EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4113733/2021

5 **Hearing held in Glasgow on 30 March 2022 to 1 April 2022**

Deliberations on 4 and 5 April 2022

Employment Judge D Hoey

10 **Mr M Lancaster**	**Claimant** **In Person**
15 **Jacobs UK Limited**	**Respondent** **Represented by:** **Mr O'Carroll - Counsel** 20 **[Instructed by Messrs Doyle Clayton]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's dismissal was fair. His claim for unfair dismissal is ill founded and is
25 dismissed.

REASONS

1. By ET1 accepted on 16 December 2021 the claimant claimed that he had been unfairly dismissed. Early conciliation had commenced on 16 December 2021 with the ACAS Certificate issued on the same day.

30 2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. Breaks were taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. The Tribunal was satisfied that
35 the hearing had been conducted in a fair and appropriate manner, with the

Practice Direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Failure to comply with orders

5 3. At the outset of the hearing the respondent's agent noted that the claimant had failed to engage with them on a number of fronts. Firstly, the claimant had not engaged with regard to the productions and it had taken time to finalise the productions for the hearing despite attempts to engage with the claimant as to productions he wished to provide. As a result, the respondent had 10 produced the papers on which they relied. The claimant had no further documents.

4. Secondly, an order had been issued on 22 March 2022 that required the claimant to provide to the respondent answers to 9 questions given the limited nature of the ET1. The claimant had not answered those questions and the 15 respondent argued that they were still unclear as to precisely the basis for the claimant's claim, albeit the claimant clarified the position during the discussion at the Hearing. The claimant believed the answer to the questions "could be found in the bundle" and did not think it was for him to provide the respondent with any further information, despite the clear terms of the Order.

20 5. While strike out had been noted as a possibility for non-compliance the Tribunal suggested that the matter could be resolved proportionately by giving the claimant time to focus the issues with the respondent reserving their right to seek expenses, particularly if time was lost as a consequence of the failure of the claimant to comply with the order. That was agreed as a way forward 25 and the claimant was given time to provide a response to the order (which he did in writing within half an hour). As a result of robust case management, the Hearing was able to conclude within the time allocated and the respondent understood the basis of the claimant's claims.

6. Thirdly. the respondent's agent noted that the claimant had failed to comply 30 with a separate Order issued on 10 January 2022 which required the claimant to set out the sums claimed and steps taken to mitigate loss. The claimant

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had been warned by email dated 17 March 2022 that if he did not comply with the Order the Judge would consider striking out his claim for failing to comply with the Order and/or failing to actively pursue his claim. This had resulted in the claimant failing to provide the respondent fair notice as to the sums claimed and steps taken as to mitigation. Again strike out had been identified as a potential remedy, but the Tribunal suggested that a proportionate way to deal with the matter would be to focus on liability, with remedy being reserved. The claimant was directed to provide the respondent during the hearing with a note of the sums claimed and steps taken to secure alternative employment, which he did.

Case management

7. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts. That was provided by the respondent, following the claimant confirming essentially that the key facts (as set out in the ET3) were not in dispute,

8. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. Each witness gave their evidence orally with appropriate questions being asked.

9. The claimant was advised as to how evidence is taken, the rules of evidence and the importance of ensuring that his case was put to the relevant witnesses (and any points with which he disagreed was raised). Assistance was given to him to ensure he had enough time to ask relevant questions. He understood the process which was followed.

Issues to be determined

10. A discussion took place as to the legal issues in respect of the claim of unfair dismissal. The legal test was discussed to ensure the claimant understood the basis upon which a Tribunal would determine his claim for. By the

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conclusion of the Hearing it was agreed that the following issues were to be determined:

1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct. The claimant believed there was some other reason for his dismissal, which was not conduct.

2. If the reason was misconduct (the onus being on the respondent to establish the reason), did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal would decide whether:

    - there were reasonable grounds for that belief;
    - at the time the belief was formed the respondent had carried out a reasonable investigation;
    - the respondent acted in a procedurally fair manner;
    - dismissal was within the range of reasonable responses. The claimant argued that that dismissal was disproportionate and not in accordance with policy (as the conduct was not gross misconduct). He argued communication and information exchanged at the time was not adequate as he had not been warned nor advised during his absence that his failures could result in his dismissal. Finally he argued the respondent had not adequately taken into account mitigation.
    - If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
    - If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    - What was the chance a fair dismissal have occurred at some point and if so when?

Evidence

11. The parties had agreed productions running to 215 pages.

12. The Tribunal heard from the claimant, Mr Kelly (Senior Associate Director, City and Places, the claimant's line manager and dismissing officer), and Mr Fullman (Operations Director and appeal officer).

Facts

13. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The chronology which the parties produced, which was finalised after the hearing has assisted the Tribunal in making relevant findings.

Background

14. The respondent is an international provider of engineering, construction, technical and scientific consulting services. It has its headquarters in Texas and employs around 55,000 employees around the world. Over 9,000 staff are based in the UK with around 900 based in Glasgow.

15. The claimant commenced his continuous employment with the respondent on 11 September 2017. He was employed as a Transport Planner in the Glasgow office. A written contract of employment had been issued to the claimant which had been updated.

16. It was a key requirement that the those engaged by the respondent retained the respondent's trust as staff required to work together as a team and individually to progress projects to deliver to clients.

17. Under the heading "sickness" in his contract of employment, the claimant was advised that provided he complied with absence reporting requirements, he would be paid sick pay. Reference was made to the sickness absence policy.

18. The claimant's contract also stated (under the heading "termination of employment" that the claimant could be dismissed in the event of any serious misconduct or serious breach of his contract or a serious breach of a policy issued by the company. The contract referred to a disciplinary procedure which was said to be non-contractual in nature.

Policy documents

19. The respondent had a **sickness absence policy** which had been updated on 1 July 2019. That had its purpose the setting out of reporting and management of absence in a fair and consistent way. The policy was stated to not form part of an employee's contract but that all employees had a responsibility to follow it. Employees were required in terms of the policy to speak to their line manager where an employee falls ill. The policy stated that the employee's line manager should be advised of the reasons for any absence on the first day of absence and within one hour of the usual start time. Text or email communication was not acceptable unless there were exceptional circumstances. Employees were also required to keep their line manager regularly informed of their progress. If an employee does not notify their manager, such absence may be treated as unauthorised absence and unpaid.

20. The policy stated that where the attendance or performance of an employee was affected by prolonged or repetitive absence and there was no evidence of an underlying medical condition the matter would normally be managed via the disciplinary policy.

21. The respondent's **disciplinary policy** had been updated on 1 July 2019 and applied to all employees. Its purpose was to address conduct that does not meet the respondent's expectations or policy requirements. The policy was stated to not form part of an employee's contract of employment. Disciplinary issues were to be dealt with fairly with employees being given the chance to respond before any disciplinary action was taken.

