EMPLOYMENT TRIBUNALS

Claimant: Mr R Hossain

Respondent: UK 1 Non Woven Ltd

Heard at: Manchester **On: 31 January 2022**

Before: Employment Judge Sharkett

REPRESENTATION:

Claimant: **In person**
Respondent: No attendance

JUDGMENT

1. **JUDGMENT** having been sent to the parties on 31 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

2. The claimant pursues claims for unfair dismissal and payment in lieu of holiday accrued but not taken at the date of termination.

3. The claimant commenced Early Conciliation naming Ms Rahman as his employer on 21 May 2021 with an Early Conciliation Certificate (ECC), issued 21 June 2021. He then commenced Early Conciliation naming the Respondent to these proceedings on 21 June 2021 with an ECC issued 22nd June 2021. His claims were submitted by ET1 of 24 June 2021.

4. The claimant had initially pursued his claims against the respondent and Ms Shelly Rahman. The claimant accepted that Ms Rahman did not employ him and withdrew his claims against her in a personal capacity on 24 September 2021. Employment Judge Batten subsequently made an Order removing Ms Rahman from the proceedings under Rule 34 Of the Employment Rules of Procedure.

5. In October 2021, the Tribunal received correspondence from a representative of the respondent a Mr Mohammed Shaakir Chowdhury, enclosing documents from the High Court which showed that on 13 July 2021 the High Court had granted to him Letters of Administration of his late father's estate. This was a contested application whereby Ms Shelly Rahman who was his father's former wife had opposed Mr MS Chowdhury's application. During the course of the claimant's employment Ms Rahman had been responsible for managing the respondent.

6. On 13 October 2021 Mr Mohammed Rayann Chowdhury, who is believed to be the brother of Mr M S Chowdhury above, wrote to the claimant and Tribunal to indicate that he was no longer a Director of the respondent and would not be attending this Hearing.

7. On 19 October 2021, Mr M S Chowdhury indicated that he intended to attend this hearing and would say that Ms Rahman acted without authority when dismissing the claimant. The Tribunal notes however that the claimant was at all times employed by the respondent and not the individuals named above, notwithstanding their involvement in the respondent at the relevant time.

8. At the start of the hearing the respondent was not present. Attempts to contact a representative from the respondent via mobile phone was unsuccessful although during the course of the hearing a Mr Chowdhury joined the hearing momentarily and then left without speaking. The claimant showed me a text message he had received from the respondent that morning which indicated that no one from the respondent would be attending the hearing.

9. I was satisfied that the notice of hearing had been properly served and that there had been no application for the hearing to be postponed. I was satisfied that I would be able to consider the claimant's claims on the basis of the information before me, whist also having regard to the respondent's ET3 and communications with the Tribunal. I was satisfied that the hearing should proceed in the absence of the respondent.

10. In preparation for the hearing the claimant has produced a written witness statement, which was taken as evidence in chief, and a small bundle of documents (B1). Within the bundle of documents is a transcript of a recording between Ms Shelley Rahman of the respondent and three employees, including the claimant, who were dismissed at the same time. I have also had regard to the documents contained in the file held by the Tribunal consisting of 70 pages (B2). All references to page numbers in this Judgement are references to B1 or B2 unless otherwise stated.

11. I also questioned the claimant for the purpose of clarification of his claim and to ensure the respondent's defence was explained by him.

12. It is the claimant's case that he commenced work for the respondent as a factory operative in August 2018. He worked an average of 52 hours per week until his employment terminated on 12 May 2021, when he was dismissed by reason of gross misconduct. It is the respondent's case that he was paid 3 weeks' notice and his dismissal took effect from 5 June 2021, however I have

seen no evidence of this and it is clear from the transcript of the meeting with Ms Rahman that the claimant was told not to come into work after Eid (B1p11). In the absence of documentary evidence to the contrary and on the basis that it is public knowledge that Eid was in 2021 on 12/13th May, I find on the balance of probabilities that the claimant was dismissed on 12 May 2021.

