy documents including an Employee Handbook [46-110], a Disciplinary Policy [114-118], a separate non-exhaustive list of examples of conduct deemed to be gross misconduct [111-112], and guidance on internal appeals [119-122].

12. All of the key events occurred in 2020. The claimant had a clean disciplinary record and there was no evidence of his conduct or performance up until then being an issue.

13. The respondent is the company which employs various workers who operate within the 'Boots' business in the UK. The claimant worked within a division of that business concerned with delivering prescription medication from high-street based pharmacies to customers, named Pharmacy Delivery and Collection, shortened to PDC. The claimant worked as a Team Co-ordinator within PDC. He was based in Kilmarnock. He reported to Denise Lowe, PDC Manager who was based in Motherwell. She oversaw the claimant's area (essentially Ayrshire) and also parts of North and South Lanarkshire. In turn she reported to Wendy Addison, PDC Operations Director, who had responsibility over the whole of Scotland and Northern Ireland.

14. The claimant's role was connected to the daily process of managing medication deliveries, or drops, from Boots high street stores to customers' home addresses and also care homes. Deliveries were made by drivers using the respondent's vans. Via a centralised computer system, a pharmacist or other member of staff at a store would log a given delivery, stating where it

was to go and by when. Normally there were three options for the delivery time, morning, afternoon and evening. The system would collate orders within a given area and organise them into delivery routes, which would be assigned to a given driver and van. Drivers would then be given a roster of collections and drops which they would follow.

15. The claimant's role involved overseeing the delivery operation. This included dealing with any problems which arose with deliveries. A degree of flexibility was permitted where, for example, the system might allocate a particular delivery to a given van, but it could be seen that it was more efficient to go on another van. Similarly a Team Co-ordinator could, within reason, change the specific timing or order of collections from stores, or change the route a driver took, or the order of their deliveries, or the number of vans and drivers required. The system could be inflexible when dealing with things like changes to normal store opening times, and a degree of individual input and common sense was often required to address any consequences. What was critical throughout, however, was that a given delivery had to be made to the correct address within the specified delivery window selected by the store. This was because often the medication was essential to the recipient's care and wellbeing. Individuals working within the PDC part of the business were not privy to details of what was contained in each order for reasons of confidentiality, and so essentially had to treat each delivery as potentially critical.

April 2020

16. On 20 April 2020 the manager of the Boots store in Ayr, Leanne Salvona, emailed Denise Lowe to raise what she described as *'some PDC issues I have had with Charlie recently'* [136-137]. Charlie in this context was the claimant. She had raised them verbally before and then it had been agreed she would put them in writing. She set out three issues, under the headings *'Removal of deliveries from PDC', 'Easter Holiday'* and *'Collection from Care Homes'*.

17. The first of those was a complaint that a delivery of insulin had been removed from a particular morning delivery slot without any contact being made to the store to explain why. The store had to arrange for it to be delivered to the customer in the afternoon.

18. The second concern related to deliveries the store wished to make on the Easter Monday of that year. Ms Salvona stated that she had followed the directions given by the PDC system in order to arrange five deliveries that afternoon, but had then been contacted by the claimant to say that there would not be any deliveries that day. She then made alternative arrangements for a number of the deliveries, before being called back by the claimant to say that he had now arranged a driver to collect them, by which time she considered it was too late.

19. The third issue raised was to do with a process which drivers followed in relation to collection of unused medication from care homes after the recipient died. Ms Salvona understood that it could not be picked up within a week of the death, in case required in connection with any investigation into its circumstances, and also knew that the practice at that time was to allow a further 72 hours before uplifting the medication, owing to potential Covid-19 risk. The claimant had told her that the practice he and his drivers were adhering to was to wait 14 days in total, namely the above duration plus essentially a further four days to further minimise Covid-19 contact risk. Ms Salvona did not know about this practice.