22. Under the heading "Examples of Misconduct" the policy stated that: "Examples of misconduct in the workplace that could breach the relationship of trust between thew employer and employee are swearing, shouting, rudeness, being disrespectful. In most circumstances these behaviours would not warrant dismissal for a first offence, but repetition may lead to formal disciplinary procedures. Continued misconduct of that nature or little improvement could result tin dismissal". Examples of "minor misdemeanours" were stated to be lateness for work, taking personal calls, breach of company procedures or professional requirements (with the example given being "unauthorised absence or repeated failure to follow absence reporting rules"), misuse of company properly, refusal to obey a reasonable and lawful management instruction, failure to comply with the requirements of notifying absence due to sickness, abusive language and persistent short term sickness absence. That list was stated to be "a guide and not exhaustive".

23. Under the heading "Examples of gross misconduct" the policy stated that "gross misconduct is a serious breach of contract and includes misconduct which in the company's opinion is likely to prejudice the company's business or reputation or irreparable damage the working relationship and trust between the company and the employee." Examples were then given of matters normally regarded as gross misconduct which included theft, deliberate and serious damage to property, serious misuse of the company's name, serious insubordination, serious breach of confidence, serious neglect of duties or a serious or deliberate breach of the employee's contract of operating procedures. The list was stated to be a guide and not exhaustive

24. The policy stated that a worker may be summarily dismissed if there had been an act of gross misconduct. The employee had the right to appeal.

25. The respondent also had a separate business management **disciplinary procedure** that set out the procedure for addressing misconduct. That set out that matters would be investigated with the matter being remitted to a disciplinary hearing if considered necessary. Investigative meetings were to be fact finding. Employees would not normally have the right to be accompanied at such a meeting. The employee would have the right to be

accompanied at a disciplinary hearing (and appeal) where the evidence would be considered and the employee given the chance to present their response to the allegations.

26. The outcome to a disciplinary hearing could be that the matter is resolved, a first level warning is issued, a final written warning issued or dismissal.

The team

27. The claimant worked in a team with colleagues and was managed by Mr Kelly. Both the claimant and Mr Kelly had a very good working relationship. Mr Kelly was supportive of the claimant and sought to accommodate the claimant where possible.

Absence from work

28. Following the onset of the pandemic and the Government requirement to work from home, those engaged by the respondent worked from home in carrying out their duties. The pandemic affected the claimant's mental health and in particular led the claimant to encounter low mood. The respondent sought to maintain contact with the claimant.

29. In August 2020 the claimant was absent from work but he did not report his absence to his line manager. The claimant's manager, Mr Kelly, kept in touch with the claimant via WhatsApp. Mr Kelly had noted that the claimant had not been logging on and sought to keep in touch with the claimant. Mr Kelly noted that the claimant had been offline for a week or so and asked if he was able to attend a team meeting that week. The claimant had said he was "struggling to get his head in the game" but that he would be able to attend the team meeting. Mr Kelly told the claimant to keep in touch with him on a regular basis with the claimant to let him know when suited to do so.

Failure to attend meeting

30. On 8 October 2020 the claimant failed to attend the team meeting and Mr Kelly contacted the claimant so check he was OK and to arrange a call to plan forward. He asked the claimant for a good time to catch up.

Claimant given support

31. On 16 October 2020 Mr Kelly had a call with the claimant and after the call provided the claimant the Employee Assistance Programme's ("EAP") telephone number which the claimant took forward. Mr Kelly asked that the claimant keep in touch and suggested a plan was made to allow the claimant space to recover. He suggested that a plan could be made for time off or to set up a working pattern that worked best for the claimant. He asked that the claimant call him to discuss.

Fit notes requested

32. On 1 November 2020 Mr Kelly requested, via WhatsApp, that the claimant provide fit notes to cover his period of absence. He stated that he was happy to keep to the plan of doing whatever length of work the claimant could manage each week. Mr Kelly tried to speak with the claimant on 2 November and asked the claimant to get in touch. He caught up with the claimant on 11 November 2020.

33. On 17 November 2020 Mr Kelly reminded the claimant via WhatsApp, that he needed to provide fit notes to cover his period of absence. He stated that he was always available if the claimant needed to discuss anything.

34. This was followed up again on 16 December 2020 when Mr Kelly requested, via WhatsApp, an update from the claimant regarding his attempts to seek a fit note from his doctor.

Absence from work letter issued

35. The claimant had not been engaging with the respondent nor providing an update as to his position. No fit notes had been provided despite the requests and on 11 January 2021 due to ongoing lack of communications, an absence from work letter issued by the respondent stating that the absence was unauthorised and as a result sick pay would be withdrawn. The letter expressed concern about the claimant's well being and asked him to contact the respondent as soon as possible and by 14 January 2021. The claimant

was again asked to provide fit notes to cover absence and the absence management policy was included with the letter.

36. On 27January 2021 a welfare call had been arranged to allow the claimant to catch up with Mr Kelly and discuss his absences, but the claimant did not attend that call. A zoom meeting was fixed for February.

37. On 3 February 2021 Mr Kelly requested, via WhatsApp, an update from the claimant regarding his attempts to seek a fit note from his doctor.

First fit note provided

38. On 8 February 2021 Mr Kelly requested, via WhatsApp, an update from the claimant regarding his attempts to seek a fit note from his doctor. The claimant said he had received one and would send it, which he did on 16 February 2021. The first fit note he produced was dated 4 February 2021. The claimant was signed off with “low mood” between 4 February 2021 and 4 March 2021. The claimant was told to contact the respondent if they could help further.

39. Mr Kelly sent the claimant a further welfare message to check the claimant was OK on 1 March 2021 suggesting a catch up. The claimant was advised that the respondent was keen to see how he was feeling.

Fit note expires and update requested

40. The fit note expired on 5 March 2021 and in the absence of any update from the claimant, on 11 March 2021 Mr Kelly stated that if the claimant was still unwell he would need a follow up note from his GP given the fit note had expired. The claimant was also invited to “virtual beers”.

41. On 17 March 2021 Mr Kelly requested, via WhatsApp, an update from the claimant regarding the claimant’s attempts to seek an updated fit note from his doctor having had no response to the previous requests.

42. This was chased again on 22 March 2021 when Mr Kelly requested, via WhatsApp, an update from the claimant regarding his attempts to seek a fit note from his doctor.

Second Fit Note provided

43. On 23 March 2021 a second fit note was obtained by the claimant. He was signed off with “low mood” between 4 March 2021 and 22 April 2021.

Contact with claimant upon expiry of second fit note

44. On 22 April 2021 Mr Kelly requested, via WhatsApp, an update from the claimant regarding the position. Mr Kelly wished to update HR about fit notes or potential return dates.

