EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4106920/2019

Held In Dumfries 18 and 19 November 2019

Employment Judge M Robison

Mr J Rennie	**Claimant** **Represented by** **Mr A Bryce** **Solicitor**
Deeside Marine Limited	**Respondent** **Represented by** **Mr T Muirhead** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant the sum of **NINE THOUSAND FOUR HUNDRED AND FORTY TWO POUNDS** (£9,442).

The Employment Tribunals (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is **EIGHT THOUSAND ONE HUNDRED AND NINETY POUNDS** (£8,190) and relates to the period from 29 January 2019 until 30 July 2019.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 13 May 2019 claiming unfair dismissal and breach of contract, and seeking arrears of pay.

The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. At the hearing, the Tribunal heard first from four witnesses for the respondent, namely Mr Gidney, managing director, who conducted the investigation and the disciplinary hearing; Mrs A Temke, office manager who conducted the appeal; Mr D Kerr, production manager; and Mr J Kirkland, maintenance engineer. The Tribunal also heard evidence from the claimant.

3. During the hearing, the Tribunal was referred by the parties to a joint file of productions {referred to by page number).

Findings in Fact

4. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

5. The claimant, Mr Jamie Rennie, commenced employment with the respondent in the role of labourer on 28 September 2015 and worked there until he was dismissed for gross misconduct on 29 January 2019.

6. The respondent is a fishing company specialising in scallop gear design, manufacture and sales. They employ 18 members of staff. Mr Richard Gidney is the managing director. There are two senior managers, namely Mrs Alison Temke, the office manager and Mr David Kerr, production manager.

7. Operatives including the claimant work a four day week, Monday to Thursday, from 6 am to 4.45 pm. One of the claimant's principal duties was to maintain and operate lathes. The respondent has four lathes which are crucial to the manufacturing process. These are mechanical (not electrical) machines some of which dated back to 1910. These are considered to be better than modern machinery for the task, but are expensive to maintain and repair.

8. It is therefore important that they are properly maintained. Operating procedures were displayed on the wall of the factory, although these were subject to "wear and tear" and were removed and replaced by a proper updated policy in January 2019 (page 135).

Relevant policies and procedures

9. The respondent has an employee handbook which was issued to staff (page 34 - 61), including the claimant. Section 3 relates to absence from work. Under "Sickness and Injury, notification of absence", it is stated, "if you are absent from work without prior authorisation, you or someone else on your behalf should notify Management by phone before 10 am on the first day of absence. Text messages and emails are not acceptable. Any unauthorised absence must be properly explained in that first contact and, if the absence continues, you must keep us fully informed. This applies to both short and long term situations and you will be expected to contact us on a daily basis during the first week and weekly thereafter" (page 40).

10. Under the heading, period of absence, it is stated that, "If your sickness is for more than seven calendar days then you must provide the company with a doctor's medical certificate. You must continue to provide medical certificates or a return to work plan to cover the whole of the absence period. Please note that the company will review the attendance levels of all employees on a regular basis. In deciding whether to take further action in respect of sickness absence, the evidence of a medical certificate may not be sufficient and the company may seek alternative medical information" (page 40).

11. Under the hearing "returning from absence", it is stated that, "On your return to work after absence because of sickness, irrespective of the length of absence, you must complete the company's sickness form" (page 40).

12. The respondent's disciplinary procedure is set out at section 6, which states (page 48) that gross misconduct will result in summary dismissal; and lists offences normally regarded as "gross misconduct", including "refusal to carry out reasonable duties or instructions" and "wilful and deliberate damage to or misuse of company property".

The "oil" incident

13. On 4 December 2018, the claimant attended work as usual at 6 am, but left around 8.45 am because he was feeling ill. David Kerr instructed Robert Newlands to take over at the lathe. Robert Newlands noted that the lathe he

was working on was low in oil and reported this to Jason Kirkland, the maintenance engineer. Mr Kirkland checked all four machines to ensure there were no leaks and noted that one was critically low in oil and the other three were low in oil.

14. When the claimant returned on 10 December, he was given a verbal reprimand by Mr Kerr and spoken to by Mr Kirkland in regard to the oil incident. He took responsibility for the oil being low. He stated that until that point he had only checked the oil in the tank every second day. He was told that he should check the oil levels every day and the consequences of failing to do so were explained to him. The claimant thereafter checked the oil levels daily. Mr Kerr did not report the matter to Mr Gidney at the time, but did so at a subsequent monthly meeting in or around January 2019 when discussing the claimant's sickness absence.

Sickness absence and annual leave

15. The claimant was absent for the rest of the day on Tuesday 4 December and absent 5 and 6 December. When he returned to work on 10 December 2018 he attended a return to work interview with Mr Gidney. As far as Mr Gidney was concerned the claimant advised that he had been sick but he had not produced a sick note or followed the correct procedure for informing the company about sickness absence. The claimant was given a verbal warning.

16. Because the claimant had not followed the correct absence reporting procedure, the claimant was paid for two of these days, 12 hours salary and 10 hours holiday pay. The claimant only became aware of the fact that part of his absence in the week beginning 3 December was attributed to holiday, and for which he was paid holiday pay, when he received his payslip on 13 December (page 109).

17. The claimant had prior to that made a request to take annual leave on 27 and 31 December and 3 January around mid-November when Mr Kerr had made a request of all staff for their holiday requests over the Christmas and New Year period. The claimant was initially given verbal confirmation that he could take these holidays.

18. However, after noting that he had been paid for holidays for the week of 3 December, and raising the matter with Mr Kerr, he was advised that he had no holidays left, so could not take 27 and 31 December. When he expressed concern about that, Mr Kerr advised him to speak to Mr Gidney. The claimant spoke to Mr Gidney some time after 20 December about his decision to convert sick leave into holiday pay, and requesting leave on those dates, but Mr Gidney advised that he could not take the time off because he had no holidays left.