20. Ms Lowe's evidence was that she spoke to the claimant about each of the three issues. She did not let the claimant see the email itself. Although, she said, there was not complete acceptance by the claimant that he had done anything wrong in relation to all of the issues, he recognised it was not appropriate to remove a delivery placed on the system by a store and effectively apologised for that. They reached an understanding about the other two issues.

21. By contrast, the claimant said that only the second and third issues were brought up by Ms Lowe, and he had no knowledge at all of the first one being

raised by Ms Salvona (under the heading *'Removal of Deliveries from PDC'*). His position was that he would never simply remove an item scheduled for delivery without contacting the store to check the request was correct, or to agree and alternative delivery arrangement.

22. He did not accept that he was at fault in relation to the second and third issues. In relation to the second, he was trying to work around the fact that the system had booked the collection time as 8.50am when the store would not have been open, and then there was an issue getting access to vans which had been locked away adjacent to the Kilmarnock store. He believed that he had come up with the best solution on the day given the limitations he was working under. Regarding the third issue, there had been agreement within PDC to allow 14 days before collection of medication, but that hadn't been properly conveyed to stores. The claimant had anticipated before Ms Salvona's email that unless stores were made aware of this change, there would be confusion. To him this was an example of that.

23. Both individuals are in clear conflict over whether Ms Lowe raised Ms Salvona's first concern with the claimant at the same time as the other two in April 2020. On consideration of the evidence it is found that Ms Lowe did raise the first concern with the claimant. This was as important as the other two items, if not potentially more so given that it related to a risk of a patient not receiving essential medication which had been flagged up. The potential seriousness of a delivery not being made was commonly known. The issue Ms Salvona was raising was succinct and clear. It would make no apparent sense for Ms Lowe to go to the trouble of raising the other two concerns with the claimant without also mentioning the first. Whilst the claimant may have been correct to say that he would not intend to remove a delivery from the system without re-booking it, that may not have been the understanding of staff at the store were they to check the system at the point when it had been removed from the system, without any further information to go on.

24. In any event, what is more relevant regarding the legal issues in the claim is whether Ms Addison at the point of deciding to dismiss the claimant formed

the belief that the first issue had been raised with the claimant, and was reasonable in doing so. It is found that she formed such a belief reasonably. Equally, it is found that Ms Salvona's account of the first issue was truthful and accurate, highlighting a potential lapse in the respondent's service to its customers.

Events of 1 August 2020

25. The main events with which the claim is concerned began on Saturday 1 August 2020. The claimant was not scheduled to work that day but decided to monitor the running of the day's deliveries and make himself available to be contacted if any issues arose. This was something he did when there was a shortage of staff. Ms Lowe was not working that day. Her duties were being covered by a Mr Ralph Blades, who was a Team Co-ordinator like the claimant, but for the Lanarkshire area. The claimant also considered he was supporting Mr Blades, who was not as experienced as he was.

26. The morning passed without incident. It was not an especially busy day for deliveries.

27. The Monday immediately following, 3 August, was a local holiday and many stores would be closed. This had caused issues with deliveries in the past, where stores had not made arrangements to have deliveries made before a public holiday which would have normally gone out on that day. The claimant had asked whether stores in his area were aware of there being no deliveries on 3 August, and was told that they were.

28. Around 12.30pm in the afternoon of 1 August the claimant was able to see the system begin to create delivery lists for the afternoon delivery runs. He noticed that a 'public' delivery – i.e. one for a person's home address rather than a care home or other facility - had been added by the Ayr store. Although the PDC system allowed a store to select a public delivery for a Saturday afternoon, he thought that this was a mistake as in his experience it was normally only deliveries to care homes that would be made from the Ayr store on a Saturday afternoon. He accepted there was no rule or universal practice

to this effect, but that was his experience. He considered that the store had meant for the delivery to be made on the Monday (although no deliveries would be made on that day) or later.