45. In the absence of any response from the claimant, on 6 May 2021 Mr Kelly requested, via WhatsApp, an update from the claimant as to his attempts to seek an updated fit note from his doctor.

Invitation to absence review meeting issued

46. On 18 May 2021 as no further fit note had been received to cover the claimant’s absence after 22 April 2021, the respondent issued an invitation to absence review meeting letter. The letter explained that the claimant was obliged to provide fit notes to cover his absence. The meeting was to take place on 21 May 2021 via Teams. The letter enclosed another copy of the absence management policy, reminding the claimant that failure to follow it may result in disciplinary action. The claimant did not attend the meeting.

Occupational health input

47. The respondent sought to understand the medical position with regard to the claimant by seeking an occupational health report. The claimant engaged with the occupational health clinician. The report stated that the claimant had seen the report, agreed its content and had consented to its disclosure to the respondent.

48. The report stated that the claimant had been off work since September 2020 due to low mood and that he reported difficulties with his concentration at times and currently lacked motivation. He was under the care of his GP and was accessing the Employee Assistance Programme. The clinician stated that the claimant’s symptoms appear to be “personal and perceived work

related concerns" and a stress risk assessment was recommended to identify any control measures. The report stated that: "In my opinion a return to work with support is likely to be beneficial as it will provide the claimant with a sense of routine. I did not identify any other relevant health issues."

5 49. As to recommendations, the report stated that: "In my opinion the claimant is fit for work from week commencing 7 June 2021." The clinician did not consider the claimant to be a disabled person in terms of the Equality Act 2010 and recommended a phased return to work with a 50% return in week 1, 75% return in weeks 2 and 3 and a full return by week 4. The prognosis
10 was said to be good.

50. As to next steps the report recommended a meeting to discuss the report and how to proceed.

Claimant fails to attend absence review meeting

51. On 22 June 2021 the respondent invited the claimant to an absence review
15 meeting with Mr Kelly on 24 June 2021. That letter reiterated that failure to follow the absence management policy could lead to disciplinary action and reminded the claimant that he was obliged to provide fit notes to cover his absence. The letter noted that the meeting would discuss a phased return to work in light of the occupational health report. The letter also noted that the
20 claimant had not responded to repeated attempts to contact him which was a breach of the absence management policy.

52. The claimant failed to attend the scheduled absence review meeting for 24 June 2021 and did not contact the respondent.

53. The claimant did not respond to a further attempt to contact him on 12 August
25 2021.

Claimant invited to investigation meeting

54. On 20 August 2021 the respondent issued an invitation letter to the claimant to an investigation meeting. That letter stated that the meeting had been fixed to investigate alleged failure to follow policy as to absence from work,

continued unauthorised absence and failure to provide fit notes, failure to keep in regular contact with the line manager and failure to attend the absence meeting set for 24 June. The claimant was told the meeting would discuss the allegations and that a potential outcome to the meeting could be remission to a disciplinary hearing given the issues arising. He was advised that he would be given the opportunity to be accompanied to the meeting by a colleague or relevant trade union official.

Phased return to work agreed

55. At the investigation meeting on 27 August 2021, which the claimant attended, it was agreed he would return to work on a phased basis from week commencing 6 September 2021, in line with the occupational health recommendations.

56. It was agreed that in week commencing 6 September 2021 the claimant would work one day in the office (Tuesday) for 8 hours and one day at home (Wednesday). In week commencing 13 September 2021 the claimant would work one day at home (Wednesday) and one day in the office (Thursday). In week 3, week commencing 20 September the claimant would work 2 days in the office (Tuesday and Thursday) and one day at home (Wednesday). Week 4, week commencing 27 September would have the claimant work 2 days in the office (Tuesday and Thursday) with 2 days at home (Wednesday and Friday) with week 5 being a full working week (with a minimum of 2 days in the office).

57. On 2 September 2021 an investigation meeting outcome letter was sent to the claimant confirming the above agreed phased return to work. The claimant was reminded that all periods of absence must be covered by a sick note and that the occupational health report had recommended the stress assessment be completed by the claimant. If he had any queries the claimant was to contact Mr Kelly.

Mental health champion seeks the claimant’s input

58. On 3 September 2021 the respondent's Mental Health Lead (a champion who supported staff in respect of mental health) contacted the claimant to arrange discussion on how to support the claimant on his return and provided the claimant with the stress questionnaire to complete. The claimant had a discussion with the mental health lead but chose not to complete the questionnaire. The claimant was chased for a response on 8 September 2021 and given the offer of help to complete the questionnaire if he needed it, but the claimant chose not to respond.

Phased return to work unsuccessful

59. The day before the claimant's scheduled return to work (on 7 September 2021) the claimant was told to check the IT was working and the claimant sent an email to Mr Kelly to check it was working. Mr Kelly confirmed that the system was working and reminded the claimant that to attend the office the claimant had to sign in the day before prior to 3pm. The claimant stated that he had missed the 3pm deadline. Mr Kelly responded suggesting the claimant work from home on 7 September (instead of coming into the office) and book into the office for the Thursday (9 September) as there would be other team members present. Mr Kelly stated the claimant could complete various training and then start on some project work.

60. On 7 September 2021 Mr Kelly sent an email to the claimant welcoming him back to work and confirmed (as had been discussed) the tasks on which the claimant would work for the first week back. Those tasks included booking into the office for the Thursday and Tuesday, completion of online training, updating his CV and passing to a colleague for future projects and having a think about case studies for projects going forward. Mr Kelly said he would then ask the claimant and a colleague to take that piece of work forward and set out a template for case studies which could then be populated. The claimant was told as to the colleagues who would be in the office on Thursday. At the end of the day Mr Kelly sent the claimant an email to check his day went OK and telling him whom he should contact when in the office on Thursday if he had any issues. Mr Kelly also confirmed that colleagues would be in the office (and they were considering going for lunch together too). The

claimant was given light tasks by Mr Kelly to allow him to return to work on a phased basis.

61. The claimant completed the 2 days in the first week of the phased return to work. In week two he worked one day at home and attended the office on the Thursday 16 September 2021. The claimant decided that the work he had been given was not sufficient for him and decided not to complete the return to work. Following 16 September 2021, the claimant failed to engage with the respondent. He decided not to continue with the phased return to work. He did not advise the respondent as to the position. No fit notes were provided.

62. Mr Kelly sent the claimant a message on 29 September asking when he was working that week. The claimant did not respond nor provide a fit note.

63. Mr Kelly sent the claimant message on 6 October 2021 asking him to call him back that day or the following day. The claimant sent a message saying he could speak on 7 October 2021 but he did not call Mr Kelly nor provide a fit note.