The incident on 31 December

19. On 31 December 2018, the factory was open with a skeleton staff, namely the claimant, Mr Kerr, Rory McMahon, Martin Fairbairn, Paul Hughes and Robert Newlands. After lunchtime, Martin Fairbairn left and then Rory McMahon left. Robert Newlands left at some point as well.

20. The claimant noted that others were leaving, and did not want to be the only operative left. He asked Mr Kerr if he could leave. Mr Kerr indicated that although he was not giving him permission to leave, he could not stop him leaving, saying words to the effect of "on your head be if. The claimant left at around 2.45.

21. Mr Kerr telephoned Mr Gidney to advise of the situation. At that point only Paul Hughes and Mr Kerr were left. Mr Gidney advised that they could go home.

Further absence on sick leave

22. The claimant did not return to work on 3 January 2019 when the factory re-opened after the new year break. On 3 January 2019 the claimant completed a SSP employee's statement of sickness, describing his condition as "diarrhea, sickness, IBS"

23. By letter dated 7 January 2018 (sic), the claimant was sent a "first written warning for absences", which stated "Despite previous warnings you have continued [to] miss work days. You have no holidays to take and so these become unpaid and unauthorised absences and you left work early on 31st December. We simply cannot allow employees to take unpaid days off as it disrupts production, loses us production and so sales, costs us in holiday pay

and also we must pay employers' Nl. You must immediately stop taking unauthorised absences" (page 65).

24. Identical letters also dated 7 January 2018 (sic) were sent to Robert Newlands (page 133) and Rory McMahon (page 134), but were headed "final written warning for absences".

25. By letter dated 15 January 2018 (sic) (page 68), Mr Gidney wrote to the claimant in the following terms, "Thank you for your self-certificate of absence which is undated. Unfortunately however, I must request that if you are unwell that you provide consecutive medical certificates issued by your GP to cover your period of absence where it has exceeded 7 days, as it is a statutory requirement that a doctor's note is provided where sickness absence exceeds seven calendar days. Without the medical certificate the company is under no obligation to pay you statutory sick pay. I must remind you that company absence reporting procedures require you to keep in regular contact with the company to inform us of the progress of your recovery , and your intentions with regard to return to work. You are also required to provide medical certificates to cover the duration of your absence. As you have not been in touch since 31/12/18 I would be grateful if you could contact me to update me as to your progress and intentions".

26. On 15 January 2019, the claimant submitted a Fit Note which stated that by reason of "headache" he was not fit for work from 14 January 2019 to 21 January 2019 (page 66).

27. The claimant returned to work on 22 January 2019. He attended a return to work interview. It is noted in the return to work form completed during the interview with Mr Gidney (page 69) that the claimant had had 21.5 days absence in the past six months; that he had 9 occasions of absence in that time; that on this occasion the absence was for 10 working days; the reason for this absence was stomach problems for which he getting tests of blood and urine samples; and that he was on a course of antibiotics; that he had not complied with the notification procedures because he had thought that it was ok to text the production manager; that this absence was not related to any

previous absence and that there was no underlying problems relating to the absence (page 70).

Investigation

28. That same day, 22 January 2019, Mr Gidney subsequently conducted an investigation interview into "absences and bad conduct". Notes were taken by Mrs A Temke, which were subsequently typed up (page 73). The claimant was asked why he had left early on 31 December, and he is noted as saying "Everybody was leaving. I left because others had and Davy said up to me. I would have been the only one left. It is also noted that "Jamie backed down; he agreed he shouldn't of left he was in the wrong".

29. With regard to the sick notes, he was asked why there were two different reasons for his absences, and the claimant is noted as saying "Went to doctors on 8th Jan doctor refused to give me a sick line and said I had to self cert. Gave a urine sample in to doctors on 9th. Ran up for sick line then saw doctor again on the 16th".

30. The claimant was then asked about running the lathes without oil, and he is noted as saying "had reason, oil was mixed with diesel in the sump, the oil must of run through faster than usual. I top up and check with oil every 2nd day. Knew diesel was in the oil as thin and could smell it."

31. Thereafter Mr Gidney spoke to Mr Kirkland and Mr Kerr specifically about the oil incident. In the note of the investigation interview (page 73), they are recorded as having advised that, "tank should NEVER be empty as the tank should be checked every day and topped up accordingly. With regards to diesel in the oil this happens about once every 3 months to flush through, this can take 2 to 3 days to run through not overnight".

Disciplinary hearing

32. By letter dated 25 January 2019, which the claimant received on 28 January, the claimant was instructed to attend a disciplinary hearing on 29 January to address the following allegations (page 75):

> Allegation 1: "that on 31 December 2018 you left without authorisation and despite an instruction not to leave";
>
> Allegation 2: "that you have failed to follow the company's absence reporting procedures for your absence between 31 December 2018 and 22 January 2019, in particular you failed to report that you would be absent as per your employment hand book and contract";
>
> Allegation 3: "that you failed to fulfil your duties, further particulars being that on 18/19 December you ran the Lathe machines without checking the oil levels, which could have caused significant damage to the machines".

The claimant was advised that allegations 1 and 3 constituted potential gross misconduct. The notes of the disciplinary interview on 22 January and the return to work interview form were attached. The claimant was advised that he had the right to be accompanied.

33. That meeting took place on 29 January 2019. Mrs Temke took notes (pages 80 -82) which she subsequently typed up (pages 77-78).

34. By letter dated 29 January 2019, the claimant was advised of the outcome of the hearing (pages 87- 90), which was that he was summarily dismissed.

