EMPLOYMENT TRIBUNALS

Claimant: Mr Lee Ellison

Respondent: Meadow Mill Wood Finishings Limited

HELD AT: Manchester **ON:** 21 July 2022

BEFORE: Tribunal Judge Holt

REPRESENTATION:
Claimant: In person
Respondent: Mr Hoyle (Legal Representative)

WRITTEN REASONS

Introduction

1. These are the Written Reasons for the Judgment given orally, and when I also gave reasons, at the conclusion of the hearing of this case on 21 July 2022; my oral decision having been followed with a short judgment prepared by me on 21 July 2022 and which was sent by the Tribunal staff to the parties shortly thereafter.

2. The Claimant presented his claim form against the Respondent on 4 February 2022. He claimed unfair dismissal. (For the avoidance of doubt, at the hearing before me it was clarified that, somewhat confusingly, the Claimant had initiated the proceedings by sending two separate ACAS certificates on different dates. In relation to the second ACAS certificate the Claimant confirmed that he had been considering making a disability claim but then decided against that course of action).

The parties to the litigation and procedural background

3. The Claimant was employed by the Respondent as a French Polisher starting on 1 April 2004. He was paid on a weekly basis. The Respondent was/is a family business engaged in furniture repair and renovation where Mr Fawley did around 50% of the "hands on" tasks, Mrs Fawley did the administration and the Fawley's daughter, Mia, also helped out on what sounded like an ad hoc basis. The Claimant was employed to do around 50% of the "hands on" work assisting Mr Fawley. Events relevant to the claim unfolded in the late summer and autumn of 2021 which I will consider below

4. The Claimant initially commenced proceedings naming his previous employers, Mr and Mrs Fawley, in their personal capacity. He then realised that he had made a mistake and wrote to the Tribunal on 26 April 2022 asking to apply for the name of the Respondent to be changed to Meadow Mill Wood Finishings Limited. On 12 May 2022, Employment Judge Johnson looked at the case and directed that the title of the Respondent should be changed and directed that there should be re-service and noting that the 21 July 2022 hearing should be adjourned and moved to another date. It then seems that, in error, the Tribunal did not re-serve the proceedings. Nor was the date for the hearing changed, such that the hearing went ahead on 21 July 2022 before me and I decided the case and announced my decision at the end of the day. For completeness, I note that the ET3 Response form has the case as Meadow Mill Wood Finishings Limited.

5. On 21 July 2022 I found that both parties had been proceeding on the basis that the correct Respondent was and is Meadow Mill Wood Finishings Limited. I found that, by dealing with the evidence on 21 July 2022 and not insisting that the case be adjourned, the Respondent had waived the requirement of re-service, although, again I acknowledge that enquiries seem to suggest that neither party was actually at fault.

6. At the hearing before me on 21 July 2022 the Claimant was a litigant in person. Because he was unrepresented, I took into account the guidance at chapter 1 of the Equal Treatment Bench Book which deals with litigants in person and how the Court should help unrepresented parties give evidence so as to enjoy as fair a hearing as possible. I record that the Claimant also had a little help from his wife with matters to do with the technology because the hearing was conducted by CVP, (the Ministry of Justice digital teleconferencing platform). The Respondent was represented by Mr Hoyle.

Issues

7. The Claimant had enjoyed a long period of employment with the Respondent but he claimed that he had suffered a number of problems and ill health from July 2021 which started with the recent birth of his third child and which culminated him being dismissed orally by Mrs Fawley on 13 December 2021, followed by a letter dated 17 December 2021 which confirmed the dismissal (but which, the Claimant claimed, did not give adequate reasons for the dismissal). The Claimant asserted that the circumstances fulfilled the criteria for unfair dismissal pursuant to s94 of the Employment Rights Act 1996. The Respondent denied that they had dismissed the Claimant unfairly, claimed that they had tried to keep communications open with the Claimant anticipating his return but that they were forced to dismiss him when they learned that he had been working elsewhere and because he was jeopardising the survival of their business. Therefore, the Respondent said that the dismissal was fair and due to the Claimant's misconduct.

