EMPLOYMENT TRIBUNALS

Claimant: Mr E Whiteley

Respondent: Dugdale Limited

HELD AT: **Hull by Cloud Video Platform** **ON:** **5 December 2022**

BEFORE: **Employment Judge Miller**

REPRESENTATION:

Claimant: Mr P Whitely BA FCA, claimant's father

Respondent: Mr P Smith, Counsel

RESERVED JUDGMENT

1. The claimant's claim that he was unfairly dismissed is well-founded and succeeds. The claimant is not entitled to a basic award as it is just and equitable to reduce it the award to nil in light of the claimant's conduct and the claimant is not entitled to a compensatory award as he contributed 100% to his dismissal
2. The claimant's claim that he was wrongfully dismissed in breach of contract is unsuccessful and is dismissed.

REASONS

1. The claimant was employed by the respondent as a compounder in his factory. Compounding is part of the respondent's process in producing PVC pallets for use in manufacturing. The claimant's employment started on 6 January 2020. By the end of his employment he was working an alternating shift pattern and during the week in question the claimant was on a shift from 2pm to 10.45pm.
2. The issues in this case concern a single incident running from 9 to 12 May 2022. The claimant had an interview to work at Santander in Bradford on

Thursday 12 May at 1.30pm. On 9 May 2022 the claimant asked the supervisor Mr Mark Glew for a day off on Thursday 12th and Friday 13th May respectively. Although it was disputed I prefer the evidence of the claimant and I find that Mr Glew's response was that that shouldn't be a problem and he would get back to the claimant. However, Mr Glew did not get back to the claimant and on Wednesday 11 May the claimant checked with his shift supervisor who was on that day, Mr Gill ,that he would be able to take the next day the Thursday off. The claimant anticipated that it would be acceptable because there was only one other person booked to be on leave that day. Mr Gill told the claimant that his request for leave had been refused.

3. The claimant then checked with the shift manager Mr Howard who said he could not have the day off due to predicted absences. Mr Cook explained in his evidence that predicted absences effectively referred to the number of likely absences based on the previous years' absences and the number of employees required to be in work depended on the orders the respondent had to process together with the predicted absences. This worked out that no more than two people per shift were generally allowed to be off although this could be reduced further if production required it. There were about 12 people rostered to work on each shift. Employees were not aware of this level of detail of how the respondent planned its work.

4. Mr Howard did however offer the claimant in that discussion the chance to go to his interview and come into work afterwards. The claimant agreed in cross-examination that he thinks he did reply to that "possibly". It was submitted that the claimant had no intention of attending work after his interview on the basis of this conversation. The claimant said that he was upset at the time about being denied the time off. That accounted for the use of the word "possibly" and the claimant agreed in cross-examination that at the time he had that conversation there was a possibility that he would come into work after the interview.

5. I find on the balance of probabilities that at that time the claimant believed that there was a possibility he would attend work but also a possibility that he would not attend work on the Thursday after his interview. I accept his evidence that he was upset with his manager's response and he perceived it as unreasonable. I think it likely that he thought at the time that he might not come in after the interview regardless of what Mr Howard had said.

6. The claimant attended that interview on Thursday 12 May and it finished at about 3pm. It seems likely that the claimant would have been able to be at work by 4 or 5pm although I heard no evidence about this. The claimant did not attend work. He said in oral evidence that he was feeling "under the weather". He said he was having large bouts of anxiety. Mr Howard called the claimant twice when he should have been at work on 12 May but the claimant did not answer the phone. He said that he does not answer calls from numbers he does not recognise. He also did not contact the respondent to explain that he would not be in or call in sick.

7. The next day the claimant did return to work and he had a return to work meeting with Mr Gill. It is recorded in the return to work form which the claimant has signed that the reason for his absence was that he had an interview and he woke up feeling under the weather. The claimant later challenged the accuracy of that record in the investigation meeting. He said

that he had not said he was ill on that day. In oral evidence the claimant said that what he meant was that he had not been physically ill but mentally unwell. I find that the claimant did say at the return to work meeting that he had been feeling unwell the previous day. That's on the basis that he signed the contemporaneous record of it.

