EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR L JANECKI	**V**	**ARCFORM LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 11TH FEBRUARY 2022

BEFORE: TRIBUNAL JUDGE DS MCLEESE SITTING AS AN EMPLOYMENT JUDGE (SITTING ALONE)

REPRESENTATION:
FOR THE CLAIMANT: MR JANECKI
FOR THE RESPONDENT: MR TUDOR (DIRECTOR)

JUDGMENT

1. The claim of unfair dismissal is well founded and upheld.

2. The claim of wrongful dismissal is well founded and upheld.

REASONS

3. This is a claim by Lee Janecki against his former employers Arcform Limited. Mr Hutton was employed from 18th November 2014 until the 30th September 2020. He brings a claim that he was unfairly dismissed.

4. He was wrongfully dismissed and not paid the correct amount of notice pay.

The Hearing

5. In the course of the hearing, I heard evidence from the Claimant. For the Respondent, I heard from Mr Jonathan Tudor, the Managing Director of the company.

6. In reaching my decision, I had regard to the evidence I was provided with and the evidence I heard during the hearing. I also had regard to the law and briefly set out the relevant parts in respect of these claims.

The Relevant Law

Unfair Dismissal

7. By virtue of Section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within Section 98 of the ERA 1996.

8. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(b) states:

   "A reason falls within this subsection if it relates to the conduct of the employee."

9. Section 98(4) of ERA 1966 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2). In a conduct dismissal, the Tribunal is bound to consider the guidance issued by the Employment Appeals Tribunal in the Courts (including the decisions in British Home Stores Ltd v Burchell [1978] 379, Iceland Frozen Foods Ltd v Jones [1993] ICR 1, Post Office v Foley [2000] IRLR 827, Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

10. In particular, the case law requires me to consider four sub-issues in determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:

    10.1. Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;

    10.2. Whether they held that belief on reasonable grounds;

    10.3. Whether in forming that belief they carried out proper and adequate investigations, and

    10.4. Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.

11. In addition, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. My function is to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band it is fair. If it falls outside that band, it is unfair.

12. The Tribunal is also required to consider the fairness of the procedure that was followed by the employer in deciding to dismiss the employee. However, if the procedure followed was unfair, the Tribunal is not allowed to ask itself whether the same outcome (i.e. dismissal) would have resulted anyway, even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL).

13. The requirement for procedural fairness includes consideration of the reasonableness of the decision to dismiss up to and including any appeal process undertaken (West Midlands Co-operative Society v Tipton 1986 ICR 192, HL).

Wrongful Dismissal

14. By virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI1623, proceedings may be brought before the Tribunal in respect of a claim of an employee for the recovery of damages or any sum for breach of a contract of employment where the claim arises or is outstanding on the termination of the employee's employment.

15. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of his contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.

The Issues

16. It was agreed that the Respondent had dismissed the Claimant and that the reason it relied upon for that dismissal was the Claimant's conduct. It was left for me to determine whether the decision to dismiss on the grounds of conduct was substantively and procedurally fair.

17. In addition, I was required to determine whether, in dismissing him without notice, the Respondent wrongfully dismissed the Claimant.

Findings of Fact

The Dismissal

18. The Claimant was employed by the Respondent from November 2014 until his dismissal in September 2020.

19. He was good at his job and there were no complaints about his work.

20. In the months leading to his dismissal he had been on furlough and on the 2nd September 2020 he was contacted by his employer Jon (Jonathan) Tudor, to let him know that a return to work was likely and to check he was available.

21. There had been issues with the Claimant getting to work previously but this had been dealt with by way of car share or use of a bike in the past.

22. At this time the Claimant did not own a bike and did not make arrangements to buy or borrow one. He was not in possession of the money to do so but did not speak to his employer about any assistance with getting one.

23. His employer had previously offered to assist with driving lessons and a motorbike.

24. On the 18th September, which was a Friday, the Claimant was contacted and asked could he be at work on the 21st September (which was a Monday).

25. The Respondent company wished the Claimant to return to work and his job remained open to him. The role of foreman was to be shelved in light of changes in production but this would have been temporary insofar as the Claimant was concerned.