29. The claimant removed the delivery from the provisional delivery list and placed it in a different list named 'unassigned', for deliveries which are to be held pending allocation to a particular delivery run. In doing so, by default no driver would know to pick it up from the store that afternoon. The claimant intended at that time to telephone the store to clarify their required timing for the delivery, then allocate it to a run as appropriate. However, he was working on other things and did not. He understood that each delivery incurred a nominal charge for the store, and by removing an erroneously placed order he would save the store money. He understood the amount in question to be around £3.65.

30. Around 1.30pm the claimant remembered to call the Ayr store. Nobody had called him about the delivery at this point. He made at least two attempts to call the store but was unable to get through to the store itself. The number he had connected him to an automated service where at best he could leave a message.

31. The claimant could see that the number of deliveries to be made that afternoon would require two vans. Around 1.50pm he spoke by telephone to one of the drivers working that day, Sheree Shaw who he could see was still at the Ayr store. There is a dispute between the claimant's evidence and that noted as Ms Shaw's in relation to which telephoned the other. The claimant's evidence was that he called her with the intention of having her ask a member of the store staff to call him back to discuss the public drop. She then mentioned that the store had been trying to call Ms Lowe about it. Ms Shaw's evidence was that she had arrived at the store and been approached by Ms Salvona who was trying to resolve the issue with the public drop, as she had with a prescription which needed to be delivered to a customer that day but which she could see had been removed from the system. This led Ms Shaw to phone the claimant.

32. On the question of whether the claimant called Ms Shaw or the opposite, it is difficult to make a certain finding. Each had a plausible reason to telephone the other in the way they described. There were no telephone or other records which could be found to support either account. Again, however, what matters is whether Ms Addison reasonably believed one or the other account. Again it is found that she reasonably believed what Ms Shaw said. In any event, this question was less significant in the overall reckoning than the question of whether Ms Lowe had discussed all of the points in Ms Salvona's email of 20 April 2020 with the claimant, or only some of them.

33. Ms Shaw had already been held back because a member of store staff was required to unlock a door to allow her out of the premises to the rear, and the keys couldn't be found. The claimant considered she was becoming stressed by that and the confusion around the public drop, and so told her to set off with the rest of her deliveries and he would resolve the issue with the store.

34. The claimant managed to speak to Ms Salvona at the Ayr branch at this point. Both individuals became anxious and the conversation became heated. Each was trying to convey their position at the same time. There was background noise which made it difficult to be heard. It became clear to the claimant that the store did require the public drop to be made that afternoon. He said that he could sort that out by getting one of the drivers to return and collect it. Ms Salvona told him not to bother and that she would arrange for the delivery herself.

35. For part of the conversation, Ms Salvona used the loudspeaker on her phone so that her colleagues, Hazel Murdoch the store Pharmacist and Jane Smith the Pharmacy Advisor, could hear it. Ms Salvona found the conversation very frustrating and by the end of it she was reduced to tears.

Events following 1 August 2020

36. Ms Lowe was on annual leave until around Monday 10 August 2020. In her absence a document drafted by Ms Salvona and titled *'Complaint / Saturday 1st August 2020'* but undated [129-130] was emailed to her. This gave Ms

Salvona's account of the events of that day. It differs from the claimant's own evidence in a number of respects. In particular, she stated that she had called the claimant three times, managing to speak to him on the third call, that he had firmly instructed Ms Shaw not to take the delivery, that he told Ms Salvona she should have contacted him to have the delivery made that afternoon, and that he was *'abrupt and aggressive'* in his tone.

37. Ms Lowe also received a document titled *'Complaint'* from a member of staff named Betty during her holiday [131]. Betty was an Accuracy Checker at the Girvan store. This document is also undated. It describes a situation where she had reported to the claimant that a customer had in turn reported to her that her prescription of a controlled drug (denoted 'CD') was missing. Betty stated that on making the claimant aware of the details, he suggested the patient had probably forgotten receiving the prescription, and that he saw no point in asking his driver about it as a few days had passed since the delivery had been made. The claimant had allegedly suggested that a member of store staff named Liz log a 'PIERS' report (used to flag up potential loss of controlled drugs) on the system which would alert Ms Addison to the matter. He could not do so himself as he was on the road at the time.