35. In regard to allegation 1, the letter states that:

> "During the hearing you stated that you left early because everyone else left early and you did not want to be alone. You also stated that David Kerr told you that you could leave early, though you later said that you were "under the impression" that David Kerr allowed you to leave early.
>
> You had, earlier in December 2018, asked David Kerr for time off. He told you that you had no holiday leave remaining to take so you could not have any time off. You then asked me if you could take time off and were again told that you had no more holidays, so this second request was also refused. On 31st December 2018 David Kerr, now for

the third time, had told you that you have no leave to take, and therefore instructed you that you should not leave. However, despite the fact you had no leave left to take in December 2018 you made the conscious decision to ignore this instruction to leave without authorisation.

Taking into account the above, I believe your actions on this occasion evidence a deliberate and blatant disregard for what I consider to be a reasonable instruction to remain at work by management, and having been refused leave twice before this occasion, at this point you had only your self interests at heart, and they were to leave early no matter what. This in my opinion, fundamentally destroys the trust placed in you to abide by all reasonable instructions, and where you also attempted to misrepresent to me the fact that you were definitely authorised to leave by David Kerr, this was actually only your impression, I have no confidence you could not repeat your actions again in the future. Therefore, I find this allegation has been substantiated.

36. With regard to allegation 2, it is stated:

"During the hearing you stated that you had been ill and so unable to work. Whilst I appreciate that you may have been ill, the whole situation has been somewhat confusing. You gave us a self-certified sick line which stated that you were suffering from diahorria, then a sick note stating a headache and a copy of a prescription for Trimethoprim, which is for a urinary infection (amongst other things). You say you have still not had results from the doctor of what the problem was and do not seem to be able to state exactly was the problem. This, does not allow me to come to any definitive conclusion on what the actual reason for your absence was, but in any event it doesn't allow me to fully understand whether you were or were not able to follow proper absence reporting procedures. As such I am satisfied that you did not follow the absence reporting procedure, and there appears to be no reasonable explanation for this that might

mitigate the circumstances. Therefore, I find that this allegation has been substantiated"

37. With regard to allegation 3, it is stated:

"During the hearing you stated that you check the oil levels every 2 days. You stated that the oil had leaked out of the machine because it contained 50% diesel which has thinned the oil, and that diesel was used occasionally (every 3 months) to clear out the oil lines. You also stated that you now check the oil every day and generally top-up each machine with about % litre of oil each day (where each machine holds 1-2 litres of oil). You agreed that it was not acceptable to run the machines dry of oil and that this was probably your main responsibility in this role. From my investigations, my conclusions are that you not only failed to follow guidance on the correct working procedure for running the lathes, but you have likely caused the machines to suffer from excess and unnecessary wear. Further, you have not been truthful about the reasons for the failure in your duties in that you say you do not remember being told to check oil every day and that your excuse for the running out because it contained diesel was a 'theoretical' one. Therefore I find that this allegation has been substantiated".

The Appeal

38. The claimant exercised his right of appeal by e-mail dated 1 February 2019 (page 92), on the following grounds:

"1. I left work early on 31st December after being told by Davy, manager, that I could if I wanted. Everyone else left at the same time or earlier than myself and they received a verbal/written warning for this. It is unreasonable for me to receive gross misconduct for the same incident;

2. With regard to failing to follow procedure for reporting absence due to sickness I messaged Davy, manager, on 4 separate occasions to notify. I handed in a self-certificate for the first 7 days and then a

doctor's sick note for the following 8 days. This was always accepted practice and I was not notified of any changes implemented (the letter dated the 15th Jan put up on the wall after a meeting that I was not present at).

3. The incident of running machines with "no oil" happened on Tue the 4th not the 18th and 19th as stated. I was then absent from work from 8.45 am on that day and did not return to work until Mon 10th I was reprimanded for this by David Kerr and Jason Kirkland on that day. Since was reprimanded I checked oil levels daily.

These points do not justify instant dismissal and I have sought further advice from citizens advice service and ACAS who can confirm".

39. The claimant was invited to attend an appeal hearing, to be conducted by Mrs Temke by letter dated 14 February 2019 (page 93); he was advised of his right to be accompanied.

40. Mr Gidney attended the appeal hearing which took place on 27 February, ostensibly as a note-taker. He took very brief written notes, which were a brief summary (page 94).

41. Notes of the meeting have been transcribed from audio (pages 95- 97). At the outset of the appeal, Mrs Temke asked the claimant what new evidence he had to bring forward. The claimant responded by advising that he had "just more information really. Leaving on the 31st - at no point was I told not to leave which it states in the paperwork". Mrs Temke replied, "You were told three times, we have already gone through this, you were told 3 times that you had no holidays and David, we have spoken to David and David advised that you said you were leaving and you were told again that you had no holidays".

42. After discussing the sickness absence procedures, Mrs Temke subsequently went on to ask "what new evidence have you got regarding no. 3 the "no oil" incident". He responded "well the dates are all inconsistent, it says in the allegation 18th and 19th", to which Mrs Temke replied, "Do you agree that that is what actually happened". The claimant responded that he took responsibility

for the oil being low. Since then he had checked oil levels every day. He stated that Robert Newlands had topped up the machines with diesel without letting him know, but he had confirmed they were never empty.

43. In response Mrs Temke said, "Robert told you that. Have you got anything to add Richard?", to which Mr Gidney replied, "Well we have got absolutely no new evidence, that's what the appeal is about. If you have got any new evidence then that's what we need to hear. But other than that, I don't think there is anything else".