8. The next issue chronologically is that Mr Howard and Mr Allen each emailed Mr Cassin setting out what they say happened. I find that the accounts set out in those emails are genuine accounts of Mr Howard and Mr Allen. They were sent to Mr Cassin and I think it likely that he requested them. There is no other reason for them to do so. Mr Cassin was the operations manager and head of HR. He said that he then passed them to Dawn Parker who is the HR manager/admin person.

9. The claimant was invited on 18 May 2022 to an investigation meeting by Dawn Parker. The invitation letter is not very clear. It says the claimant is invited to an investigation meeting and says at the meeting the claimant will be given a full opportunity to discuss his reasons for absence on 12 May. It does not specify any allegations. I do find however that it is obvious in that letter that the claimant is to be subject to an investigation about his absence on 12 May.

10. The investigation meeting took place on 19 May 2022 with Paul Chapman. Mr Chapman explained to the claimant that it was a fact finding meeting. Dawn Parker also attended to take notes. Mr Chapman asked the claimant why he was off and the claimant said he had had an interview. He had attempted to book the day off. Mr Chapman said the return to work meeting said you were feeling under the weather and the claimant said no it wasn't an illness, the form just assumed he was ill. When asked why he didn't come in to work after the interview as agreed the claimant said "I haven't got an excuse. It was sour grapes on my part." The claimant then said in response to a question about mitigation that "the main cause was sourness. To book a holiday I gave them 72 hours' notice and there was only one other person off on holiday but my request was rejected due to the prediction of absences. I acted in anger. I needed to have it off. I wasn't in the right frame of mind to attend the interview."

11. In my judgment this encapsulates the reasons the claimant did not attend work on Thursday 12 May 2022. He disputes that he used the phrase "sour grapes" but that really makes no difference. The fact is he was not feeling up to going into work because he was feeling out of sorts (I put it no higher than that in the absence of evidence) and he was annoyed that the respondent had said he had to go into work anyway.

12. The claimant deliberately decided in my view to act on his potential decision not to attend and did not, in the event, attend work.

13. Mr Chapman then referred the case to a disciplinary hearing. The claimant was invited to a hearing in a letter dated 20 May 2022. I find that the statements of Mr Howard and Mr Allen were not included with that letter. I prefer the claimant's evidence about that combined with the explicit list of enclosures at the bottom of the letter which does not refer to those documents.

14. The claimant was given the right to be accompanied at the meeting and was provided with a note of the investigation meeting. The allegation in that letter was "12/5/22: one day absence – reason – to attend job interview". It then said "since the allegations against you could be found to be up to a serious breach of the absence policy which potentially falls under Dugdale handbook listing as GMC, the resultant sanction or outcome can be up to and including summary dismissal for GMC."

15. This is quite a confusing letter. However I find that the claimant reasonably understood two things from this letter. That the disciplinary charge he was facing was for breach of the absence policy and that that could amount to gross misconduct which could result in summary dismissal.

16. It is convenient to refer to the respondent's respective policies at this point. The absence management policy set out a number of matters including a procedure for reporting absence which requires contact on the first day of absence and the right for the manager to contact the employee during their absence. It provides for a form of a return to work form which includes reference to the Bradford factor. It was not disputed that a Bradford factor calculation with a result of up to 49 would result in no action being taken against the employee.

17. The disciplinary policy includes a list of matters that might fall within misconduct or gross misconduct. Under misconduct at paragraph 11 the policy refers to lateness, poor timekeeping or unsatisfactory levels of attendance. Under gross misconduct at paragraph 12 it refers to serious of acts of insubordination and, at paragraph 18, serious breach of confidence.

18. I note here that both Mr Cassin and Mr Cook understood breach of confidence to refer to a loss of confidence in the employee rather, as might reasonably be expected, a breach of confidentiality.