13. It is not disputed that there had been an issue between the parties about taking time out of the workplace to attend Friday prayers. The usual hours of work included a half hour for lunch with a 15 minute break in the morning and a further 15 minute break in the afternoon. The respondent had agreed that employees would be able to take a two hour lunch break on a Friday to attend Friday prayers but would have to clock out when doing so.

14. However, at about mid-day on 12th May 2021 the claimant and others were called to an unscheduled meeting with Ms Rahman, her son Rayhan Chowdhury and Jamal Hussain, a manager, where they were accused of disrespectful behaviour. The claimant was unaware of when or where this behaviour had taken place but it is clear from the claimant's evidence, that he and others would challenge Ms Rahman on working practices and there had been some dissatisfaction in respect of the taking of time for Friday prayers.

15. The claimant and his colleagues were told that if they wanted to go to Friday prayers they would not be allowed to take a break in the afternoon as the business needed them to work. The claimant and the others objected to this as they believed it to be unfair and said that they needed the break as they would be working from 3pm to 6pm without a break. They were not paid for their time away from work and others not attending Friday prayers would be allowed to have the break whereas those attending Friday prayers would not. The meeting was recorded by the claimant and a transcript has been provided. The respondent has not challenged the accuracy of the transcript

16. In oral evidence, which is supported by the content of the transcript of the meeting, the claimant explained that Ms Rahman had told the claimant that those were her rules and he either followed them and stayed or if not he would have to go. The claimant explained that they had not been given any notice or pre-warning of the meeting and they were not given an opportunity to speak properly before being told that their employment was being terminated with immediate effect.

17. However, the claimant also went on to say that he would not have accepted Ms Rahman's rules and that even if she had paid him double pay he would not have worked for her. Whilst he accepted that the respondent did have the right to make rules in the workplace he explained that he had followed the rules for three years, and, whilst others were prepared to just put up with working conditions at the respondent, for him matters had been building up and he decided that enough was enough.

18. It is not disputed that the claimant was dismissed and whilst not particularised in such terms in the ET3, it is clear that it is the respondent's position that the claimant was dismissed because he had been disruptive in the workplace and had refused to follow reasonable requests. In other words the respondent relied on the potentially fair reason of misconduct for the dismissal. There is

no evidence that there had been any investigation into the alleged misconduct or that claimant had prior warning of the allegations against him prior to being dismissed. He was not given an opportunity to respond to any allegations nor given the right of appeal. I make this finding because there is no mention of a process that was followed in the ET3 nor evidence that any such procedure took place either by way of notes or witness evidence. Having had regard to the transcript of the meeting I am satisfied on the balance of probabilities that the claimant's evidence of what took place can be relied upon.

19. The respondent accepted that the claimant had not been paid for annual leave that he took and agreed he was owed a total of £845 gross for this period. These monies have however not been received by the claimant. We discussed the claimant's claim for holiday pay which equates to 136 hours pay at £9.50 per hour. The claimant's holiday year runs from 31st December to 1st January each year.

20. The claimant has produced payslips and a letter dated 27 June 2019, confirming at the time of his dismissal he was remunerated at the rate of £9.50 per hour. Following discussion with the claimant it was established that he worked approximately 48.5 hours per week. There is some documentary evidence that the claimant's employment may have commenced prior to August 2018 when the respondent name changed but this is not pursued by the claimant in respect of his continuity of service. The respondent has not responded to the particulars of this claim and has not provided a counter schedule to the amount claimed.

21. In evidence the claimant has confirmed that he was not given a contract of employment or written statement of employment particulars in accordance with s1 Employment Rights Act 1996

The Law

22. The right not to be unfairly dismissed is contained in Part X Employment Rights Act 1996 (ERA 1996. In so far as is relevant Section 98(1) of the Employment Rights Act 1996 ("ERA") states:

    a. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

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

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

23. Section 98(4) of the ERA states: 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

24. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof The Tribunal must not substitute its own view for that of the employer. The question to ask is whether the decision to dismiss for the reason given falls within the band of reasonable responses (Iceland Frozen Foods v Jones 1983 ICR 17). This band applies to procedural as well as substantive matters (Sainsburys v Hitt 2003 ICR 111).

25. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

26. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

27. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

28. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

29. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

30. If a dismissal is found to be unfair the Tribunal will consider what remedy is appropriate in the circumstances of the particular case. In this case the claimant has not sought reinstatement or reengagement but asks instead for financial compensation if he is successful. Under s123 of the ERA 1996 provides that the compensatory award shall be: '...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer'.

31. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing.

32. In the case where a dismissal is found to be unfair because of procedural unfairness the principle in Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) will apply. If a Tribunal find that the dismissal is unfair because of the procedural failing, the tribunal should carry out an exercise based on the evidence before it to establish, where possible, the chance of a fair dismissal being established had a fair procedure been followed and reduce the amount of compensation to reflect the identified chance

33. The Tribunal should also have regard to any culpable or blameworthy conduct of the claimant that may have contributed to the claimant's dismissal The basic award may be reduced where the tribunal 'considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...'. In respect of other awards 'where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...'.

34. The right to paid holiday is set out in the Working Time Regulations 1998 which provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2).

35. The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1).

36. Compensation related to entitlement to leave is set out in regulation 14 14.— (1) This regulation applies where—

    a. (a)a worker's employment is terminated during the course of his leave year, and
    b. (b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired. (

2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3). (
3) The payment due under paragraph (2) shall be—
(a)such sum as may be provided for for the purposes of this regulation in a relevant agreement, or (
b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula— where— A is the period of leave to which the worker is entitled under regulation 13(1); B is the proportion of the worker's leave year which expired before the termination date, and C is the period of leave taken by the worker between the start of the leave year and the termination date.
(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

37. Where an employer fails to provide written particulars of employment under s1-6 Employment Rights Act 1996, s38 of the Employment Act 2002 provides that where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay.

38. The claims before this Tribunal all fall within Schedule 5 of the Act and if the claimant is successful in any of those claims, irrespective of whether it makes an award of compensation the Tribunal must ask whether when these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars and if so whether there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay if it considers it just and equitable to do so..

Application of the Law and Secondary findings of fact

39. Turning first to the claimant's claim of unfair dismissal. The first issue to determine is whether the dismissing officer, in this case Ms Rahman, had a genuine belief in the alleged misconduct and if so whether the genuine belief was based on reasonable grounds. It is clear that Mr Rahman considered that the claimant had behaved in a manner which was not acceptable to her. However, there is an absence of detail about what the alleged misconduct is save that it amounted to disruptive behaviour and that the claimant also failed to follow reasonable instructions. It is not known however what the reasonable instructions were that he did not follow but it is assumed that it is that he refused to agree that he would not take an afternoon break if he attended

Friday prayers. This may have fallen within the band of reasonable responses depending on the circumstances of the case.

40. However there are serious flaws in the procedure adopted by the respondent. Firstly the claimant was not made aware of the allegations against him or the fact that his attendance at the meeting on 12 May 2021 might result in his dismissal. He was given no prior warning of the meeting and because he was deprived of the information about the allegations against him he was deprived of the opportunity to respond to them. However, the claimant has been quite candid in his explanation of the relationship he had with Ms Rahman and how he had had enough of the way in which he and others were treated and was not opposed to challenging her or to stand up to her. To that extent it may be that had the respondent followed a proper procedure the decision to dismiss may have fallen within the band of reasonable responses.