44. The claimant then said, "I literally just said Robert told me the day of the 29th, when I asked him, no one had actually investigated because you never heard that before. How can you say you have done a thorough investigation when he is part of the situation". Mrs Temke said to Mr Gidney that he would have to speak to Robert Newlands. Mr Gidney said that Robert had nothing to do with it because he was a co-worker. Mr Gidney is noted as saying "We will em (sic) its for Alison to judge whether it is relevant or not".

45. By letter dated 7 March 2019, the claimant was advised of the outcome of the appeal (pages 99 - 101). With regard to the first ground of appeal, which was not upheld, she said that she had

> "spoken to David Kerr and he tells me that he did not say that you could leave. In fact, he tells me that he told you, and Richard Gidney had told you, on 3 separate occasions prior to 31st December 2018, that you had no holidays left to take and therefore you could have no further time off, so you were not allowed to leave on this day.
>
> Whilst others may have received different sanctions to you, I believe that your case can be distinguished where there were repeated comments and instructions to you before 31st December 2018 that you could not take any more time off…..".

46. With regard to the second ground of appeal, she stated,

> "At the hearing you stated that, in the past, you had never followed the absence reporting procedure set out in the handbook, and previously

this had not been a problem. I am aware that employees were told on 8th January 2019 by Richard Gidney to follow the handbook absence reporting procedure going forwards, and that texting David Kerr was no longer acceptable. However, you were absent at that time. Also your absence until 22 January has never been satisfactorily explained as discussed at the disciplinary hearing, and you offered no further explanation as to the reason for your absence.

For these reasons, I can uphold element of your appeal in part because not following the procedure set out in the handbook had not previously been fully adhered to and you were absent when this instruction was given, and so you were not informed of the requirement to follow the correct procedure. However there still remains some concern about the reason for this lengthy absence".

47. With regard to the third ground of appeal, it was stated,

"You stated that the date of the incident was wrong, the lathes were not actually out of oil but low in oil and that you did check them daily, even though you had been instructed to only check them every two days by Jason Kirkland. I spoke to Jason Kirkland and he tells me that no instruction was given to you to check the oil levels every second day. I am told that the instruction has always been to check them daily. Furthermore you confirmed in the first disciplinary interview that the checks were daily. I am therefore satisfied that you have been instructed to check the oil daily, and that the machines had run out of oil or were low in oil.

You were not formally disciplined either by David Kerr or Jason Kirkland as I am told you were just spoken to about the incident. The lack of oil was discovered during your absence which also contributed to the delay in disciplinary action. Whilst the day was incorrect, I do not believe that alters the decision that was made to take action against you for the incident. For these reasons I cannot uphold this element of your appeal".

Claimant's post-dismissal earnings

48. The claimant's gross weekly earnings were £376 per week, which is £315 per week net (pages 108 —113). The claimant sought employment following his dismissal primarily through the website Indeed (pages 119 - 131). He also sought employment through other routes including facebook and newspapers and registered with other employment agencies. He is in receipt of universal credit

Relevant law

49. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(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. Conduct is one of these potentially fair reasons for dismissal.

49. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

50. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303, the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief; and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

51. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on

the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) *(Boys and Girls -v- McDonald* [1996] IRLR 129, *Crabtree* -v- *Sheffield Health and Social Care NHS Trust* EAT 0331/09).

52. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses *(Iceland Frozen Foods Ltd* -v- *Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached *(Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

53. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response.

54. A lack of consistency may give rise to a finding of unfair dismissal *(Post Office v Fennell* 1981 IRLR 221 and *Hadjioannou v Coral Casinos Ltd* 1981 IRLR 352).

55. Under section 113 ERA, if the Tribunal finds that the claimant has been unfairly dismissed, it can award compensation under Section 112(4). Section 118 states that compensation is made up of a basic award and a compensatory award. Section 122(2) states that the basic award can be reduced if the Tribunal considers that the claimant's conduct was such that a reduction would be just and equitable.

56. Section 123(1) ERA states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative

employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, etc. If the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, under Section 123(6) it can reduce the amount by such proportion as it considers just and equitable.

57. If the dismissal is found to be unfair on procedural grounds, it may be just and equitable to reduce compensation if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred. This is known as a "Po/fcey" reduction.

58. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the Tribunal that the claim concerns a matter to which the Code applies and that the employer has failed to comply with the code in relation to that matter, and the failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than 25%.

Respondent's submissions

59. Mr Muirhead submitted that in terms of section 98 ERA account should be taken of the size and administrative resources of the respondent and equity and the substantial merits in assessing whether dismissal was unfair in this case. In this case the respondent is a small employer with 18 staff, and a small management structure. The only individuals who could be called upon to be involved in a disciplinary hearing were Mr Gidney and Mrs Temke. Bearing that in mind, Mr Muirhead submitted that it was reasonable for Mr Gidney to conduct the investigation and the disciplinary hearing leaving Mrs Temke to deal with the appeal.

60. There was no evidence that Mr Gidney has prejudged or any suggestion that the decision to dismiss was influenced by the fact that he had conducted the investigation. The evidence indicates that Mrs Temke was given full authority to make an independent decision.

61. With regard to leaving early on 31 December, the respondent states that the claimant was told on three occasions that he had no leave to take; and he had no permission to take leave on 31 December. While there is a question whether the respondent was entitled to give the claimant holiday pay when he was on sick leave, Mr Muirhead asked the Tribunal to accept that this was standard practice, the claimant having confirmed that similar requests in the past had been acceded to. The Tribunal is asked to accept Mr Gibney's evidence that the claimant had made no complaint.