Absence from work letter and claimant instructed to contact respondent

64. On 25 October 2021 an absence from work letter was sent to the claimant noting that the claimant's last communication was on 7 October and his line manager had attempted to contact him without a response from the claimant. His absence was again being considered unauthorised. The letter stated that the respondent was concerned for the claimant's well being and asked for urgent communication to confirm the reason for the absence. The claimant was told to contact Mr Kelly by 29 October 2021, failing which disciplinary action will be taken for failing to adhere to the company absence policy. The claimant was again reminded of his obligation to provide fit notes to cover his absence and to keep in touch with his line manager.

Claimant fails to respond to letter and disciplinary invite letter issued

65. The claimant did not respond to that letter and did not contact Mr Kelly as directed.

66. On 2 November 2021 as no response had been received from the claimant to the 25 October 2021 absence from work letter, the claimant was advised that the disciplinary process would be commenced (as had been stated in the letter of 25 October 2021).

5 **Invitation to disciplinary hearing**

67. On 4 November 2021 an invitation to disciplinary hearing letter was sent to the claimant, inviting him to a disciplinary hearing on 11 November 2021. The meeting was to be chaired by Mr Kelly with an HR consultant in attendance as note taker. The claimant was to face 3 allegations.

10 68. Firstly, it was alleged that there had been persistent failure to follow company policy regarding absence from work, specifically by failing to provide a fit note to cover the absence and by failing to keep in regular contact with his line manager

69. Secondly it was alleged he had failed to adhere to the agreed phased return
15 to work programme

70. Thirdly it was alleged the claimant had failed to respond to the letter sent on 25 October 2021.

71. The letter stated that the allegations were regarded as gross misconduct and if proven could result in dismissal. The claimant was advised that the purpose
20 of the hearing was to explain the allegations, listen to the claimant's response and decide on what, if any, disciplinary action. The disciplinary procedure was sent to the claimant with the letter and he was reminded of his right to have a colleague or trade union representative accompany him.

Disciplinary hearing

25 72. The disciplinary hearing took place on 11 November 2021 and was chaired by Mr Kelly who was supported by an HR Representative and note-taker. The claimant attended himself.

73. The claimant did not arrive promptly prior to the start time (and sent a Whatsapp message to Mr Kelly at 9.31am saying he would "be a couple of

minutes”). He logged into the meeting shortly thereafter. He confirmed he had chosen not to be accompanied. The claimant was told as to the detail in relation to each of the 3 allegations which he confirmed he fully understood.

74. Upon being asked why he had not contacted his line manager or adhered to the phased return to work he stated that he had not been motivated to return to work. The claimant asked if the meeting was to discuss “the inevitable” or was it “staged”. He was told that the meeting was “not about the inevitable” but rather about seeking the claimant’s response to each of the 3 allegations.

75. Mr Kelly noted that the claimant had not completed his agreed phased return to work which had created difficulties for the team. The letter of 25 October 2021 had been issued to the claimant as he had not been in communication with the respondent nor submitted a fit note and had failed to respond which led to the meeting. Upon being asked if there was anything further the company could have done, the claimant stated that the respondent had “gone above and beyond” and there was “nothing else they could have done”.

76. The claimant said there had been a very slight improvement with his wellbeing but he had not spoken with his GP or the Employee Assistance programme. Mr Kelly noted that the claimant had not given a reason for the unauthorised absence. The claimant said he had also not communicated with friends and family. The claimant was told that he had failed to communicate the position for a considerable period of time, which was agreed by the claimant. He was asked if he had anything further to say or ask and he said no.

77. The meeting concluded after a period in excess of 30 minutes discussion.

Claimant summarily dismissed due to gross misconduct

78. Mr Kelly considered the position in detail. He had detailed knowledge of the claimant and had established a very good working relationship with him. Mr Kelly understood the claimant’s work ethic and was aware of the difficulties the claimant had suffered. He considered the evidence before him and spoke to HR and his own line managers to consider his options. He considered in

detail what the claimant had said in response to each of the allegations, the facts of which had not been in dispute.

79. On 16 November 2021 Mr Kelly issued his decision in writing to the claimant. The letter set out the 3 allegations and summarised the claimant's response which was that he said he was not motivated to return to work and that the company had gone above and beyond and could have done nothing further. There had been a slight improvement in his well being but he was unable to give a reason for his non communication with the respondent and had agreed that he had failed to adhere to the company absence policy for some considerable period of time.

80. Mr Kelly decided that the claimant had not given sufficient justification for his prolonged absence, his lack of communication or his failure to adhere to company policy. He reasoned that there had been significant efforts by the respondent to put in place a reasonable phased return to work which the claimant had agreed but he failed to adhere to the process or provide sufficient reasoning for his failure to do so. During the most recent period of absence the claimant had failed to provide a fit note, failed to respond to communications from his line manager and failed to respond to the formal unauthorised absence letter. There had been no justification provided other than a lack of motivation to work. Mr Kelly took into account what the claimant had said together with the medical evidence that had been obtained.

81. Mr Kelly concluded that the foregoing conduct taken together amounted to conduct which destroyed the relationship of trust and confidence. He had no confidence the claimant's position would change or that the claimant would maintain contact with the respondent. He concluded that there had been a serious breach of contract which irreparably damaged the working relationship and trust. He concluded that the claimant's actions amounted to a serious breach of the company's policies. Mr Kelly was satisfied the claimant's conduct amounted to gross misconduct.

82. As to sanction Mr Kelly considered action short of dismissal but was of the view that the appropriate sanction was dismissal. He took into account the

claimant's work record and ethic (which had been without any concern prior to the pandemic). He had lost all confidence in the claimant and concluded that action short of dismissal would not be appropriate given the facts. He decided to dismiss the claimant summarily.

5 **Appeal against dismissal**

83. On 17 November 2021 the claimant appealed against his dismissal. In his letter the claimant agued that the outcome should have been a first written warning and not dismissal as his conduct was not gross misconduct. He raised 7 grounds of appeal.

10 84. He argued his conduct was not gross misconduct in light of the disciplinary policy and its definition of gross misconduct. He argued no prior warnings or instances of misconduct existed. He argued while his correspondence was inconsistent, it was not "entirely negligent". He submitted that while his doctor's notes had been "inconsistently provided" they had not been 15 completely neglected. He argued that the inconsistency of providing his doctor notes mirrored his inconsistency in communication in line with his medical condition and he was not deliberately misleading. He also argued his phased return to work was unsuccessful but was not ignored and expecting a success was unreasonable given the period of absence. Finally he argued that finding 20 gross misconduct was premature given the pandemic and the fact he lived alone and was not a native of Scotland.

Appeal hearing conducted as a full re-hearing of the matter

85. On 29 November 2021 the appeal hearing took place. It was chaired by Mr Fullman MBE (Group Lead Delivery Solutions) who was supported by a 25 different HR Representative and note-taker. Mr Fullman was impartial and independent. The claimant attended the hearing himself.