19. There was then a disciplinary hearing on 24 May 2022 which was conducted by Mr Cassin. Again Dawn Parker was in attendance ostensibly as a note taker. The claimant was accompanied by a work colleague. Mr Cassin said that he did not discuss the case at any point with Dawn Parker even though she undertook HR functions from time to time and I accept his evidence of that.

20. In the course of the disciplinary hearing the factual circumstances were put to the claimant as follows.

21. The claimant agreed that on 12 May he failed to attend work. He agreed that he had signed the return to work form and that he was feeling under the weather. The approved notes of the investigation meeting say "no it wasn't an illness" but that the claimant was also well enough to attend the interview and the claimant confirmed both of those things. The claimant confirmed that he did not notify the company of his absence and that he did not answer the phone when his manager called which he put down to his generation or social anxiety.

22. Mr Cassin then said "I also understand that Aaron Howard offered you the opportunity to go for the interview and return to work after. However you declined". The claimant said he did but the interview was not successful so there was ill feeling. Mr Cassin said "against Dugdale?" and the claimant said "no." Mr Cassin then asked if there was anything else that the claimant

wished to be considered with mitigation and the claimant said “I apologise and I am embarrassed. I was not thinking in a rational manner and if I had understood the gravity of this I may be would have acted differently. I have an exemplary record. I only have a BF score of one.” At that point Mr Cassin said “this is not regarding the Bradford factor score. I must make that clear; it is regarding the reasons for your absence. You were refused a holiday but thought I’m going to be off anyway. In my opinion it was very reasonable of Aran to offer you the chance to go to the interview and then return to work. Did you consider the impact on the business that your absence may have caused and that your machine stood idle. What have you got in mitigation?” Then the claimant said “just my exemplary record that I am remorseful for my actions and I personally believe that I will learn from this as I didn’t understand the gravity of the situation at the time.” Then Mr Cassin said “if you’d received the job offer for the role you would have left that day anyway” and the claimant said “yes. Though not desperate to leave I just saw an opportunity in an industry that I am interested in. My actions on the day were foolish”.

23. Finally Mr Cassin concluded “I understand however the gravity of the serious breaches (insubordination, confidence, absence reporting and holiday procedure) two of which can be defined as gross misconduct – Dugdale handbook. After due consideration the outcome is summary dismissal with immediate effect. This will be confirmed in writing. You also have the right to appeal within seven days”.

24. I find in respect of the question about taking a new job, that on the balance of probabilities this did have a bearing on Mr Cassin’s decision. I also find that this was the very first time that the claimant was made aware that he was facing allegations of insubordination and breach of confidence. However I also find that Mr Cassin did say that this was not about his absence but about his reasons for failure to attend. In response to that the claimant apologised and said that he would learn.

25. The claimant said in his witness statement that he had never been provided with full details of the allegations against him in relation to breach of confidence and insubordination. I find that the claimant was perfectly well aware that the factual allegation he was facing was that he had an unauthorised absence and in fact he was expecting a sanction. I think it unlikely that the claimant really expected, however, that dismissal was a realistic outcome.

26. The claimant was then summarily dismissed and he received a letter confirming that dated 24 May 2022. He was given a copy of the emails of Mr Howard and Mr Allen with that letter which supports my finding that the claimant had not been given them earlier.

27. The four summary reasons for the claimant’s dismissal were serious act of insubordination - gross misconduct, serious breach of confidence - gross misconduct, breach of absence reporting rules procedure - memo 21 January 2022, and breach of holiday policy.

28. The claimant said that the first two were not put to him and I find that prior to his dismissal they were not. However the second two were also not put to the claimant but the claimant does not appear to take any issue with them. I find that this was because the claimant was expecting the matter to be dealt with as a breach of policy rather than as gross misconduct.

29. The claimant appealed in a letter dated 29 May 2022. He said that the allegations of gross misconduct namely, insubordination and breach of confidence had not been made known to him until the dismissal and I agree that they had not. The appeal hearing was held on 7 June and it was heard by Lewis Cook, the operations director. Again Dawn Parker was in attendance and the claimant was accompanied by a work colleague.

