EMPLOYMENT TRIBUNALS

Claimant: Harry Callan

Respondent: Perrin & Son Construction Limited

Heard at: Exeter (by VHS) **On:** 10 & 11 January 2023

Before: Employment Judge Oldroyd (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: In person

JUDGMENT & REASONS

JUDGMENT

1. Perrin & Sons Construction Limited be substituted for Christopher Perrin as the Respondent to these proceedings.

2. The Claimant was unfairly dismissed by the Respondent and is entitled to a basic award of £100 and a compensatory award of £236.50.

3. The Claimant's claim for breach of contract is not well-founded and is dismissed.

4. The Respondent made an unlawful deduction from wages by failing to pay the full amount of wages due for 2020 and 2021 and is ordered to pay the Claimant the sum of £181.63, being the net sum deducted.

5. The Respondent made an unlawful deduction from wages by failing to pay the Claimant in lieu of accrued but untaken holiday and is ordered to pay the Claimant the gross of £400 being the gross sum deducted.

6. The Respondent did not deny the Claimant of his entitlement to annual leave and is not entitled to compensation pursuant to Regulation 30 of the Working Time Regulations 1998.

SUMMARY OF CLAIM

7. The Claimant was summarily dismissed from his employment with the Respondent after taking unauthorised holiday.

8. The Claimant says that:

    a. his dismissal was unfair in that proper procedures were not followed.

    b. he was wrongfully dismissed as he was not paid during the contractual notice period to which he was entitled.

    c. throughout his employment of just over two years, unlawful deductions were made from his wages.

    d. he was deprived of his right to take holiday giving rise to a right to compensation.

    e. he was not paid in lieu of holiday that had accrued at the date of his dismissal.

9. The Respondent denies the claims. The Respondent says that taking unauthorised holiday was clearly a matter that merited summary dismissal and in those circumstances the Claimant was not entitled to notice or indeed holiday pay. In respect of the claim for unauthorised deduction of wages, the Respondent says that any deductions were lawful and agreed to as a matter of contract. The Respondent further denies refusing the Claimant holiday or else causing him any loss as a result.

10. I should say at this stage that the Claimant made various other complaints relating to delays in providing payslips, a toxic working environment, breaches of GDPR, a failure to return work tools and an unsafe working environment. None of these matters, though, are relevant to the claims that I must now adjudicate upon. I therefore do not propose to deal with these other matters.

SUBSTITUTION

11. ET1 names Christopher Perrin as the Respondent to these proceedings. The Claimant's employer was in fact Perrin & Sons Construction Limited.

12. In light of this and during the course of the hearing, I made an Order to the effect that Perrin & Sons Construction Limited be substituted for Christopher Perrin as the Respondent to these proceedings pursuant to Rule 34 of the Employment Procedural Rules.

13. The parties did not object to this Order being made.

REPRESENTATION AND WITNESSES

14. The Claimant represented himself but was assisted by Kate Gliddon, a former employee and also a witness. The Respondent also represented itself through its director, Mr Perrin.

15. The Claimant, Miss Gliddon and Mr Perrin gave oral evidence.

16. The Tribunal also reviewed Statements produced on behalf of the Claimant by the Claimant's parents, a former employees (Luke Seabrook) and a former client of the Respondent (Phil Joyce). None of these witnesses gave oral evidence and so little weight can be attached to these Statements. In any event, this evidence was not directly relevant to any disputed matters.

DOCUMENTS

17. At the outset of the hearing, Mr Perrin explained that he had not received any documents submitted to the Tribunal by the Claimant of which there were about 70 (including the Statements to which I have referred). These documents were e-mailed to Mr Perrin on the first morning of the hearing and a short adjournment (between 11am and 2pm) was provided for in order to allow Mr Perrin to review these documents, to the limited extent he had not previously seen them.

18. When the hearing resumed Mr Perrin confirmed that he had been able to review the documents.

FACTS

19. The Claimant is 20 years' old and on 20 January 2020 he commenced employment as an apprentice carpenter with the Respondent.

20. The Respondent is small building business (that comprises of just a handful of employees at any time) with a turnover of about £500,000. It has no bespoke human resources or accounts department.

21. The Claimant was initially employed by the Respondent as a Level 2 Carpentry Apprentice albeit at that time the parties did not enter into any written form of contract. It was instead verbally agreed that the Claimant would work 40 hours each week and be paid £5 per hour.