41. In respect of the procedure that was followed this was fundamentally flawed because the claimant was not given any prior notice of the meeting at which he was dismissed and he had not been provided with the detail of the allegations against him or the fact that the meeting may result in his dismissal. In addition, and as is clear from the transcript of the proceedings, the claimant was not given a reasonable opportunity to explain himself or given the right of appeal to someone who may have been able to assess the situation objectively. There were clearly other senior members of staff available to conduct different stages of the disciplinary process but this was not an option taken up by the respondent. The decision to dismiss was made by Ms Rahman in the meeting without any indication that she had given consideration to anything that the claimant may have said, or that she had given any consideration to alternatives to dismissal. As she quite clearly indicated during that meeting, she made the rules and if the claimant did not like them then he would no longer be working for the respondent. I find that given the circumstances of this case Ms Rahman had already decided that the claimant would be dismissed if at the meeting he had not been willing to acquiesce to the respondent's rules.

42. For the reasons set out above this is clearly a procedurally unfair dismissal. However, had a fair procedure been followed the claimant has made it abundantly clear that he no longer wished to work for the respondent. As he said in oral evidence he would not have worked for her (Ms Rahman) even if he had been paid at double the rate. Whilst he refers to a long history of dissatisfaction with the respondent's treatment, it is clearly the decision relating to Friday prayers and the afternoon break which was the final straw for the claimant.

43. The claimant accepts that, subject to compliance with the Working Time Regulations, the respondent does have the right to decide when and if further discretionary breaks should be taken. I find that even if a fair procedure had been followed this would not have altered Ms Rahman's decision to withdraw the afternoon break on a Friday if employees had taken extended lunches to attend prayers. Consequently the claimant would not have been prepared to work for the respondent following this meeting. Applying the principle in Polkey I find that the probability of his employment terminating at that time was 100%.

44. However, whilst the claimant has admitted that he has stood up to Ms Rahman, and challenged her rules there is no evidence that prior to 12th May 2021 he was aware that his conduct was unacceptable. Consequently I do not consider there is sufficient evidence to find that he contributed to his own dismissal by culpable or blameworthy conduct. I find that the environment in which the claimant worked was such that such exchanges with Ms Rahman and other employees was commonplace by reason of the fact that it was not a happy workplace.

45. The right to paid holiday is the right of every employee or worker as set out in the relevant section of the Working Times Regulations above. It is the claimant's case that he did not take any holiday leave and there is no evidence to suggest otherwise. Consequently the claimant is entitled to payment in lieu of holiday which he has accrued but not taken at the date of the termination of his employment which is pro-rated for the part holiday year. Having discussed his holiday entitlement with him it was agreed that he was entitled to payment in lieu of holiday at the rate of £9.50 per hour in the sum of £1290.01

46. As the claimant has succeeded in two of the claims listed in Schedule 5 Employment Act 2002, under s38 of that Act I consider whether at the time these proceedings were issued the respondent had failed to provide to the claimant a written statement of employment particulars. I accept the claimant's evidence that he was not provided with such a document because as part of these proceedings he made a written request of the respondent to provide him with a copy of his contract of employment. The respondent did not provide the same and therefore on the balance of probabilities it is reasonable to conclude that a written statement of employment particulars was not provided to the claimant.

47. I have not been told of any reason why it would not be just and equitable to award 2 weeks' pay to the claimant by way of the respondent's failure to provide him with a written statement of employment particulars. I further consider that in the absence of any representation from the respondent or evidence to the contrary, it is just and equitable to make an award of four weeks' pay by reason of the respondent's failure.

Conclusion

48. For the reasons given above I find that the claimant's claim of unfair dismissal is well founded and succeeds. The Polkey principle applies to the extent of 100% to the compensatory element of the claimant's claim. There is no deduction made to the Basic award.

49. The claimant's claim for payment in lieu of holiday accrued but not taken at the date of termination in well founded and succeeds.

50. For the reasons stated above an award of four weeks' pay is made by reason of the respondent's failure to provide him with a written statement of employment particulars under s1-6 ERA 1996

Employment Judge Sharkett

Date: 17 May 2022

JUDGMENT SENT TO THE PARTIES ON

18 May 2022

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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