30. The claimant's complaint about the appeal hearing is that his case was not given proper consideration. Particularly, the claimant says that Mr Cook did not engage with his case and that the two allegations had been sprung on him at the last minute, and that because Mr Cassin asked about whether he would have taken any job he had been offered his dismissal was pre-determined.

31. The claimant's appeal was not upheld. Mr Cook did not address the two issues explicitly raised by the claimant. He provided six reasons for refusing the appeal. They are:

    (1) You deliberately absented yourself from work despite being refused the time off.

    (2) You ignored the reasonable suggestion that if you needed to take time off you could return to work after the interview.

    (3) You did not respond to enquiries made on the day as to your absence.

    (4) You were notified in the invitation to the disciplinary meeting that your conduct could amount to gross misconduct and lead to instant dismissal.

    (5) With the absence of one clerical mistake that foremen should read form the notes of the investigation meeting appear accurate and in any event there is no substantial issue as to the facts.

    (6) The decision to dismiss you was valid and should be confirmed.

32. In his witness statement, Mr Cook said that there was no substantial issue as to the facts of the matter and concluded that the claimant had been informed that the disciplinary hearing could result in his dismissal for gross misconduct so he upheld the dismissal.

33. That deals with the chronology. I now address other findings of fact.

34. It was part of the claimant's case that in fact the real reason for his dismissal was redundancy. He said that a number of people have been laid off and this was evidence that the respondent was trying to reduce its employee numbers. Mr Cassin said they had in fact recruited 20 people since April 2022 and that at the date of his witness statement the respondent had 118 employees.

35. It was put by Mr Whiteley on behalf of the claimant that in fact the overall number of employees had gone down. I prefer Mr Cassin's evidence that the respondent was not seeking to reduce its head count significantly in May 2022 even if that may have later changed.

36. I also find that in the event of an unplanned absence the respondent may be required to wholly stop production on the machine that the absent employee would have been working on and this would have an impact on the respondent's business.

Law and conclusions

37. It is not disputed that the claimant was dismissed. That means that pursuant to section 98 of the Employment Rights Act 1996 the burden is on the respondent to show the reason for the dismissal. The reason must be a reason falling within subsection 2 of section 98 and as far as relevant that is a reason that relates to the conduct of the employee.

38. The reason for a dismissal of an employee is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee and I refer to the case of **Abernethy v Mott Hay and Anderson** [1974] IRLR 213, [1974] ICR 323.

39. It does not matter at this stage if that belief is reasonably held or not, just that that is a genuine belief. In my view the respondent has shown that the reason for the dismissal was the conduct of the claimant. The claimant accepted that he was guilty of some misconduct and did not dispute the substantive events of 11 and 12 May 2022. Mr Cassin did believe that the reason he was dismissing the claimant was because of the claimant's misconduct. I reject the insertion by the claimant that the real reason was redundancy. There is no sufficient evidence to support that.

40. Considering then reasonableness under section 98(4). Section 98(4) says 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) it shall be determined in accordance with the equity and substantial merits of the case.

41. I have referred to the well-known cases of **British Home Stores Ltd v Burchell** [1978] IRLR 379 and **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439. The latter case says that I must not substitute my own decision for that of the employer. I really have to decide whether the decision to dismiss the claimant was in the band of reasonable responses of a reasonable employer and that range of reasonable responses test applies to every stage of the process and that process is more or less the one set out in British Homes Stores Ltd v Burchell.

42. What that case says is that what the Tribunal have to decide every time is broadly expressed whether the employer who discharges the employee on the ground of misconduct in question usually though not necessarily dishonest conduct entertain the reasonable suspicion amounting to a reasonable belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief that the employer did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly we think the employer at that stage at which he formed that belief on those grounds at any rate in the final stage which he formed the belief in those grounds has carried out as much investigation into the matter as reasonable in all the circumstances of the case. It is the employer who manages to discharge the

onus of demonstrating those three matters we think who must not be examined further.