8. That meant that the sole issue for me to determine was whether the dismissal was fair or unfair under part X of the Employment Rights Act 1996 applying the general test of fairness in section 98(4).

Evidence

9. The Claimant gave evidence with my help and was asked cross-examination questions by Mr Hoyle. The Respondent's Mrs Fawley then gave evidence and the Claimant asked her a few cross-examination questions with some help from me in formulating his questions. At the end of the case I summed up for the Claimant what I believed his case to be and he agreed with my summary.

10. At the hearing I was provided with a bundle of documents that had been organised by the Respondent's representatives. The Claimant did not make any adverse comment or application in relation to the bundle. The Respondent sent a witness statement from Mrs Fawley two days before the hearing. It seems that this prompted the Claimant to provide a witness statement the day before the hearing when he sent an unsigned document by email. Neither party objected nor applied for an adjournment in relation to the very late service of witness statements.

Relevant Legal Principles

11. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. At section 94, the right is simply stated in the following terms, that: "**an employee has the right not to be unfairly dismissed by his employer**".

12. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) 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 sub-section (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.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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".**

13. The law is such that the onus is on the employer to show that the dismissal was for one of the five permitted reasons. Where the dismissal falls within one of the five

permitted reasons, then the Tribunal has to decide whether the employer acted reasonably in all the circumstances pursuant to ERA 1996 s 98(4).

14. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

15. 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 which was 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?

16. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

17. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

18. 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.

19. 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.

20. 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). ***See also Hope v BMA December 2021??***

21.

Relevant Findings of Fact

22. Having heard from the Claimant and Mrs Fawley and having considered all the documents, I found that the relevant facts were as follows immediately below. I have omitted from this summary any matters raised in the evidence which were not relevant to deciding whether the dismissal was fair or unfair. After my findings of fact, I will turn to consider the consequences of the Respondent not having followed the correct procedure.

23. The following is the chronology of what is said to have happened. The Claimant's employment with the Respondent commenced on 1 April 2004. There was disagreement between the parties about what happened between 12 August 2021 and 13 December 2021, which I highlight below.

24. On 26 July 2021 the Claimant took one week's leave. On 2 August 2021 the Claimant took one week's paternity leave. On 10 August 2021 the Claimant went to ask Mr Falwey about taking a second week of paternity leave because his wife was suffering from Post Natal Depression ("PND"). In slight contrast, the Respondent claimed that the Claimant had turned up late to work and said that he needed the week off due to his wife's PND. 11 August 2021 was the date on a first fit/sick note that the Claimant send to the Respondent.

25. Precisely what happened on 12 August 2021 was in dispute at the hearing. The Claimant said that Mr Fawley had phoned the Claimant to say that he should return to work when he was "ready", whereas the Respondent said that they had contacted the Claimant asking him to phone Mrs Fawley, but that the Claimant failed to return the call or communicate with the Respondent. On 13 August 2021 the Respondent received SC3 form and fit/sick note. Mrs Fawley noted that it had started on 11 August 2021. On 9 September 2021 the Claimant sent a second sick note valid to 11 October 2021, (which meant that the Claimant was due back at work on 12 October 2021). On 13 October 2021 when he had not attended for work, Mrs Fawley tried to call the Claimant but with no response. On 14 October 2021, Mrs Fawley wrote and emailed a letter to the Claimant because the Respondent had not received a fit/sick note and because, accordingly, the Claimant was absent without leave. She asked for a response from the Claimant by 19 October 2021. In fact, the letter was overtaken by events. The Claimant's evidence was that his GP had not provided the fit/sick note on time due to problems at the surgery, but eventually provided one which covered the relevant period. Mrs Fawley received a fit/sick note back-dated to 9 October 2021 valid to 8 November 2021. Mrs Fawley's evidence was that the Claimant had simply sent the fit/sick note without any explanation. In contrast, in oral evidence the Claimant said that he had also "*relayed a text or something*". On 10 November 2021 the Respondent received the next sick/fit note back-dated to cover the period and up to 12 December 2021.