86. The appeal hearing was a full re-hearing of the matter with Mr Fullman considering afresh the allegations, the facts and the position advanced by the claimant, including his grounds of appeal and his response to the issues.

87. The claimant confirmed that he had chosen not to be accompanied. The claimant was asked to provide more detail in relation to each of his grounds of appeal. The claimant argued that the list of actions that amounted to gross misconduct in the disciplinary policy showed that his conduct did not fall into that category. He argued his conduct was different.

88. The claimant also argued that during his absence there had been no "insinuation" that his employment would be ended. He said he was not arguing that he was not guilty but he said "the punishment did not fit the crime". He accepted that he was guilty of the conduct relied upon in respect of each of the 3 allegations but that the outcome was excessive.

89. The claimant confirmed that he had not adhered to the phased return that had been agreed and that he struggled with consistency due to mental health in terms of his communication.

90. He argued that the disciplinary process had "jumped the gun" and that a written warning would have been reasonable, but it was not reasonable to conclude the claimant was guilty of gross misconduct.

91. The claimant stated that motivation was an issue for him. He also accepted the company had been supportive of him, up to a point. He confirmed he had not provided doctor's notes nor communicated with the respondent. He said he struggled during lockdown. His mood had been low.

92. The claimant understood that it was his responsibility to communicate in respect of his absence and provide fit notes and that he had not done so consistently. He also accepted he should have been in regular contact with his manager but had failed to do so. The claimant said that going straight to gross misconduct showed there was no trust. He was not sure how trust could be restored but he wanted to get back to work.

93. The claimant apologised for the breaches and believed there was mitigation and no previous warnings. He acknowledged he was "not completely innocent" and his actions deserved a warning but the outcome was "over

zealous". He had not been warned he could lose his job and he did not consider it gross misconduct.

94. The claimant was advised that Mr Fullman would consider what he had said and make his decision. The meeting ended after around 50 minutes.

5 **Appeal dismissed – claimant guilty of gross misconduct**

95. Following the meeting, Mr Fullman took time to consider afresh the issues. He considered the evidence and the claimant's response. He considered in detail each of the allegations, the facts of which the claimant had accepted, and the claimant's response. He also considered the terms of the disciplinary 10 policy.

96. Mr Fullman concluded that the claimant had failed in his contractual obligations over a considerable period of time. He considered the claimant had been offered ample opportunity to work collaboratively with colleagues to achieve a resolution to his continued absence but had disengaged from the 15 attempts to assist him.

97. Mr Fullman considered that the claimant's actions, taken together, amounted to misconduct which had irreparably damaged the working relationship and trust between the claimant and respondent.

98. With regard to the first ground appeal, Mr Fullman considered that the 20 examples within the disciplinary policy as to gross misconduct were expressly stated to be examples. He concluded that the claimant's conduct fell within the definition of gross misconduct given the cumulative effect and impact upon the trust required for the employment relationship to continue. While the claimant believed the punishment did not fit the crime Mr Fullman considered 25 that it did on the facts. The conduct was significantly more severe than misconduct and in Mr Fullman's view properly amounted to gross misconduct.

99. With regard to the second ground of appeal, there being no previous warnings, the claimant's previous record had been fully taken into account. The claimant had also, in Mr Fullman's view, been advised as to the position 30 and its seriousness. The claimant had been alerted to the serious nature of

the situation from September 2021 and ought to have seen the fact it was becoming more formalised. Mr Fullman considered that the claimant required to take some personal responsibility for his actions given the support that had been offered. Sufficient notice had been given to the claimant.

5 100. The third ground appeal was that the claimant's approach had been inconsistent but not negligent. Mr Fullman took the facts into account. He considered the times the claimant had engaged together with the periods when he had failed to do so. He also took account of the claimant's health position, his low mood and that he had limited motivation to return to work. 10 That was an important issue for the respondent given the need for teams to work together. There was no suggestion the claimant had been negligent.

101. The fourth ground appeal was that some fit notes had been provided. Mr Fullman took account of the 2 fit notes that had been provided but that the vast majority of the claimant's absence had not been covered by fit notes, 15 despite repeated reminders to the claimant to do so.

102. Mr Fullman considered the fifth ground of appeal and that the inconsistency in provision of fit notes was mirrored by the inconsistency in communication and that the claimant had not been deliberately misleading. Mr Fullman did not consider there to be any suggestion that the claimant had been misleading 20 but that he had failed to follow the policy, which the claimant had understood and had done so repeatedly despite the clear positions set out for him both in terms of his contract and the policy document. Employees understood the importance of communicating with the respondent. The claimant had failed for lengthy periods of time to do so. He had continued to do so despite the 25 occupational health assessment (which said he had been fit to return to work). Still no fit notes had been provided.

103. The penultimate ground of appeal was that the return to work had not been ignored. Mr Fullman took account of the claimant's attempt to comply but he had not completed the return, despite agreeing to the plan. He had also failed 30 to engage with the respondent or provide a reason or communication with regard to his return to work. Team members had been in the office to welcome

the claimant and his absence had impacted upon the team. The occupational health report had suggested a return to work as a measure to help the claimant. The claimant had failed to complete the agreed return to work.

104. Mr Fullman also considered the final ground of appeal and acknowledge the impact of the pandemic and the claimant's personal situation. He considered that the respondent had sought to assist the claimant by facilitating a return back to the office to meet his colleagues with light duties (which was intended to help the claimant). The claimant had disengaged from the process.

105. Mr Fullman considered the allegations had been established. The facts had not been disputed by the claimant. He considered the claimant's response, including his comment that he believed his mental health had improved to an extent. He was concerned however, by the claimant's continued failure to comply with the relevant polices and his continued unauthorised absence.

106. Mr Fullman considered that the facts fell within the definition of gross misconduct. He was satisfied the relationship of trust had been destroyed in light of the claimant's actions.

107. He considered what the sanction should be. He was prepared to overturn dismissal if he considered that to be suitable. He took account of the mitigation the claimant had presented but concluded that dismissal was appropriate. The claimant had shown clear and repeated disregard for the respondent's policy and his obligations under his contract and had become disengaged.

108. Mr Fullman considered the matter generally and concluded that the claimant was guilty of conduct which justified his summary dismissal. Trust had been irrevocably damaged and dismissal was the right approach.

Claimant's last day of employment 30 November 2021

109. On 30 November 2021 Mr Fullman issued his written response to the claimant confirming that the appeal was being dismissed. The claimant's last day of employment was 30 November 2021.

Observations on the evidence

110. This was not a case in which there were material factual disputes for the purposes of the claims. The Tribunal was satisfied that each of the witnesses sought to provide evidence to the best of their recollection.

Law – Unfair dismissal

5 111. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to “conduct”. The burden of proof rests on the respondent
10 who must persuade the Tribunal that it had a genuine belief that the employee committed misconduct and that belief was the reason for dismissal.

112. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether
15 the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

113. Section 98(4) provides that 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
20 administrative rescores of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.”

114. What a Tribunal must decide is not what it would have done but whether the
25 employer acted reasonably: **Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden** *2000 ICR 1283.* It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer
30 would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers

can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

115. Mr Justice Browne-Wilkinson in his judgement in **Iceland Frozen Foods Ltd v Jones** ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

    i. "The starting out should always be the words of section 98(4) themselves.

    ii. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.

    iii. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt.

In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

116. In terms of procedural fairness, the (then) House of Lords in **Polkey v AE Dayton Services Ltd** 1988 ICR 142 established that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation

may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: ”in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.”

117. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show:

1. It believed the employee guilty of misconduct

2. It had in mind reasonable grounds upon which to sustain that belief

3. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

4. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

118. In **Ilea v Gravett** 1988 IRLR 487 the Employment Appeal Tribunal considered the **Burchill** principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where

the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

119. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

120. The amount of investigation needed will vary from case to case. In **Gray Dunn v Edwards** EAT/324/79 Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded **British Labour Pump v Byrne** 1979 IRLR 94 principle but emphasises that the amount of investigation needed will vary in each case. Thus in **RSPB v Croucher** 1984 IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

121. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In **Ulsterbus v Henderson** 1989 IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was

wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

122. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

123. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

124. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

125. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192). This was confirmed in **Taylor v OCS** 2006

IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Submissions

126. During the hearing the respondent's agent had agreed to provide the claimant with written submissions in advance. The claimant was given time to consider these submissions and confirmed that he did not require further time. The submissions had reiterated the points that had been put to the claimant during cross examination. The claimant gave his submissions orally and engaged with the Tribunal as to the issues arising. The parties' submissions have been fully taken into account in dealing with each of the issues and are not reiterated in full in this judgment.

Discussion and decision

127. The Tribunal took time to consider the evidence that had been led and the productions to which the Tribunal was directed together with the parties' submission. The Tribunal deals with the issues in turn.

Unfair dismissal

The reason for the dismissal

128. The respondent argued that the reason for the claimant's dismissal was the claimant's conduct. Reference was made to the respondent's sickness absence policy which required all employees to notify their line manager as soon as a sickness incident arises and seek permission for their absence. The absence reporting procedures required employees to notify their line manager of the reason for their absence on day one at the earliest possible opportunity. Employees were further required to keep their line manager regularly informed of their progress. None of these requirements, by the

claimant's own admission, was adhered to by him. The policy also stated that a sickness absence which had not been notified could be treated as unauthorised absence and may therefore be treated as unpaid. This applied for substantial periods of time with respect to the claimant.

129. Further, where attendance or performance of an employee is affected by prolonged or repetitive absence from work and there was no evidence of an underlying medical condition, the policy stated that this issue may be managed under the respondent's disciplinary policy.

130. The disciplinary policy defined gross misconduct as "a serious breach of contract and includes misconduct which, in the Company's opinion, is likely to … irreparably damage the working relationship and trust between the Company and employee."

131. The claimant argued that there was some other reason for his dismissal. Although he had no evidence to show what the reason was, nor did he know what it was, he believed that there must have been some other reason since his line manager had a very good working relationship with him and had not said that the claimant could be dismissed. His position changed quickly such that gross misconduct was referred to and the claimant was dismissed.

132. The Tribunal is satisfied that the set of facts or beliefs that led to the claimant's dismissal, the reason for his dismissal, was matters relating to the claimant's conduct. The claimant was dismissed because he had not complied with the policies and he had not fully engaged with the respondent, resulting in the respondent losing all trust and confidence in him, such that the relationship, in the respondent's eye's, had fundamentally broken down. The respondent had established that the claimant's dismissal was for a potentially fair reason, matters relating to conduct.

Reasonable grounds for that belief

133. The next issue is whether or not the respondent had reasonable grounds for that belief. The Tribunal is satisfied from the evidence that the respondent genuinely believed the claimant was guilty of conduct that justified his

dismissal. Although the claimant disputed that his conduct justified dismissal, the respondent took the view that his conduct has satisfied the definition of gross misconduct in terms of the respondent's policies and that in terms of the claimant's contract, there had been a serious breach of the policies that justified his dismissal. That was a belief that was genuinely and honestly held.

134. The Tribunal is satisfied that there were reasonable grounds to sustain the belief in the claimant's guilt.

135. The claimant accepted that he had a good working relationship with his line manager who had worked closely with the claimant and sought to manage his attendance at work. Considerable latitude was given to the claimant. The claimant's line manager had sought to work with the claimant, mostly via Whatsapp, to ensure he was kept up to date as to the position. He sent repeated requests for a fit note and the claimant fully understood the requirements in terms of the respondent's policies. Contact with the respondent was sporadic and the claimant had not followed the terms of the respondent's policies which had been sent to him on a number of occasions.

136. Assistance was provided to the claimant, including by the provision of an Employee Assistance Programme, by having the mental health champion contact the claimant and engage with him and by the provision of an occupational health assessment and report. The claimant was given a stress assessment questionnaire to complete but he chose not to progress that.

137. Given the time that had passed and the continual failure to comply with the respondent's policies. matters were treated more seriously from around May 2021 when formal letters were sent to the claimant. At that point reference was made to disciplinary action. Formal action was finally triggered by the claimant's failure to attend the Absence Review Meeting. In the formal letter of 20 August 2021, the claimant had been invited to an investigatory meeting and he was warned that there could be a disciplinary outcome. He was also given the option of being accompanied to that meeting by a colleague or trade union representative thereby underlining the seriousness with which the respondent was dealing with matters.

138. Instead of proceeding with disciplinary action at that point, the claimant had agreed to a phased return to work in terms that were more generous to the claimant than set out in the occupational health report (which had confirmed the claimant was fit for work and was agreed by the claimant). Instead of a 3 week phased return to work, the claimant agreed to a 4 week phased return.

139. The respondent was seeking to support the claimant who had been suffering from low mood. The occupational health report noted that one way to assist the claimant would be to phase his return to the office and integration into the team, thereby assisting him by taking him out of his sole dwelling and back into the office environment with his colleagues. The claimant was given light duties to phase him back to work.

140. While the phased return worked initially, the claimant decided that he would not continue with it, in part as he believed there was insufficient substantive work given to him, a matter that he had not fully raised with his line manager. He disengaged from the respondent.

141. The claimant's failure to adhere to the phased return to work led to a resumption of formal procedures. A formal letter (with mention the possibility of disciplinary action) dated 25 October 2021 was sent to the claimant requiring him to contact his line manager by 29 October 2021. The claimant did not comply with that direction. No explanation for that failure was given and the respondent decided that a disciplinary process would follow. The respondent was concerned that his conduct had led to a potential irrevocable breach of trust given he had failed to fully and properly engage with the respondent given the context.