43. I will address those Burchell factors. However in my view it is also a necessary requirement of a fair process that the employee understands the nature of the allegations he is facing and has a reasonable opportunity to respond to them or such reasonable opportunity as would be given by a reasonable employer.

44. So considering the three Burchell tests then, firstly I have already established that Mr Cassin did believe that the claimant was guilty of misconduct. Secondly, I consider the investigation and had the respondent conducted a reasonable investigation. I have to conclude that predominantly they did. The claimant admitted all of the elements of the factual allegations: that he has requested leave, that that had been refused, that he had been granted some time off to attend an interview on the condition that he return afterwards and he had not returned afterwards. Really there was nothing more to investigate except for one thing and that was the extent to which the claimant understood the nature of misconduct and whether he would undertake such misconduct again.

45. In my view this is where the respondent has failed. It is perfectly clear that the claimant did not fully appreciate the gravity of the allegations against him. He said that he didn't understand the impact of his decision on the respondent and he viewed it as just one day off that would be dealt with under the relevant policy.

46. Mr Cassin did allow a brief opportunity for the claimant to respond in his meeting when he said "it's not about the Bradford factor, its not about your absence, it's about the reason for his absence that he was refused a holiday but thought I'm going to be off anyway". The claimant's response to that was to say "personally I believe I will learn from this as I didn't understand the gravity of the situation at the time".

47. It is clear that even at this point the claimant was only expecting a warning. It was only after then that the particular gravity of the breaches was fully explained to the claimant, that it was insubordination and the misinterpreted breach of confidence.

48. In my view had the claimant understood that he was facing an allegation of insubordination explicitly, there is a possibility that he might have approached the hearing and the investigation differently. In my view a reasonable employer would have made it very clear from the outset if the claimant was facing charge of insubordination that they were doing so, rather than stating in the slightly confusing way that the respondent did that the claimant was facing an unauthorised absence charge.

49. For those reasons the claimant's claim that he was unfairly dismissed is successful.

50. However, it is also perfectly clear in my view that the claimant did give a limited response to the allegation when framed in non-technical terms in the hearing by Mr Cassin and he was unable to offer any further explanation or mitigation.

51. There were matters that might have merited further exploration by the respondent, but on balance and having heard all the evidence of the

respondent about the impact on their production methods of the claimant's absence and the claimant's inconsistent responses throughout the investigation, I find that the claimant contributed to 100% to his dismissal. Ultimately, the claimant decided not to come into work with no good reason and has offered no subsequent explanation or justification that could materially have altered the decision of this employer.

52. Additionally or in the alternative, had the claimant been given the opportunity to comment on the allegations as framed in terms of insubordination and breach of confidence, there is, in my judgment, a 100% chance that he would have been dismissed at that point anyway. That would not have added to the length of the process in any meaningful or significant way, the claimant having already set out his full versions of the facts on two occasions (the investigation and the disciplinary).

53. Consequently, I reduce the basic award to nil in accordance with s 122(2) of the Employment Rights Act 1996 on the basis that it is just and equitable to do so, and I reduce the compensatory award to nil under s 123(6) of the Employment Rights Act 1996 on the basis that the claimant contributed 100% to his dismissal.

54. Finally in respect of breach of contract the respondent is entitled to dismiss a claimant without notice in circumstances where they are entitled to treat the contract of employment as abandoned. For the reasons I have explored, the claimant did take a conscious decision not to attend work on 12 May 2022. That is a paradigm example of a person rejecting their contract of employment. It may be that the claimant thought that it was just a day off, nobody would really be that concerned about on day's unauthorised absence, but it in fact does go to the heart of the employment contract. The obligation to attend work unless there is a good reason not to is the main obligation of the employee under an employment contract.

55. For those reasons the respondent was entitled to dismiss the claimant without notice and his claim of wrongful dismissal in breach of contract is unsuccessful and is dismissed.

Employment Judge Miller

Date 5 January 2023