22. As an Apprentice, the Claimant was required to have his own tools. The Respondent agreed with the Claimant that it would buy tools and provide them to him. The Claimant would pay for these tools on a rolling basis and to this end he consented to £50 pcm being deducted from his wages. The Claimant did not dispute that this arrangement is in place, or that he was provided with tools. Further, the Respondent produced, in evidence, an undated text message which confirmed that, at a certain point in time, deductions of £500

had been made on this basis. The Claimant did not object to the deductions having been made and he plainly agreed to them.

23. In January 2022, the Claimant was appointed to work as a Level 3 Apprentice whereupon his hourly rate increased to £10 per hour. Moreover, the parties entered a written contract at this time (the **Contract**).

24. As to the Contract:

    a. Its duration was expressed to be 15 months, expiring on 24 April 2023 unless terminated earlier.

    b. The Contract permitted deductions from salary to be made in respect of "*sums due to [the Respondent]".* As I have alluded to above, a deduction of £50 per month was regularly made by the Respondent in respect of tools provided to the Claimant.

    c. The Contract provided for disciplinary action and even summary dismissal in the event of "*unacceptable behaviour*". There is no definition of unacceptable behaviour in the Contract.

    d. The Contract provided for no specific notice period or holiday entitlement.

25. The Claimant says that the Contract was supplemented by an unsigned letter dated 10 January 2022, which set out various particulars of the Claimant's employment (the **Particulars of Employment**.) The Particulars of Employment suggested that the Claimant would be entitled to 4 weeks' written notice and 5.6 weeks of holiday. It also refers to the Respondent being entitled to make a deduction from wages in respect of any form of indebtedness to it.

26. Mr Perrin has no recollection of sending the Particulars of Employment to the Claimant and he did not himself have a copy of the document. The Respondent thus rejected the suggested that the Particulars of Employment set out agreed contractual terms. However, the Claimant was clear in his evidence that he was sent the document and since the document is one that is required to be sent pursuant to Section 1 ERA 1996, I am satisfied on the balance of probabilities that it was sent. I accept therefore that the Particulars of Employment further evidence the contractual arrangement between the parties.

27. I therefore find that the Claimant was entitled to 4 weeks' written notice of the termination of his employment (unless summarily dismissed) and 5.6 weeks of holiday each year.

28. The Claimant came to be summarily dismissed by the Respondent on 18 April 2022. I now summarise the events that gave rise to the dismissal, below, starting with an event that took place in September 2021.

29. The Respondent says that the Claimant was issued was a final warning letter on 21 September 2021, as a result of the Claimant failing to lock a steel

container for which he was responsible. The container housed tools with a value of £40,000 or more. The letter states that:

> *"You and I had a disciplinary conversation on 20 September 2021. I am writing to inform you of your final written warning … the likely consequence of further misconduct is instant dismissal"*

30. The Claimant denies that he received the warning letter (until after his employment was ended) .

31. The bundle certainly contains text messages that evidence an instruction from Mr Perrin to an employee, Miss Gliddon, to settle a draft of the warning letter. It then appears that Miss Gliddon prepared a draft and sent it to Mr Perrin on 22 September 2022. At this time, Miss Gliddon also provided Mr Perrin with a document, on the Respondent's headed notepaper, called "*Disciplinary & Grievance Procedures*" (the **Procedures**). The Procedures provide that:

    a. No disciplinary action will be taken until an investigation has taken place.

    b. Employees will have the chance to state their case at a meeting and be represented by a trade union representative or colleague.

    c. If, after investigation, an employee has committed gross misconduct, the normal consequence will be dismissal in lieu of notice. Gross misconduct is not defined but examples are given such as theft, use of alcohol and drugs, use of violence and bullying. Unauthorised absence is not listed as an example of gross misconduct.

32. Mr Perrin says that when he received the draft letter from Miss Gliddon on 22 September 2021, he topped and tailed it, signed it, dated it and sent it. (It seems that if this is right, then the letter was wrongly dated 21 September given that it was only received in draft by Mr Perrin on 22 September 2021).

33. Miss Gliddon, though, says that she subsequently spoke with Mr Perrin on 8 October 2021 and at that time Mr Perrin said that he had not issued the letter and was not going issue a final warning after all. Miss Gliddon recalls that this was because Mr Perrin was very satisfied with work that the Claimant was carrying out on an ongoing project.

34. Mr Perrin accepts that he spoke to Miss Gliddon on 8 October as she claims, but he denies that he said he had decided not to send the letter. Mr Perrin says, instead, that he simply stated that he was "*mulling things over*".