62. The claimant's evidence regarding what happened on 31 December was not consistent. At page 73 it is noted that the claimant says everyone was leaving and that he accepted that he was he was in the wrong; whereas during the disciplinary hearing (page 77), he said that everyone was leaving and he wasn't going to be the last man standing. Then in the appeal letter, he states that he left work after being told by Davy that he could if he wanted (page 92); and then at the appeal hearing he is noted (page 96) as saying with regard to Mr Kerr he did not tell me I couldn't. This is entirely different from being told that he could leave; he was not given permission. The claimant either misinterpreted it or deliberately misunderstood it. He submitted that this was a refusal to carry out a reasonable instruction.

63. With regard to the oil in the lathes, all the respondent's witnesses confirm that the procedure was that it should be checked daily; that there was a sign up confirming that; and it was clear that the oil should be checked daily and topped up as necessary and the claimant was initially told that the oil was to be checked daily. Mr Muirhead invited the Tribunal to accept that evidence; and that it was one of the claimant's primary responsibilities.

64. Mr Muirhead submitted, the claimant having admitted the misconduct, that was a sufficient reason to dismiss, falling within the band of reasonable responses, given the potential for the lathes to cease and the resulting financial impact on a small business in regard to the cost in lost production and replacing/repairing the machines.

65. However the claimant was not dismissed only because of the lathes issue; it was also for leaving early on 31 December; and taking the two together it was appropriate and reasonable for the respondent to dismiss the claimant.

66. Should the Tribunal consider there were procedural errors, then that would have made no difference to the outcome. In particular, with regard to the lack of statements from Mr Kerr and Mr Kirkland, the Tribunal having now heard evidence from both is invited to accept that it would have made no difference to the outcome had they done so.

67. With regard to the question of contributory fault, Mr Muirhead asked the Tribunal to accept that since some of the conduct is admitted by the claimant, then there was a significant level of contributory fault which should reduce both the basic and compensatory awards.

Claimant's submissions

68. Mr Bryce submitted in summary that this was a case which turned on a factual dispute and not on legal issues; that the claimant did not "get a fair crack of the whip"; that Mr Gidney had prejudged the matter and that the decision does not come within the range of reasonable responses.

69. With regard to the procedure, the initial difficulty stemmed from the claimant's early departure on 31 December; which was exacerbated by the fact that he continued on leave until 22 January; and in the interim the matter had been dealt with by the first written warning (page 65).

70. With regard to the return to work interview, while it may not be significant whether the hearing immediately shifted from a return to work interview to an investigatory interview, what is significant is that by the end of the interview Mr Gidney was of the view that the claimant had lied to him, but he went on to conduct the disciplinary hearing. Even if, given the size of the company, there was no-one else to hear both stages, having concluded that the claimant was lying, he cannot conduct the disciplinary hearing with an open mind; the result of having a closed mind is that there is nothing the claimant can do to change the respondent's position. This shows that the outcome was prejudged.

71. With regard to the sickness absence, although this was not upheld on appeal, the fact that the issue was pursued although it was found that texting was the accepted practice is indicative of ill-will towards the claimant. This was included to ensure that they had as much evidence as possible to support the decision to dismiss.

72. While Mr Bryce said that he was not making an issue of the fact that there were no witness statements, he argued that their absence was indicative of the haphazard approach and the fact that matters were pre-judged. Mr Bryce submitted that it was telling that Mr Kerr had said that the claimant was a good worker "when he was at his work", giving cause for speculation that was the real issue about which Mr Gidney had an axe to grind.

73. With regard to the claimant leaving early on 31 December; the claimant has maintained a broadly consistent position throughout. Despite using different language, his position comes down to having made a decision that if everyone else was leaving, then he was leaving and that he had not been told that he could not leave. Indeed it was common ground that Mr Kerr had said something to the effect that "I can't stop you leaving". While it is a matter of interpretation, there is at least ambiguity regarding what was said and how it should be interpreted, which Mr Kerr conceded. Therefore this cannot meet the threshold for gross misconduct; and anyway this matter was already dealt with in the letter on page 65.

74. With regard to the oil in the lathes, there is a good deal of confusion given that it was originally stated to be on 18 December and there was no adequate explanation about how the wrong date was arrived at, calling into question how thorough the investigation has been. This shows a desire to get to a particular outcome rather than to be troubled with the facts.

75. The claimant accepts an element of fault; and he accepts that he was in the wrong; but he submits that this cannot constitute gross misconduct. Relying on the evidence of Mr Kerr and Mr Kirkland that the matter had been dealt with by them, it was not at the time deemed sufficiently serious to refer to Mr Gidney. It had not happened again and lessons had been learned. This issue was picked up again later solely to secure sufficient reasons for dismissal.

76. There are two different versions of the dismissal letter, one of which is dated before the disciplinary hearing. Initially in cross examination Mr Gidney had stated that only the date had changed after the initial draft, but later admitted that there had been wholesale changes. Mr Sidney's explanation that he could not have known about the explanation for the 50% diesel until after the meeting was not accurate because this had been raised at the investigation meeting. Although there is no specific reference to that in the note (page 73), the notes are not verbatim.

77. An examination of the questions and phrasing in the notes of the appeal hearing (page 95) are indicative of the absence of an open mind, and suggest that Mrs Temke's starting point was that the claimant was guilty of gross misconduct and needed to be persuaded otherwise. It is noted that she defers to Mr Gidney, and despite recording the further information supplied by the claimant, it is clear they will not entertain any new evidence. It is indicative that Mrs Temke said at the end of her evidence that there was nothing which the claimant could have said which would have changed her mind.

78. With regard to *Polkey,* and relying on *King v Eaton Ltd* (No. 2) 1998 IRLR 686, Mr Bryce submitted that the flaws were so fundamental that they could not be rectified to render a fair process; the process was “so far off the rails” that it was incapable of being redeemed.