38. The claimant's position on this matter was that since the controlled drug reported missing was one which had been scheduled for delivery a week before, it was unlikely that the driver would remember whether they did deliver it, and that time would initially be better spent visiting the elderly customer to check whether it could be found at their home. He accepted that he had a duty to log a PIERS report, but was driving at the time and it was late in the day, plus he did not want to disturb his manager outside of normal working hours. He checked the system later that evening when he was home and saw that no PIERS report had been logged by Liz. He took from this that the prescription must have been found. He telephoned Liz at the Girvan store the next morning who confirmed the medication had been found at the customer's home.

Investigation by Denise Lowe

39. As requested by Ms Addison, Ms Lowe conducted an investigation into the events of 1 August 2020 and the complaint by Betty on her return to work from leave. By this point the claimant himself had gone off on annual leave. On his return he was suspended pending further action.

40. Ms Lowe obtained a short account from Mr Blades of his involvement on 1 August by way of email dated 18 August [132]. On 19 August she interviewed Hazel Murdoch, the Pharmacist and Jane Smith, Pharmacy Advisor at the Ayr branch. She took notes of the conversations [133-134], [135]. Both gave an account of the part of the conversation between Leeanne Salvona and the claimant which they had heard. Ms Murdoch confirmed that in her clinical judgment the public delivery had to go that day. She stated that Ms Salvona had told the claimant *'this was not acceptable'* and that she also told him repeatedly that she had not *'go[ne] over his head'* in relation to arrangements for the delivery. At one point Ms Salvona was said to have burst into tears. Ms Murdoch confirmed that ultimately she had delivered the medication to the customer herself. Ms Smith said that Ms Salvona said the claimant's name a number of times, but the claimant '*wasn't listening'*. She also said Ms Salvona *'was upset'*.

41. Ms Lowe did not appear to interview Ms Salvona.

42. On 24 August 2020 Ms Lowe interviewed Sheree Shaw, the driver who was supposed to have collected the public delivery. Again Ms Lowe made a note [138-139]. Ms Shaw confirmed that when she entered the Ayr store she was told she should have collected a public delivery, and replied that those aren't delivered on Saturdays. She said she called the claimant to confirm this, but ended up feeling uncomfortable as the claimant was telling her not to take it while a member of staff was saying she should. She repeated that she had called the claimant and not the other way around. She said she thought there had just been miscommunication over the matter.

43. On 25 August 2020 Ms Lowe interviewed the claimant and a note was made by Leigh Haggarty [140-155]. The note states that the discussion lasted for an hour and fifteen minutes. Ms Lowe gave the claimant the other statements and items she had gathered in her investigation. The note is accepted as a suitably accurate summary of the discussion. The claimant signed each page as did Ms Lowe.

44. Based on the information she had gathered by that point Ms Lowe decided that there was a disciplinary case for the claimant to answer and sent him a letter, also on 25 August 2020, inviting him to attend a disciplinary hearing with Ms Addison on 28 August 2020 [156-157]. The purpose of the meeting was said to be *'to discuss your potential gross misconduct leading to a serious breach or [sic] your employer's policies & practices.'* The letter enclosed the investigation materials listed by bullet points. The claimant's right to be accompanied was confirmed. He was to remain under suspension in the meantime. The letter did not clearly itemise the allegations of misconduct which the claimant had to answer. The letter used was a generic template. Ms Lowe considered that the nature of the allegations was clear from the enclosures. She confirmed in evidence that she saw them to be (i) taking a delivery off the system so a patient would not receive it and (ii) the claimant's attitude towards colleagues, both on 1 August 2020 and more generally.

Disciplinary hearing and dismissal

45. The process was handed over to Ms Addison who held the disciplinary meeting on 28 August 2020. The claimant attended without a representative. Ms Anne McKenzie took notes [159-180]. Again the claimant countersigned each page and the notes are accepted as a reasonably accurate summary of the discussion which took place. The hearing lasted from 10am to 2.05pm including breaks.