26. On 8 December 2021 there was an important development when Mrs Fawley received a text message from the Claimant at 22:12 saying that his sick note would

run out on 10 December 2021 and asking for three weeks holiday thereafter. On 9 December 2021 Mrs Fawley received the same request as immediately above by email. She responded inviting the Claimant to meet with her and to clarify his leave situation because the Claimant was asking to change the sick leave to annual leave status.

27. There was lack of agreement between the parties regarding what had happened on 13 December 2021. The Claimant's case was that he went to the Respondent's unit for a pre-arranged meeting intending to discuss his return to work in the new year. He was unaccompanied. At the meeting Mrs Fawley presented the Claimant with the allegation that he had worked for someone else whilst off on sick leave. At the meeting the Claimant denied that he had been working for someone else and said that he had simply borrowed some tools to fix a roof for a friend/neighbour. Nonetheless, he was "let go" by Mrs Fawley whose explanation, the Claimant claimed, was that due to his sick leave they had lost a lot of business.

28. In relation to 13 December 2021, it was the Respondent's case that the Claimant turned up at their work premises at 10:15. Mrs Fawley saw him drinking a can of "Monster" energy drink and having cigarette before speaking to her. At their meeting the Claimant claimed he had not been out of his house whilst on sick leave. They discussed the adverse financial impact of the COVID-19 pandemic on the Respondent's business and Mrs Fawley asked the Claimant why he had been to a local business in order to borrow tools, but the Claimant avoided discussing the allegation. She terminated the employment orally.

29. On 17 December 2021 the oral termination of the employment was followed up by the Respondent sending a letter to the Claimant formally terminating his employment and which included his P45, holiday pay and sick pay, but no payment in lieu of notice. At the hearing before me, the Respondent, through Mr Hoyle, acknowledged that the letter did not go into the detail regarding what was discussed that the meeting on 13 December 2021 including the reason for the dismissal. In relation to this, the Claimant has subsequently claimed, including at the hearing before me, that "no solid reason" was ever given for him having been dismissed. The Claimant emphasised that that, during the period that he was off work from July 2021, he was not given any warnings and no grievances were raised.

30. Turning to the chronology relating to the Tribunal proceedings, 2 February 2022 is the date on the ACAS certificate. The Claim form is dated 4 February 2022. 8 June 2022 was the date by which witness statements were supposed to be filed.

<u>The Claimant's case</u>

31. The Claimant's case is that he was unlawfully dismissed because he was "let go" following the meeting on 13 December 2021 without having been given any reason. Further, when Mrs Fawley wrote to the Claimant confirming the dismissal, she did not give a clear reason. The Claimant therefore claims that the dismissal was unfair. He complains that the Respondent did not communicate with him whilst he was off sick and failed to investigate steps to get him back into work, did not give him any verbal or other warnings, nor follow a dismissal process. They did not tell him that he could have ben accompanied at the meeting of 13 December 2022. He highlights that he received no formal information about policies or processes to be followed. He

alleges that when he was dismissed there was no attempt at engaging in any grievance process.

The Respondent's case

32. In their ET3 Response form at para 6.1, the Respondent, then acting in person, sets out a chronology of events between July 2021 and December 2021. In her more recent witness statement, Mrs Fawley explained that the "last straw" was, after a prolonged period of claimed sickness-related leave, the Claimant suddenly and unexpectedly contacted her on 8 December 2021 asking for his sick leave to be converted to annual leave up to the Christmas period. It was agreed by the parties at the hearing that the usual arrangement was for the Respondent's business to close for two weeks over Christmas, and so, in effect the Claimant was asking for three weeks annual leave, knowing that this would be followed by around two weeks leave anyway. Further, and in summary, in December 2021 Mrs Fawley and her husband were having a torrid time with family illness and the business was struggling to survive following the pandemic and particularly given that the Claimant was the only employee doing 50% of the "hands-on work". Mr Fawley was not able to cope with doing the "hands on" work alone.

33. At the outset, the Respondent acknowledged that they had not followed the usual and expected steps for dismissing an employee and candidly admitted that they were in breach of the ACAS code. In terms of procedure (only), the Respondent admitted that they had not acted reasonably.