79. Mr Bryce accepted that there was an element of contributory fault but asked the Tribunal to take into account the fact that neither of the issues give rise to gross misconduct and that both were dealt with in disciplinary terms at an earlier stage; so that if there is any reduction for contributory fault it should be at the lower end of the scale. Subsequent suggestions by Mr Gidney about damage to the machine was wild speculation because it did not happen.

Tribunal's deliberations and decision

Observations on the evidence and witnesses

80. Although it appeared that there were a number of key disputes of fact in this case, in fact I came to the view that what matters came down to was a difference of interpretation of the circumstances/language used.

81. I was of the view that the claimant was essentially being honest in the evidence that he gave. I noted that he had accepted that he was at fault in regard to the oil levels on 4 December; that he thought he may have forgotten to replenish the oil that day or the day before; that he admitted that he had understood that they should be checked every second day. And while I accepted that the claimant would have been trained and it may well be that he was told to check the levels in the particular tank every day, I accept that he may well have forgotten that he was told that. Further the evidence did indicate that the instructions which had at least at one point been on the wall were either no longer there or through "wear and tear" no longer readable or consulted and indeed they were replaced and updated after this incident came to light.

82. Apart from that I took the view that the claimant's evidence aligned with that of Mr Kerr and Mr Kirkland, whom I found to be credible witnesses, and in particular I noted that although Mr Kerr could not recall the exact words said to the claimant on 31st, he at least indicated that he was not giving him permission, but did essentially say to the claimant that he could not stop him leaving, indicating that he would have to be responsible for his own actions.

83. While I accepted that the evidence which Mr Gidney's gave was essentially credible, it was perhaps what was not said that was a cause for concern. Indeed, I thought that there was something in Mr Bryce's suggestion that what this was really about was Mr Gidney's concerns about the absences and what he saw as a lack of consistency in the reasons given by the claimant for them. I came to the view that had it not been for the absences, Mr Gidney may well not have revisited the issue of the level of the oil or the issue about leaving early on 31st or at least would not have considered them to be serious enough to warrant summary dismissal. Given his view that he was a good worker, and

Mr Kerr's view, which I agreed was telling, that he was a reasonable worker "when he was at work", I came to the view that there was another underlying concern which meant that Mr Gidney was too quick to conclude that the misconduct was sufficient to justify dismissal. Otherwise it was not clear to me why he would have concluded so quickly that the claimant had lied during the investigation meeting.

84. I did accept that by the investigation stage Mr Gidney had already formed a view, although I did not consider that any tendency to have pre-judged that matter extended to drafting the dismissal letter before the hearing; I accepted his evidence that he had overwritten a first draft and not saved the second.

85. Mrs Temke was clearly very unsettled when she was giving evidence and I thought that this was indicative of the fact that she was not in fact confident of having full authority or independence to make the decision she was charged with making with an open mind and fresh eyes. This was also evident from what was said in the appeal hearing.

Reason for dismissal

86. The first issue for this Tribunal to consider is whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct.

87. The claimant did not dispute the fact that he had left early on 31 December and he took responsibility for the fact that the oil levels were low on 4 December. As I understood it, Mr Bryce did not dispute that the respondent's belief was genuine and that the claimant had been dismissed for misconduct. The Tribunal therefore concluded that the first limb of the *Burchell* test had been met and that the respondent believed the claimant to be guilty of misconduct.

88. Accordingly the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

89. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

90. In determining whether or not dismissal was reasonable in all the circumstances, the Tribunal then considered the second limb of the *Burchell* test, that is whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct.

91. As stated above, the claimant did not dispute that he had left early on 31st or that he was responsible for the low oil incident on 4th. To that extent, the Tribunal accepts that Mr Gidney had in mind reasonable grounds on which to sustain his belief that the claimant was guilty of misconduct.

92. The Tribunal then turned to the third limb of the *Burchell* test. The question is whether at the stage at which the respondent formed the belief that the claimant was guilty of misconduct, he had carried out as much investigation into the matter as was reasonable in the circumstances. The range of reasonable responses test applies to the question of the investigation as well as other procedural aspects leading up to dismissal. The requirement is to conduct as much investigation as is reasonable. It is generally accepted that less investigation is required where an employee admits the misconduct which is alleged.

93. The evidence here was that the investigation had taken place shortly if not immediately after the return to work interview on 22 January. During that meeting, the claimant admitted that he had left early on 31st but explained this was because "everybody was leaving" and he also admitted that there was an issue with the oil, suggesting that this was because the oil was mixed with diesel in the sump and had run through faster than usual.

94. Mr Bryce sought to make an issue of the level of investigation, not least because it was eventually discovered that the oil incident had taken place on 4 December, and not 18/19 December as was understood right up until the appeal. There was also the matter of Mr Newlands not having been interviewed. While this may have called into question the thoroughness of the investigation, I accepted Mr Muirhead's submission that this made no difference to the question of whether there had been misconduct or not, not least given the claimant's admission, so that I did not consider that it rendered the investigation unreasonable.

95. Although no witness statements were taken (and Mr Bryce did not make a specific issue of that), Mr Gidney spoke to Mr Kerr and Mr Kirkland subsequently, apparently about the oil incident, then included a short note of those conversations following the interview notes, it would appear, having already discussed the claimant's sickness absence with Mr Kerr. While this may well be indicative of a haphazard approach to the investigation, I take account too of the fact that the respondent is a small employer and I concluded that the failure to take formal witness statements did not render the extent of investigation unreasonable in this case, where the sickness absence was not relied on as a reason for dismissal.

96. While the failure to formally interview and lack of follow up may well be relevant to other matters, including the seriousness of the misconduct, not least given the delay in dealing with it from 4 December until mid January, I did not consider these limitations in the way that the investigation was concluded rendered the investigation unreasonable in these particular circumstances. While investigation could be said to be limited, in these particular circumstances, taking account of the size of the respondent's operation and the issues to be investigated, as well as the claimant's admissions, I concluded that the extent of investigation was reasonable.