142. The Tribunal finds that there were reasonable grounds on which to sustain their belief that he was potentially guilty of misconduct that justified his dismissal. The claimant's conduct was in breach of contract. The claimant's admitted actions themselves provide a reasonable basis upon which a belief in the claimant's gross misconduct existed.

143. The disciplinary policy provided a number of examples of behaviour that might constitute gross misconduct. The examples were expressly stated to be a

guide. They were not exhaustive. The issue was whether the claimant's conduct could fairly be regarded as having fundamentally destroyed the relationship of trust necessary for the employment relationship to continue. This was fundamentally disputed by the claimant but ultimately there were reasonable grounds for the respondent's belief, given the claimant's conduct as above, that justified their belief he was guilty of conduct going to the root of the employment relationship that could justify his dismissal.

Gross misconduct or misconduct?

144. The claimant's principal argument was that his conduct amounted to misconduct and not gross misconduct. As such he argued there was no reasonable basis upon which a belief could be sustained in his guilt, justifying dismissal.

145. With regard to misconduct, the disciplinary policy stated that "In most circumstances, these behaviours would not warrant dismissal for a first offence, but repetition may lead to formal disciplinary procedures." Examples refer to failure to follow absence reporting rules. The respondent's position was that there had been persistent, repeated and serious failures to comply with the requirements and that the claimant's conduct had destroyed the trust required for the relationship to continue. The failures continued over a period of 15 months. The claimant had failed to provide fit notes and failed to remain in contact with his line manager. The respondent's agent noted that Mr Fullman had said there was a "litany of failures" over such a lengthy period that in the respondent's view, it properly fell within the category of gross misconduct rather than misconduct.

146. It was the persistent nature of those failures against the background of efforts to support the claimant using occupational health, Employee Assistance, the services of the mental health champion and line manager that led to the breakdown in the working relationship and trust between the respondent and claimant. It was submitted that it is the breakdown of that relationship that is the signifier of gross misconduct as opposed to mere misconduct. That submission is upheld by the Tribunal.

147. The Tribunal accepts that the respondent had a genuine belief that the claimant was in persistent and prolonged breach of the respondent's policies and that gross misconduct in accordance with the disciplinary procedure had been established on the facts of this case.

5 *Fair investigation*

148. Even if the respondent genuinely believed the claimant was guilty of gross misconduct, that belief required to be established after as much investigation that was reasonable. In this case there were no material facts in dispute. The claimant confirmed he fully understood the factual basis for each of the allegations he faced (for which he was dismissed). He accepted that he was guilty for each of those failures. His issue was the sanction.

149. In the circumstances of this case, the investigation that was conducted was reasonable and fair. At the time the belief was formed had reasonable investigations been carried out .

Did the respondent act in a procedurally fair manner?

150. The Tribunal raised with the parties at the commencement of day 2 of the Hearing paragraph 6 of the ACAS Code which provides that "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." The Tribunal wished to understand whether an issue was taken by the claimant with regard to the fact his line manager had been involved in both the investigation and the disciplinary hearing. The claimant confirmed that there was no issue with regard to this. He had not raised any concerns during the process (including during the appeal, which was conducted by an independent and more senior manager). The claimant stated that he had a very good working relationship with his line manager and this was not an issue in this case. In any event there were no disputes as to the facts and no suggestion the claimant's line manager acted inappropriately during the investigation process.

151. On the facts of this case the Tribunal finds that the respondent acted fairly and reasonably with regard to the procedure adopted. The facts relied upon by the respondent in dismissing the claimant were not in dispute.

152. The claimant had been invited to a disciplinary hearing and had been given clear notice of the potential seriousness of the issues. He understood that there was a risk of dismissal, even if he disputed that such a finding would be fair. He was content for his line manager to decide the matter.

153. The disciplinary hearing was fair and the claimant was given the opportunity to set out his position which was fully and fairly taken into account. The dismissing officer approached matters with an open mind and genuinely wished to understand the basis for the claimant's actions given the context, not least the agreed occupational health report that had confirmed the claimant was fit to return to work and engage with the respondent. The claimant had chosen not to fully engage with the respondent.

154. The claimant had candidly stated that the company had gone above and beyond for him and that there was nothing else they could have done to help him during that time. He believed that to be so, at the time of the hearing. His position was that dismissal was not a proportionate outcome. The claimant had raised no issues with regard to the procedure adopted.

155. The dismissing officer took account of each of the points made by the claimant and reached a reasoned and rational decision.

156. The appeal hearing was conducted fairly. Mr Fullman approached the hearing with an open mind. He conducted a fresh and full rehearing of each of the issues. Even if there had been any issue as to the claimant's line manager dealing with the disciplinary hearing, Mr Fullman ensured that the matter was considered entirely afresh and he applied his mind to the matter independently. He was prepared to overturn the dismissal if he believed that to be the right thing to do. Mr Fullman fully engaged with the claimant's issues with his dismissal and took into account the full factual matrix. He reached a decision that was reasoned and rational.

157. The Tribunal finds that the procedure adopted that led to the claimant's dismissal was a procedure that was fair and reasonable. The procedure adopted in this case fell within the range of responses open to a reasonable employer.

5 *Was dismissal within the range of reasonable responses?*

158. They key issue in this case was whether or not dismissal was a fair sanction. The claimant argued that at best a warning ought to have been issued. The claimant argued that the disciplinary policy made it clear that his conduct was misconduct and not gross misconduct and that it was disproportionate to
10 dismiss him. The respondent's agent argued that the claimant's behaviour constituted gross misconduct as it had, crucially, led to irretrievable damage to the working relationship and trust between the claimant and the respondent and that dismissal was fair.

159. Both the dismissing and appeal officers considered the entirety of the
15 claimant's absence and his behaviours and concluded that the relationship had been irretrievably damaged after 15 months. They had both considered whether a lesser sanction was appropriate and decided that standing the loss of trust, it could not. Both considered the claimant's clean disciplinary record but considered that the misconduct was such that dismissal was the only
20 appropriate sanction. In all of the circumstances the respondent's agent argued that the decision to apply the sanction of dismissal was a fair one.

160. The Tribunal fully considered the parties' submissions. The respondent's submissions have merit. Both the dismissing and appeals officers fully engaged with the claimant. It was not disputed by the respondent that the
25 claimant's approach following lockdown was out of character. No issues had arisen as to the claimant's approach to his work prior to this period. His clean disciplinary record was accepted, and fully taken into account,

161. The claimant argued that greater leniency should have been shown to him. The respondent had sought to be flexible with him and had managed his
30 absence on an informal basis. While no formal process had been undertaken with formal warnings being issued as to his conduct, the claimant had been

absent for a lengthy period of time, and there was an impact upon the respondent, given he was not carrying out his duties nor engaging with the respondent in the manner required.