34. So first I record my findings about what happened and whether, in principle, the Respondent acted reasonably in dismissing the Claimant. I find that the Respondent *did* act reasonably because:

a. The Claimant was a long-standing employee. However, as per the evidence that I heard, I find that the Respondent had also had a number of challenges in employing the Claimant over the years. Because I accepted Mrs Fawley's oral evidence as reliable and accurate over that of the Claimant, I find that the Claimant had previously run up a large phone bill for the Respondent when using their phone, allegedly for gambling. (The Claimant prevaricated, did not deny the allegation regarding the phone bill, but denied that it was related to gambling "hotlines"). Mrs Fawley's evidence was that there had been a lot of 0800 numbers on the company landline, she had "*pulled [the Claimant] over to one side*" and he had apologised and said that he would not do it again. On a different but linked topic, there was also an occasion when the Claimant had arranged for strangers to go onto the Respondent's rented premises to pick up a mystery package from his car. When pressed about this, he denied that that the package had contained illegal drugs, but confirmed that he had been dealing in paracetamol, painkillers and the like. In relation to these incidents, the Claimant clearly knew that such behaviour was wholly unacceptable, despite the relatively informal way in which the Respondent had treated them at the time they occurred. I so find because the Claimant agreed when Mr Hoyle put these matters to the Claimant towards the beginning of the cross-examination. The relevance of these past misdemeanours to the case before me was not so much that the Claimant was unreliable, although his honesty was in

question, because the Claimant and the Respondent had resolved matters and moved on. Rather, the point was that the Claimant knew that he would be challenged when he acted unprofessionally and at the same time, the Claimant also had considerable experience of knowing that problems regarding his employment could be resolved if he communicated with his employer about them. This is in stark contrast with his behaviour and events between July/August 2021 and December 2021 when the Claimant admitted to Mr Hoyle that he had not spoken to the Fawleys in 5 months regarding what was going on nor his plans to return to work.

b. I have borne in mind the size of the Respondent's undertaking. So far as hands-on skilled employees, the Claimant accepted that it was only really him and Mr Fawley doing the substantive work of the business, (although he referred to Mia helping out too, but that Mia did not have the "full skills" and her work was limited to things like "sanding down"). At the beginning of his cross-examination, the Claimant acknowledged that the Respondent's business was a small one and that his employment had been established on an informal basis. The Claimant had no contract of employment, yet confirmed that he knew what his job was, and also his pay. He had received pay rises and annual leave over the years. He knew his hours of work.

c. The Respondent found the Claimant to be dishonest and unreliable in his dealings with them in the period after July 2021. This was well-evidenced in the reasons that the Claimant gave for being off work from August to December 2021:

    i. The Claimant claimed to me that he had been suffering from stress and depression linked to longstanding depression and mental health problems. (He emphasised depression which, I note, is a formal medical diagnosis). However, when pressed, he admitted that his "longstanding mental illness" was in fact only periodical.

    ii. The sick notes that were provided to the Respondent did not mention depression. Just stress.

    iii. The Claimant also claimed to be on the medication, Sertraline, which requires a diagnosis of depression, although there was no corroborative evidence of the depression nor a prescription for the medication. In oral evidence the Claimant said that he had only stopped taking this medication in January 2022 and gave the very clear impression that he had stopped taking Sertraline because it made him "feel worse". However, when pressed by Mr Hoyle, he admitted that he had no evidence to corroborate that he had taken Sertraline until January 2022. Mr Hoyle also drew my attention to the fact that the last prescription that the Claimant had provided was in September 2021. Later in his evidence, however, the Claimant claimed that he has switched to a different medication, Mertazipine. This also was a significant change and inconsistency in his evidence.

iv. The Claimant also agreed with Mr Hoyle that he was fit to return to work by the beginning of December 2021 but that he did not want to return and instead wanted to claim his annual leave monies instead.

d. Most strikingly, I also find that the Claimant acted dishonestly when he took his children on holiday to Scarborough on 26 August 2021 for a week, at a time when he was claiming to be on sick leave. He also implied to me that he had been too ill to leave the house in this period. The evidence for the holiday, which he could not deny nor explain, was taken from his Facebook posts. When asked in cross-examination how he thought the Fawley's felt when they discovered that the Claimant had taken his children on holiday whilst he was claiming to be on sick leave, the Claimant volunteered that they would have felt "*a bit angry*".