46. During the hearing there was discussion about whether the claimant telephoned Ms Shaw or vice versa on 1 August 2020, and on which number, or phone. The claimant produced two mobile phones that he had been using in connection with his duties. He confirmed that Ms Salvona had telephoned

both the Manager's phone, which at the time was diverted to him, and his own Team Co-ordinator phone. He stated that in relation to the latter he had begun using a new handset with the original SIM card in the first week in August 2020. The call history of that phone was viewed and it showed only one call, from the claimant to Ms Addison on 5 August 2020.

47. Ms Addison put to the claimant that both Ms Salvona and Ms Shaw had telephoned him. The claimant said that he had called Ms Shaw first, so that she could ask a member of store staff to call him.

48. Ms Addison asked the claimant when and why he had removed the public delivery from the system. He had done so at 12.30pm as he genuinely thought it was there by mistake. She accepted that, but said he should have contacted the store first as clinical judgment was involved. He said he thought it *'would route better for [the] driver.'* He was recorded as saying he understood and apologised, that hindsight was a beautiful thing and that he should have phoned the store. In his evidence he stated that he meant he should have contacted the store specifically at the point he removed the delivery from the system, i.e. 12.30pm, and that he had tried to call the store shortly before 2pm but could not get directly through to a member of staff. However, that is not recorded in the note.

49. The claimant explained why he had told Ms Shaw just to leave the Ayr store while he dealt with the staff. Ms Addison stated that she had checked Ms Shaw's route that day, that she made her last drop at 3.33pm and that making the public drop would only have taken another three minutes.

50. The claimant accepted that a clinical judgment had been made to have the public delivery carried out on the Saturday, but he had not been aware of that at the time. He said what happened was a mistake but he would have dealt with it.

51. Ms Addison discussed the email of 20 April 2020 from Ms Salvona to Ms Lowe. She made the point that the first item was about medication being removed from the system, and therefore what happened on 1 August was *'not*

a one off'. The claimant said he didn't know anything about that and had never taken off an AM (i.e. morning) drop.

52. Next Ms Addison raised the claimant's manner in dealing with the Ayr store staff on 1 August. She said she had three statements about the conversation with Ms Salvona. The claimant denied saying anything about Ms Salvona going over his head. He said there was a lot of confusion in the conversation which was not helped by background noise.

53. Ms Addison moved on to the complaint raised by Betty at the Girvan store regarding an alleged loss of a controlled drug. The claimant confirmed he was aware of how serious such an instance might be, and that the procedure was to gather as much information as possible, complete a 'PIERS' report and phone a manager. Ms Addison stated that as well as phoning a manager, a PDC hotline also had to be contacted. She commented that the claimant had not made any such calls, and relying on the store to make the referral was not fulfilling the PDC side of the process. The claimant acknowledged this. Ms Addison confirmed that Liz at the Girvan store had called her.

54. At this point Ms Addison said that she wished to consider everything that had been discussed and speak to People Point, the respondent's remote HR support function. The meeting was adjourned at 11.55am until 1.50pm.

55. When the meeting resumed Ms Addison asked the claimant to convince her why she shouldn't dismiss him. He said that he always did his best, but sometimes tried to do too much. She responded that it was difficult for her to deal with the matter when a customer had been affected, that she would need to check into what he said about normal delivery practices, that he appeared to be taking decisions above his authority and that there was a *'complete breakdown [in] trust*'. Ms Addison was unable to reach a firm decision at this point and was still contemplating options including a warning. She wished to consider things over the weekend which followed. She agreed to call the claimant on the Monday, 31 August, with her decision.