26. The Claimant was told by the Production Manager, Mr Nick Norton Berry, that his two colleagues were not prepared to car share given the social distancing rules in place at the time.

27. The Claimant did not think this should be the case and wanted to use a temperature gun to show his temperature and presumably therefore that he did not have Covid. He felt this meant he should be able to car share.

28. Mr Jon Tudor decided on Friday 18th September 2020, the day the Claimant was asked to come in on the Monday, that if the Claimant did not attend work on the Monday (21st) he would hold a disciplinary hearing on the Tuesday (22nd). He did not tell the Claimant this.

29. The Claimant did not answer phone calls over the weekend and was never informed in writing or otherwise of the intention to hold a disciplinary hearing. He was not written to too tell him there was to be a disciplinary hearing.

30. He was not messaged by text or What's App to be told of any of the details for the disciplinary hearing, nor was he advised of any of the matters set out in the disciplinary and grievance procedures of the company.

31. The Claimant did not attend work on Monday 21st September.

32. On Tuesday morning the Claimant contacted Mr Tudor by What's App indicating that he had been in a stressful situation since Friday and asking if Tim (Mr Tudor's brother) had been calling him to go over the same issues about transport. Mr Tudor confirmed he was and Mr Tudor tried to call the Claimant twice that morning.

33. The company were trying to get back to work after the disruption caused by the pandemic.

34. Mr Tim Pratt, Mr Tudor's brother and Mr Tudor met between two and three that afternoon, of Tuesday 23rd September and decided to terminate the Claimant's contract.

35. Mr Tudor had no regard to the ACAS code nor the company's own disciplinary and grievance procedure in convening that meeting or its outcome.

36. The company's disciplinary and grievance procedure allows for an informal hearing, or where appropriate notice of a disciplinary interview in writing giving the time and date of the meeting and giving 2 days' notice where possible. The right to be accompanied is provided for as is a right of appeal. None of those procedures were followed.

37. The company did not put the outcome of that meeting in a letter on that date and the earliest this was done was on balance of probabilities at least 24 hours later or more.

38. However, Mr Tudor tried to contact the Claimant by What's App the following morning, the 23rd September.

39. The Claimant told Mr Tudor by What's App that he was at a low point and that "this stress was too much at the moment".

40. That message was sent at 1011.

41. At 1127 Mr Tudor messaged the Claimant to say that, “we have had to decide to move on” and that he would stay on the books until the end of the month but then “we’ll cut you free”.

42. Mr Tudor at some point but certainly not on the 22nd September wrote a letter of dismissal, citing “serious misconduct”.

43. “Serious misconduct” does not appear in the company’s own disciplinary and grievance procedure.

44. The letter offered no recourse or right of appeal.

45. The company’s disciplinary procedure cites unauthorised absence as misconduct, not gross misconduct.

46. The Claimant had sought advice from the Citizen’s Advice Bureau (CAB) and wrote to the company on the 22nd September. That letter is in the bundle and was received by the company on the 24th September.

47. The Claimant was paid until the 30th September and his employment was terminated.

48. He did not receive any further notice pay beyond this date.

49. The Claimant got a new job at better pay, starting on the 12th October 2020. He had not looked for or intended to do this new job prior to week commencing 21st September 2020.

Submissions

50. Both parties appeared in person and without representatives.

51. Their submissions may be summarised as follows.

52. The Claimant says that he did not wish to leave his job, that the car share could have happened. He says the situation put him under great stress and that part of his reason, at least in not answering calls was that he had not been able to resolve the matter with Mr Tudor and did not want to speak to his other colleagues about it.

53. He says it was unfair that he was dismissed at a meeting he wasn’t aware of and that he wished to return to work for Arcform but that when he could not resolve the situation on transport he did seek advice from the CAB and asked about voluntary redundancy.

54. Mr Tudor submitted that the problem with transport was longstanding, that the Claimant, having been asked to come to work was not turning up or answering calls and that they felt he was not going to return and had no option but to terminate his contract.

Conclusion:

55. It is not in dispute that Mr Janecki was an employee, that he had been an employee for 5 ½ years and that he was dismissed.