Reasonableness of the sanction of dismissal

97. The Tribunal then turned to consider whether the sanction of dismissal was reasonable in all the circumstances. In this case, the respondent categorised the misconduct as gross misconduct resulting in summary dismissal. The

question is whether that was fair in all the circumstances, having regard to equity and the merits of the case, including the size and administrative resources of the respondent.

98. This was the key question in this case, and as I understood it this was Mr Bryce's main argument, that is that dismissal was substantively unfair because it was a disproportionate response given the facts of this case, the outcome having been "pre-judged".

99. In particular, he submitted that leaving early on 31st of December was not sufficient grounds for dismissal. This is was primarily because what was said was at least ambiguous and subject to interpretation.

100. In any event, I have found that there was a lack of clarity about the instruction given by Mr Kerr, so I could not conclude that it was clear that the claimant had failed to comply with a reasonable instruction. I accepted that he was not making a request for annual leave from Mr Kerr on that day, but simply requesting to leave early because others were also leaving early. Whatever the exact words said by Mr Kerr, his evidence was that while he had not given him permission to leave, he had not prevented him from leaving, and he had essentially indicated that if he left that he would be responsible for the consequences. This is not a clear management instruction, leaving the claimant with the impression that he could leave early.

101. Even if he did leave early without permission, this in isolation was initially considered to be sufficiently serious to warrant only a first written warning (the claimant having had a verbal warning following the incidents of 4-6 December). However the matter was revisited, and Mr Gidney's evidence was that the matter was not closed until he interviewed him. However, if that were the case then he should not have sent out the letter indicating that the matter had been considered and that a written warning was sufficient.

102. I also considered that it was significant that (at least) two others who left early that day were given final written warnings, due as I understood it to previous absences, but were not dismissed. I did not accept the analysis of Mr Gidney that the claimant's case was more serious than the others. I am of the view that

the reliance on their conclusion that he had asked and been refused three times for annual leave was a convenient issue to distinguish their circumstances, but without substance. I accepted the claimant's evidence that he wasn't asking for annual leave that day. He was asking to leave early. Mr Kerr's evidence was that he had said that if he wanted the day off he should have kept holidays for that day. Of course, the only reason the claimant had no leave left was because Mr Gidney had converted two days of sick leave taken in early December to holidays, without the claimant's approval.

103. Mr Gidney's evidence was that this was sufficiently serious to warrant summary dismissal for gross misconduct on its own. I did not accept that.

104. The other issue which Mr Gidney stated warranted dismissal in isolation, which I would accept was potentially more serious, was the issue of the low oil. However this issue arose on 4 December, and was apparently dealt with on that date. Although it is clear that running low or indeed dry of oil has potentially very serious consequences for the business, I consider it significant that Mr Kerr was not of the view that it was necessary to advise Mr Gidney at the time, although he said in evidence that any serious issues warranting disciplinary sanctions would be referred to him. I accepted Mr Bryce's submission that again this issue was revisited only because of Mr Gidney's concerns regarding the absences had warranted a disciplinary investigation.

105. Although Mr Muirhead submitted that together this misconduct was sufficiently serious to constitute gross misconduct, I did not accept that submission. I considered that neither issue in the circumstances could be said to be sufficiently serious to warrant dismissal, and I could see no reason why the fact that there were two such different incidents would make dismissal reasonable.

106. I came to the view therefore that dismissal in these circumstances could not be said to fall within the range of reasonable responses, and therefore that dismissal was unfair.

Procedural fairness

109. However I turned in any event to consider the question of procedural fairness. Mr Bryce also argued that the procedure which had been followed was unfair. He stressed in particular the fact that Mr Gidney had pre-judged matters and since concluding at the investigation stage that the claimant had lied, that he could not thereafter approach the matter with an open mind.

110. While I appreciate that the respondent is a small employer, and that what might not be acceptable for a large employer could be excused for a small employer, I did have some serious concerns about how this matter was dealt with.

111. There were a number of steps which were certainly not best practice. It appeared from the evidence that the investigation took place immediately if not very shortly after the return to work meeting. I accepted Mr Muirhead's point that it would have taken some time at least for Ms Temke to come into the meeting, and it did appear that she was not present at the return to work meeting. No witness statements were taken which might suggest a "haphazard" approach to procedural matters. Clearly it was not ideal that Mr Gidney conducted the disciplinary hearing having already undertaken the investigation, or that Mrs Temke, an employee who was subordinate to Mr Gidney, was charged with carrying out the appeal.

112. These deficiencies might have been forgiven, given the size of the undertaking, however I considered that there were a number of other deficiencies in the process which gave particular cause for concern.

113. I took on board Mr Bryce's point when he raised concerns about the investigation having been carried out by Mr Gidney and him having concluded at the end of it that the claimant was lying. As Mr Bryce argued, for him to then conduct the disciplinary hearing it would be difficult if not impossible for him to approach the matter with an open mind.

114. I took account also of the fact that Mrs Temke took notes at both the investigation meeting and the disciplinary hearing. Even in a small outfit it seems to me that another member of staff could have taken the notes. She

then went on to hear the appeal, and even if it is accepted that she had full authority to overturn the decision of the managing director and that she was entirely independent, again she could not come to the matter with a fresh pair of eyes if she had been present in both the interviews. While this might be a theoretical concern, its validity is confirmed by what was said in the appeal hearing, when she referred back to what she had heard during previous meetings during that hearing, and relied on "facts" which she considered to have been established there.