56. As part of the claimant's case was that there was a general practice in Ayrshire of not making public deliveries on Saturdays, Ms Addison took steps to verify if that was the case. She spoke to Andrea Ferguson, who had been the claimant's manager before Ms Lowe, until around early 2020. Ms Ferguson essentially asked four questions which are not recorded in the hearing documents, but which were said by Ms Addison in her evidence to be as follows:

    56.1. What kind of delivery service was offered in that area – i.e. Ayrshire – on a Saturday;

    56.2. If a store contacted you requiring a public delivery in an emergency, what would be the process;

    56.3. Would it be common practice to remove a planned delivery without notifying the store which had requested it;

    56.4. Can you confirm that all your team would have known any process for responding to a report of a missing controlled drug.

57. The answers given to the four questions were provided in a note which Ms Ferguson signed on 1 September 2020 as follows:

    57.1. *'We would only offer a delivery service to Care Services on a Saturday P.M. This had been in place since I started with P.D.C. due to the majority of our stores being closed in the p.m;*

    57.2. *'If a store contacted us we would advise that the service was for care services, but if it was an emergency we would do the delivery and advise the store to make sure the patient was at home for the delivery.*

    57.3. *'We only remove "store to store" that have been put on the system without us knowing due to the geography of some requests. We would always contact a store before removing a delivery.*

57.4. *'Yes I am confident that my team know the process for any missing medication including C.D. They will always contact me to discuss.'*

58. By Monday 31 August 2020 Ms Addison had made a decision on the outcome of the disciplinary process, which was to dismiss the claimant for gross misconduct. She telephoned him on that morning to confirm her decision and said she would send a letter confirming the details.

59. Ms Addison therefore made her decision before receiving Ms Ferguson's written note, although she had been given the details in a telephone conversation before then.

60. The disciplinary outcome letter was dated 1 September 2020 [185-188]. In it she provided a summary of the matters discussed. Her decision was outlined as follows:

> *'Gross misconduct is an act or acts which are so serious that it is a serious breach of the colleague's employment obligations, duties or responsibilities. This in turn causes a serio[u]s breakdown of trust. There was a clear failure to follow company rules. Your behavio[u]rs towards other Boots colleagues was questionable & removing the medication from the delivery request was a deliberate act or omission which undermines the mutual trust on which the contract of employment relies.*
>
> *Because your behavio[u]rs fell short of what is acceptable the company could not expect to continue to employ you therefore it is my decision to summarily dismiss you from Boots with immediate effect.'*

61. In her evidence Ms Addison said that her reason for concluding there was a breakdown in trust was that she could no longer trust the claimant to make the right decision. He had mentioned that he wanted to take a decision himself more than once which she felt he should not have taken. She felt it 'likely' that he would do so again if allowed. She also said her belief that the claimant's conduct towards colleagues was 'questionable' was based on her conclusion that the claimant had spoken to Ms Salvona inappropriately on 1 August 2020.

62. The letter enclosed a copy of the disciplinary hearing minutes and included details about the appeal process available. Mr Brian Hunter, Senior PDC Manager, was nominated as the point of contact.

Appeal

63. On 8 September 2020 the claimant wrote to Mr Hunter [189] indicating his wish to appeal and requesting an appeal meeting be arranged. Within the letter he stated:

> *'Whilst I do take ownership of my conduct which led to disciplinary proceedings, I do not consider that my conduct amounted to Gross misconduct and the decision to summarily dismiss me is excessive and does not fall within the band of reasonable responses available to the employer.*
>
> *'I would also like to discuss the process leading up to this as I believe it was flawed.'*

64. Mr Hunter wrote back to the claimant on 11 September 2020 to acknowledge his letter and propose an appeal meeting for 1 October 2020 [190].

65. The appeal meeting was rescheduled to 2 October ad proceeded on that day. Again notes were taken of the discussion, this time by an Adam Leslie. The claimant attended along with a Mr Paul Bennett from Unite the union. The claimant countersigned the meeting notes [194-213].

66. In the meeting the claimant initially summarised his appeal grounds before the issues were discussed in more detail.

67. There was discussion of the matter of the controlled drug reported missing by a customer of the Girvan store. Mr Hunter said he would check with Ms Addison how she had considered that in the process of making her decision. Mr Hunter then asked the claimant about the events of 1 August 2020. The claimant gave his account. Again Mr Hunter considered he should speak to Ms Addison to understand her thought process in concluding misconduct had occurred.