162. When matters were escalated the claimant was fairly warned that disciplinary action could result. While he was not explicitly told that dismissal could ensue, until the invite to the disciplinary hearing, he was clearly advised that his conduct could give rise to a disciplinary outcome. There was no suggestion that dismissal would not be considered, if the respondent were to conclude (reasonably) the claimant was guilty of gross misconduct.

163. The claimant had tried to return to work but that had failed. The claimant then continued to fail to follow the respondent's policies and engage with them. He had been given a number of opportunities to remedy that and he had been given the policy documents, the contents of which were known to him. He ought to have known that if the respondent fairly and reasonably concluded that they lost trust in him as an employee, he could be dismissed. The Tribunal takes into account that no formal advance warnings were issued.

164. The claimant had agreed with the terms of the occupational health report which stated that he was fit for work and that a return to work would assist the claimant given his mood and concerns. Despite that, he did not engage with the respondent.

165. The claimant argued that he would have preferred to have been disciplined following the initial investigation meeting. It may well have been reasonable to have done so but that does not mean the respondent's approach was unreasonable, given equally reasonable employers can act in different ways. The respondent chose instead to support the claimant and implement the agreed return to work and when that failed decided to resume the disciplinary process. The respondent's approach was reasonable on the facts.

166. It ought to have been obvious to the claimant by this stage how serious the respondent considered matters given the process that was now being followed. Despite that, the claimant continued to disengage from the process. He did not complete the return to work nor communicate with the respondent.

No fit notes were provided (despite the rules in this area and in the absence of any reason why the claimant could not comply with the rules).

167. It was reasonable for the respondent to conclude by this juncture that the relationship of trust had been destroyed. It was not a fair criticism of the respondent to state that the process was "incoherent and illogical". The respondent sought to accommodate the claimant and encourage a return to work, in line with the agreed occupational health report, the contents of which were unchallenged during the process.

168. The respondent took into account the claimant's mental ill health, his low mood, during the disciplinary process fully and fairly. The respondent also took into account the terms of the occupational health report and the agreed fact that the claimant was fit to return to work (and thereby engage with the respondent). The claimant provided no explanation for his failure to engage with the respondent (and his failure to follow the policies) despite the agreed phased return nor was there any explanation for the failure to engage with the respondent in the required way, despite the claimant being able to do so. The respondent took into account the fact the claimant apologised at the appeal.

169. While some reasonable employers could have decided to provide the claimant with a further opportunity to improve, an equally reasonable employer could reach the conclusion the respondent did in this case. It was a reasonable and fair conclusion to consider the claimant's conduct that could justify dismissal on the facts of this case. The persistent and repeated failures of the claimant could reasonably be regarded as conduct that goes to the root of the employment relationship, and amount reasonably to gross misconduct.

170. Even although the claimant disputed that the conduct could reasonably be considered as gross misconduct, if the conduct results in the relationship of trust having been destroyed, as it did in this case, it was reasonable to conclude the claimant was guilty of gross misconduct. The fact that conduct in this case was not similar to any of the examples of gross misconduct did not mean the conduct could not fairly be considered as gross misconduct. Equally, the fact the definition of misconduct could potentially be applicable

did not alter the fact given the nature of the misconduct in question in this case: it was persistent, repeated and serious. The conduct could fairly be considered conduct that could lead to dismissal.

171. The claimant was given time to engage and ought to have known how serious this was regarded by his phased return to work. Even although no express warnings were issued, it was clear that the respondent was seriously contemplating disciplinary action. Continued failures to follow the respondent's policies, which existed for good reason, could reasonably result in trust being destroyed which could in turn result in dismissal.

172. The claimant argued that the "crux of this case" was that the respondent "did not come close to warning" him as to the risk of dismissal. The claimant understood the policy requirements. While he did not accept his conduct was gross misconduct, the issue is whether the respondent reasonably believed that to be the case. The claimant ought to have known that acting in a way which leads the respondent to lose all trust and confidence in him could lead to his dismissal. That is clear both in terms of his contract (which refers to the potential for dismissal as a result of serious breaches of the policy) and the policies themselves, which make it clear that dismissal can flow from conduct that destroys the relationship. While some reasonable employers might have provided formal warnings, an equally reasonable employer could adopt the process the respondent followed. His contract made it clear that serious breaches of the company's policies could lead to dismissal.

173. In all the circumstances the claimant was reasonably considered guilty of misconduct that could justify his dismissal. His actions had led to loss of trust such that he was reasonably considered guilty of gross misconduct, conduct that could justify his summary dismissal.

Specific challenges the claimant made as to the fairness

174. With regard to the specific challenges the claimant levelled as to the dismissal, the Tribunal finds that the conduct was reasonably regarded as gross misconduct given the terms of the policy. The Tribunal also finds that the communication and information provided to the claimant was reasonable on the facts of this case. The respondent was supportive of the claimant. The Tribunal must avoid a counsel of perfection and avoid substituting its view as to how the matter should have been handled and instead apply the legal test. The claimant was not formally warned but the position set out in the policy documents and the respondent's communications were clear. If the relationship reached a point where trust had been destroyed, dismissal could follow – irrespective of the absence of formal prior warnings. Finally all relevant mitigation was taken into account.

Dismissal was fair in all the circumstances

175. A finding of gross misconduct does not automatically result in dismissal being fair. An employer should still act fairly and reasonably in concluding dismissal was the appropriate outcome. In this case, from the evidence, the respondent reasonably concluded that dismissal was an appropriate sanction. That decision was a decision that fell within the range of responses open to a reasonable employer. Alternatives were considered but given the approach the claimant had taken to his employment in the 15 month period on the facts of this case, it was reasonable for the respondent to dismiss the claimant summarily.

176. While some reasonable employers might well have given the claimant a further opportunity to improve, an equally reasonable employer could have chosen to dismiss the claimant. The decision to dismiss the claimant on the facts of this case fell within the range of responses open to a reasonable employer.

Taking a step back

177. The Tribunal took a step back to consider the procedure that was adopted, the claimant's conduct and the decision to dismiss. The Tribunal considered the approach and decision the respondent took in dismissing the claimant, taking account of the size of the respondent and its resources. The Tribunal also considered the equity and substantial merits of the case.

178. Having considered the facts of this case, the Tribunal finds that the respondent acted fairly and reasonably in all the circumstances in deciding to dismiss the claimant, taking account of its size and resources, equity and the substantial merits of this case.

Claimant's dismissal was fair

179. The claimant's dismissal was accordingly fair and his unfair dismissal claim is dismissed. On that basis it is not necessary to consider the remaining issues.

Employment Judge: **D Hoey**
Date of Judgment: **6 April 2022**
Entered in register: **6 April 2022**
and copied to parties