56. I find the primary reason for his dismissal was conduct.

57. Mr Tudor has shown that the primary reason for dismissal was a potentially fair reason, namely conduct and in this case not attending work. There was however no investigation.

58. *Section 98 (4) of the Employment Rights Act provides:*

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

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

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

59. Although persistent non-attendance could become gross misconduct that was not the situation here where a decision was taken to hold a full disciplinary hearing without informing the Claimant of it in writing before he had even been absent for one day.

Substantive Fairness

60. It was substantively unfair as the employer had decided to hold a full disciplinary procedure if the Claimant did not turn up for one day.

61. That decision was made the previous week and was not communicated to the Claimant.

62. It must be noted that that the Respondent was under pressure given it was trying to return to operating following the effects of the pandemic but phoning the Claimant a number of times does not, regardless of the size of the company, constitute an investigation.

63. Although the Claimant was not answering calls the Respondent did not know what he was going to do beyond the start of that week and at the time of informing him of his dismissal had been told the Claimant was under a lot of stress and struggling with his mood.

64. The decision to dismiss for what the Respondent has called “serious misconduct”, a term not even in their own disciplinary procedure document was not based on proper or adequate investigations.

65. The belief that the Claimant was absent was well founded but after one and at the time of the disciplinary hearing, two days absence the decision to dismiss was not within the range of reasonable responses open to it at that time.

66. For all these reasons, the Respondent’s decision to dismiss the Claimant for “serious misconduct” was not based upon proper and adequate investigation and the decision to dismiss was not within the range of reasonable responses open to it at that time. It follows that the decision to dismiss was substantively unfair.

Procedural Fairness

67. The disciplinary and grievance procedure I am satisfied was neither consulted nor followed.

68. The ACAS procedures were not consulted or followed.

69. The Claimant was not:

- Informed in writing of the time and date of the disciplinary meeting and therefore was not aware this was being considered or what the outcome could be;
- Written to about his conduct;
- Written to immediately after the meeting or even the next day. Instead he was sent a What’s App message to be told he would be “cut free”;
- Afforded a right of appeal;
- In addition, the Respondent employer went straight to “serious misconduct”, a disciplinary and termination after one day of absence of a very highly thought of employee.

70. I am satisfied on the on balance of probabilities that had a proper procedure been followed that the time and consultation that would have allowed would have resulted in the resolution of the issue and allowed the Claimant to return to work. Both parties spoke in the hearing of how highly they thought of each other.

71. By reason of the above findings of fact, I was satisfied that the decision by the Respondent to dismiss the Claimant was substantively unfair. The Respondent's belief as to the Claimant's conduct was held on potentially reasonable grounds but was the product of inadequate and negligible investigations. It did not fall within a range of reasonable responses.

72. I also concluded that the Claimant's dismissal was procedurally unfair. It did not accord with the Respondent's own disciplinary and grievance procedure, the ACAS Code or the principles of natural justice.

73. As such, the claim of unfair dismissal is well founded and upheld.

Wrongful Dismissal

74. The claim of wrongful dismissal is well founded and upheld as the Claimant was wrongfully dismissed and not paid the notice pay that he was entitled to.

75. The Claimant was entitled, under section 86 of the Employment Rights Act 1996, to 5 weeks notice as a result of having been continuously employed for a period of over five years.

76. The Respondent has failed to show that there was a fundamental breach of the employment contract such as would have allowed the Respondent to treat the employment contract as immediately terminated.

77. The facts are set out in some detail above. The Respondent decided before the Claimant had even been absent for one day to hold a disciplinary meeting, without informing the Claimant in writing of that meeting.

78. In addition, prior to deciding to terminate the Claimant's contract the Respondent was made aware of the Claimant's state of mind and the effect the circumstance was having upon him.

79. The conduct of the Claimant in being absent for two days, in the particular circumstances of this case, did not warrant the Respondent being able to come to the conclusion that the contract was terminable without notice as a result of the Claimant's conduct and certainly not without further investigations being undertaken.

TRIBUNAL JUDGE DS MCLEESE SITTING AS AN EMPLOYMENT JUDGE

Dated: 21st March 2022

Order posted to the parties on 1 April 2020

For Secretary of the Tribunals
Mr N Roche