e. All of this was against a background that the Claimant also acknowledged at the hearing before me that the Respondent had been a compassionate employer, including in relation to another an ex-colleague who had had serious mental health problems. Despite being aware of the positive and supportive treatment that his ex-colleagued had received from the Respondent, the Claimant chose not to discuss what was going on with his alleged health difficulties with the Respondent from August 2021 to December 2021, and also knowing that the Respondent had been flexible with him in the past and tolerated his poor behaviour, for example on the occasion when he had encouraged someone to pick up a mystery package from his place of work at the Respondent's premises.

f. I was also satisfied from the clear description of evidence (in the form of oral evidence from Mrs Fawley) of poor quality of work on the part of the Claimant shortly before he had stopped turning up to work. Mrs Fawley described how one piece of shoddy workmanship had caused problems with a customer that had to be re-done following a complaint.

g. I also noted with interest that the Claimant conceded in cross-examination that his behaviours had eroded the faith/trust/confidence that the Respondent had previously placed in him. He also accepted that he had damaged the employment relationship. He was reluctant to accept that he had caused the Fawleys to lose confidence in him as an asset to their business and prevaricated when asked questions by Mr Hoyle, but nonetheless, he accepted that "faith, trust, confidence" were a "mingled concept" and ultimately, if an employer had no faith in an employee, then they would have no trust or confidence in the employee. The Claimant agreed that the "employment relationship" must have been damaged by 13 December 2021.

h. The Claimant admitted that, having been dismissed on 13 December 2021 (followed by the Respondent's letter on 17 December 2021) at no point did he ask for the Respondent's decision to be reviewed/appealed.

35. A consequence of my findings at a. to h. immediately above is that I find that it was the Claimant's poor attendance, dishonesty and poor quality of work before he

went on sick leave that led to his dismissal. Further, a reasonable employer would not have demoted or suspended the Claimant as an alternative to dismissing him. As set out above, his behaviour was so prolonged and egregious and he was so dishonest and unreliable that the reason for dismissing him immediately and "on the spot" on 13 December 2021, followed up by the letter on 17 December 2021, was fair. The Respondent's response to the Claimant's very poor behaviour, lack of explanations and lack of communication was reasonable

36. Therefore, the substantive reason for the dismissal was fair. Taking his children on holiday whilst allegedly on sick leave and working at the house of his friend/neighbour (whether paid or unpaid) whilst also saying that he was "too ill to leave the house" were the stand-out examples of his dishonest behaviour. Nonetheless, as alluded to above, a dismissal can still be unfair if the employer does not follow a fair procedure in reaching the decision to dismiss.

37. As Mr Hoyle submitted before me, a procedurally unfair dismissal can be "rescued" if the conduct of the dismissed employee is particularly unfair. In relation to that, I have had regard to the case of **Gallacher v Abellio Scotrail (UKEATS/0027/19)**. In summary, the **Gallacher** case says that the absence of any procedure does not *automatically* mean that a dismissal will be unfair. In that case, the Claimant's manager decided to dismiss her without contacting HR, without following the correct procedure and without any warning. In relation to the particular facts and circumstances of the **Gallacher** case, the Tribunal found the decision to dismiss without the correct procedure having been followed was within the reasonable responses to the particular circumstances and because further action would have been futile. The Tribunal so found whilst noting that such a situation would be rare. I also note that the Employment Appeal Tribunal cautioned that dismissals without following any procedures will always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses. I have borne this warning firmly in mind in reaching my decision on the facts of this case.

38. The Claimant's claim is therefore dismissed, so I do not have to consider any financial claims.

Decision

39. The Claimant was not unfairly dismissed and so the claim of unfair dismissal pursuant to s94 of the Employment Rights Act 1996 does not succeed and the claim is dismissed.

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Tribunal Judge Holt

11 September 2022

JUDGMENT SENT TO THE PARTIES ON

20 September 2022

FOR THE TRIBUNAL OFFICE

Notes

1. 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.

2. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.