115. In fact, I could not be confident that she did have full authority to overturn Mr Gidney's decision. This is not least given what was said in the appeal, where it appears that she at least deferred to Mr Gidney, and indeed her view that Mr Newlands should be spoken to was not followed through. Further I found it surprising that Mr Gidney was the note taker at the appeal and while he may have set out to take nothing to do with decision making, he was not able to hold that line when asked for a contribution from Mrs Temke.

116. It is noted too that she focussed on the question of new evidence. While that might be one matter to be considered at appeal hearings, it is not the only reason an appeal might be allowed. Indeed, in the grounds of appeal, the claimant is claiming inconsistent treatment and severity of sanction, as well as the fact that he had already been disciplined for the offences relied on.

117. As Mr Bryce pointed out, having focussed on a search for new evidence, when the claimant apparently raised "new evidence", it seems that was not accepted and not taken into account. Although Mrs Temke suggested that Mr Newlands should he interviewed, he was not.

118. I have given careful consideration to the fact that this is a small operation with much more limited options than larger enterprises. However, even in a small organisation it seems to me that it would have been possible for another member of staff to have taken notes at the meetings, for another manager (such as Mr Kerr or Mrs Temke) to have conducted the investigation. Further, Mr Gidney might have considered engaging an external consultant from a relevant trade body to undertake the appeal at minimal cost. Had the

respondent adopted these or similar alternatives, they may well have avoided the traps they fell into.

119. I therefore conclude that dismissal in the circumstances was procedurally as well as substantively unfair.

120. The claimant was not of course dismissed because of his sickness absence or even his failure to comply with company policy in regard to sickness absence, because this was overturned on appeal and in any event it was not considered, in itself, to constitute gross misconduct. Although I did not hear sufficient evidence to allow me to assess whether he had or had not complied with company policy or what the practice on the ground was, while the absences may well have been a cause for concern, clearly that matter should also have been handled in a very different way. Indeed, I have noticed that the respondent does have a procedure set out in its handbook for dealing with concerns about sickness absence which could have been followed.

Compensation

121. Mr Bryce had lodged a schedule of loss, seeking a basic award, a sum for loss of statutory rights and a compensatory award. Mr Muirhead accepted the figures in that schedule, expect that he took issue with the stated net wage per week. Mr Bryce conceded from the wage slips lodged, that the net wage per week was indeed £315 per week.

122. With regard to the level of the compensatory award, I am obliged to consider the question of contributory fault since, in this case, the claimant has admitted his misdemeanours. Mr Muirhead submitted that in such circumstances, both the basic award and the compensatory award should be reduced significantly.

123. I have gained the impression from the evidence I heard and the circumstances of this case that Mr Gidney's real concern was the claimant's sickness absence, both the length of absence and the lack of clarity about the reasons for the absence. The issues about low oil and leaving early on 31st were ostensibly already dealt with and had not resulted in dismissal. While the claimant was clearly to some extent at least in the wrong, I could not say that

it was these actions which contributed to his dismissal. It was the fact of being absent from 3 to 22 January (10 working days) that was the catalyst that set in motion the dismissal outcome, but the claimant was not dismissed for anything to do with his absences in the end.

124. In these circumstances, I concluded that the claimant's actions did not contribute to his dismissal, so that there was no requirement to consider any reduction in compensation in that regard.

125. As I understood it, Mr Muirhead did not concede that the claimant had sought to mitigate his losses. However the claimant lodged 13 pages showing job applications through the Indeed website, indicating that he had applied for a wide range of jobs. He said in evidence that he had some interviews and a trial, but no job offers. I also accepted his evidence that he had been using other channels, such as other as the internet and newspapers, to search for work.

126. Mr Bryce sought 26 weeks of compensation for wage loss. I considered that it was just and equitable to award compensation for 26 weeks.

127. Mr Bryce had included in his schedule of loss an uplift for a failure to follow the ACAS Code of Practice. However, during submissions, he conceded that the "bare bones" of the Code had been followed by the respondent, and therefore he conceded it had been followed, at least in outline, such that he could no longer argue for the uplift.

128. Although I have found that dismissal was both substantively and procedurally unfair, I gave thought to whether had a proper procedure been followed that dismissal would be fair. I did not however consider that it was appropriate to make any kind of *Polkey* reduction because I considered that had a fair procedure been followed then dismissal for the reasons relied on would in any event have been unfair.

129. During submissions, there was a discussion about whether the recoupment provisions applied to universal credit. It is noted that the Employment Tribunals (Recoupment of Benefits) Regulations 1996 have been amended in respect of their title as well as to include universal credit as one of the types of benefits to

which recoupment applies (see Universal Credit (Consequential, Supplementary, Incidental and Miscellaneous Provisions) Regulations 2013, regulation 8).

130. As the claimant has been in receipt of universal credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. Meantime, the respondent should only to the claimant the amount by which the monetary ward exceeds the prescribed element.

131. The prescribed amount consists of the loss of wages from the date of dismissal until those losses ceased, less sums earned. Here the dismissal took effect on 29 January 2019 and losses continued for 26 weeks, that is to 30 July 2019. As no sums were earned in this case, the prescribed amount is therefore £8,190. The balance falls to be paid once the respondent has received the notice from the relevant department.

Compensation table

Head of loss	**Calculation**	**Total**
Basic award	2 x £376	£752
Loss of statutory rights		£500
Compensatory award	26 x £315	£8,190
Total award		£9,442

Conclusion

132. I have concluded that dismissal in the circumstances does not fall within the band of reasonable responses and is therefore unfair. The claimant is therefore entitled to compensation and the respondent shall pay to the claimant the sum of £9,442.

Employment Judge: M Robison
Date of Judgment: 9 December 2019
Entered in register: 11 December 2019
and copied to parties