68. The claimant also raised that he did not consider there was a need to suspend him while Ms Lowe was carrying out her investigation, and that the statement from Betty appeared to have been elicited from her rather than freely submitted. He also commented that there was no note of the questions put to Ms Ferguson by Ms Addison which the former had answered on 1 September 2020, and that reliance was placed on a 'historical' statement from Ms Salvona which did not involve the claimant (this was a reference to the email of 20 April 2020). He did not accept that was accurate. He said additionally that Ms Addison did not come back to him regarding any follow up checks on whether he had attempted to call Ms Shaw or the Ayr store on 1 August 2020, as he maintained he had done.

69. In summing up, the claimant submitted that there was enough in his conduct to justify a final written warning, but not dismissal.

70. Mr Hunter spoke to Ms Addison after the appeal meeting as he wanted to understand better her rationale for deciding to dismiss the claimant. He prepared a set of questions and made a non-verbatim note of her responses [191-193].

71. Mr Hunter reached his decision on the appeal by 2 November 2020 when he issued an outcome letter to the claimant [214-216]. He had decided to uphold the decision to dismiss the claimant for gross misconduct. He outlined his findings and responses to the various appeal points the claimant had raised.

72. He set out his conclusions as follows:

'Conclusion

'In consideration of the above, I have found that there was no attempt by you to understand why a request for delivery had been placed. You missed multiple opportunities to do this including the point at which the driver was at the store in a position to take the delivery. In fact, not only did you not seek to understand but it appears you deliberately made it difficult for this drop to be fulfilled having already taken the unilateral decision to remove it. I therefore conclude that you consciously removed this drop for reasons

unknown. I can find no evidence of a vendetta nor of incorrections in process. Your actions have resulted in unnecessary patient risk being introduced and given that this is not the first time this issue has been raised, I can understand why the investigation pursued one of breach of trust. There are several things that can be categorised as gross misconduct. At the very least in this case, Gross negligence or incompetence is one. On this basis it is my opinion that your actions did constitute gross misconduct and Wendy was correct in treating it as such. In accordance I find that Wendy's decision to summarily dismiss you was just and proportionate and I am therefore unable to uphold your appeal.'

73. The letter concluded by confirming that this was the final stage in the respondent's process and there was no further right of appeal.

DISCUSSION AND CONCLUSIONS

General reasonableness of the respondent's process

74. The parties appeared to agree that the claimant had been dismissed because of his conduct, but disagree over whether the requirements of section 98(4) ERA had been satisfied. In any event it is found that conduct was the reason for the claimant's dismissal. That is evident from all the documents in the process, particularly the disciplinary hearing and appeal outcome letters.

75. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

76. There appears to be little doubt that Ms Addison, as disciplinary hearer and the person who decided to dismiss the claimant, genuinely considered he was guilty of misconduct. Her outcome letter of 1 September 2020 makes this clear. She concluded that by removing the Saturday public drop from the order

list of the Ayr store he had knowingly and unnecessarily created a risk that a patient waiting on medication would not receive it on that day, and therefore the delivery would be delayed by up to three further days owing to the public holiday. She also concluded that the claimant's manner of dealing with his colleague at the Ayr store fell short of an acceptable standard. She further considered that the claimant had admitted to not following an established procedure for logging a report of a missing controlled drug.

77. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct. Looking first at whether there was evidence of the misconduct which Ms Addison had found to have occurred:

77.1. The claimant admitted he had removed the scheduled public delivery on 1 August 2020. Whatever he did, or intended to do subsequently on that day, in the disciplinary meeting on 28 August 2020 he said that he recognised he should have contacted the Ayr store but did not. Ms Addison was entitled to make a decision on the basis of the claimant's account, the record of which was confirmed by him when he signed the meeting notes. Ms Addison's impression was that he had not tried to call the store and was acknowledging with the benefit of hindsight that this had been unsatisfactory;

77.2. The claimant also admitted that he did not log the report of a missing controlled drug which was made by the Girvan store employee Betty, albeit that he believed the situation to be low risk and the matter was cleared up the next day;

77.3. There was also evidence, albeit challenged by the claimant, to the effect that the claimant had been informally warned about removing deliveries placed on the system by stores without agreeing that with the relevant store, by way of the email of Leanne Salvona of 20 April 2020 which Ms Lowe discussed with him;

77.4. There was the written account of Ms Salvona regarding how the claimant had behaved towards her on 1 August 2020. There is a degree of corroboration in relation to the general complaint that he was uncivil and obstructive towards her. Ms Murdoch confirmed she burst into tears and Ms Smith said she was upset.

78. Considering the question of whether Ms Addison had reasonable grounds on which to make a finding of gross misconduct, there was sufficient evidence, some of it admitted and/or corroborated, to do so. That evidence was serious enough in nature given the standards set by the respondent within its disciplinary rules and procedures (particularly its Employee Handbook and supplementary list of examples of gross misconduct) and more generally in terms of acceptable standards of behaviour between colleagues and the unnecessary additional risk posed by the unexplained removal of a prescription from the delivery system.

79. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every metaphorical stone, but no obviously relevant line of enquiry should be omitted.

80. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's investigation met the required legal standard. This is not to say that it was perfect, as it was not. But the legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently. There was no material witness or area of enquiry which the respondent overlooked. At the time of the process the claimant did not raise issues with the sufficiency of the investigation. Whilst he raised in the hearing that he expected the respondent would contact its mobile telephone provider to check further into who had telephoned whom on 1 August 2020, there is no record of him saying

that during the process. Further, he had admitted to Ms Addison that he had not telephoned the Ayr store, and so realistically the question of whether to contact a network provider would have been to resolve the issue of whether he telephoned Ms Shaw first, which was a less material issue as by then much of the damage had been done.

The band of reasonable responses

81. In addition to the ***Burchell*** test, a Tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

82. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

83. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

84. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances. In particular, whilst one might have some sympathy with the claimant regarding his intentions throughout, which were generally to do good,

the respondent was also entitled to consider (as it did) the significant unnecessary risk his various decisions created and the confusion and upset they caused for his colleagues, however unintentional. A key concern for Ms Addison when reaching her decision was that she saw a pattern of the claimant overriding established procedures and she feared he could do so again. The core activity of the PDC operation was to deliver prescriptions, often essential medication, to the public and the respondent considered that this required a high standard of process and personal conduct on the part of those involved.

85. Therefore, whilst dismissal of the claimant may have been towards the harsher end of the band of reasonable responses, it did fall within that range on the evidence in this case.

Breach of contract claim/wrongful dismissal

86. The additional claim of wrongful dismissal must be considered separately. This has to be evaluated on a different common law basis to the approach taken in the unfair dismissal claim. Not all of the relevant principles and considerations are common to both.

87. It is determined that the respondent was not in breach of the claimant's contract by dismissing him summarily and without notice pay. The claimant fundamentally breached his contract with the respondent by way of the misconduct which Ms Addison concluded had been established – in summary the failure to record a report of a missing controlled drug, the removal of the public delivery on 1 August 2020 from the delivery list and his conduct towards Ms Salvona on the same day. That conduct was either admitted by the claimant or corroborated. In doing so he materially breached the mutual obligation of trust and confidence between himself and the respondent. The respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

Conclusions

88. As a result of the above findings it is not necessary to address further matters such as contributory conduct, ***Polkey,*** mitigation or other aspects or remedy.

89. The claimant will understandably be disappointed that he has not succeeded in his claims when in his view the actions for which he was dismissed were examples of him trying to work within an imperfect system. However, applying the necessary legal tests it is determined that he was neither unfairly or wrongfully dismissed and therefore his claims are dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 18 June 2021
Entered in register: 21 June 2021
and copied to parties