35. I treat Miss Gliddon's evidence with some caution as she is not a wholly independent witness in that sense that she is a former employee of the Respondent who described the working environment in which she worked as "toxic" and she was plainly assisting the Claimant in the presentation of this claim. That is not to say that I consider that Miss Gliddon is fabricating her account of the conversation that took place with Mr Perrin (or indeed that Mr Perrin is). It appears that each of them simply have different recollections of it.

36. In light of the evidence available, I find it is more likely than not that the warning letter was not sent to the Claimant at the time. I say that as:

    a. The Claimant says he did not receive it. I have no reason to reject that evidence which is supported too by the evidence of Miss Gliddon.

    b. Sending the letter would have been premature given a formal disciplinary meeting had not taken place (as required by the Procedures).

    c. I note that it is not consistent of Mr Perrin to say that he had issued the letter on 22 September 2001 but that he was also mulling over whether to send it on 8 October 2021. That suggests that Mr Perrin's recollection is not clear.

37. Although I find that the letter was not sent, at the time the Claimant was dismissed summarily 6 months later, I find that Mr Perrin believed it had been sent.

38. I shall now deal with the immediate events giving rise to the dismissal.

39. On 2 April 2022, the Claimant's father sent a text message to Mr Perrin asking for time off on behalf of the Claimant between 18 April 2022 and 24 April 2022. The Claimant's father explained that that he wished to take the Claimant on a surprise family holiday.

40. On 7 April 2022, Mr Perrin and the Claimant's father spoke on the telephone. The fact and detail of that conversation is not in dispute:

    a. Mr Perrin indicated to the Claimant's father that he was not inclined to allow the Claimant to take holiday at this time saying "…*this is too short notice* .." as a new project had begun. Mr Perrin explained in evidence that he had committed to begin a project for a client that required the Claimant's attendance on a site and the Claimant's holiday was likely to be disruptive and might involve letting the client down (whose project had already been delayed).

    b. The Claimant's father told Mr Perrin that to refuse the Claimant a leave of absence for holiday was unreasonable in circumstances where more than 14 days' notice had been provided for a 7 day holiday.

    c. The conversation ended with Mr Perrin telling the Claimant's father that the Claimant should personally request holiday, but that he would "*still say no*".

41. It is not then disputed that the Claimant spoke with Mr Perrin on 11 April 2022 to request holiday in person and the Respondent denied the holiday request.

42. I do not consider that denial of this request was unreasonable. Although the general notice period for taking holiday is often reasonably considered at least twice as long as the amount of leave a worker wants to take, plus a day, (hence in this case adequate notice was prima facie given), this is not an immutable rule. I am satisfied in this case that the Respondent had a legitimate business

justification for not authorising leave, namely the commencement of a new project. The Respondent is a small business and reasonably required the Claimant to be available for the project that it had committed to so as to ensure that it could be commenced and completed timeously.

43. In reaching this conclusion, I do take into account that the Claimant had, up to this point, only taken 3 of 8 days holiday due to him (as to which see below) in the relevant leave year. I also take into account that Mr Perrin was able to subsequently complete the project himself.

44. Although a holiday had been denied, the Claimant decided to take a holiday in any event. And so when Mr Perrin attended the Claimant's property at 7.30am to collect him for work (as he sometimes did) , he was told by the Claimant's father that he was going on holiday.

45. In evidence, the Claimant accepted that he fully understood that his request for holiday had been refused but he decided to go on holiday, nonetheless. The Claimant's justification was that he had only taken 3 days' holiday in the year so far (and so was a due another 5 days or so) and that, in his view, the refusal of holiday was not reasonable.

46. The Claimant's unauthorised holiday led the Respondent to text the Claimant, at about 7.35am (just 5 minutes later) in very brief terms saying that he was dismissed immediately. Pausing here, it is clear that there was no investigation carried out (in the minutes available).

47. Mr Perrin says that although he acted swiftly in dismissing the Claimant, this was because he saw it as an open and shut case, especially when he believed that the Claimant had already been given a final written warning. Mr Perrin said in evidence that although he could have met with the Claimant before making a decision (as required by the Procedures with which Mr Perrin accepted he was not familiar), he knew it would be futile and not change his position.

48. The following day and on 19 April 2022, the Respondent e-mailed the Claimant and attached two letters:

    a. The first letter confirmed the Claimant's instant dismissal on the basis of an unauthorised absence but offered a right to appeal to Mr Perrin himself within 5 days. This letter attached a copy of the written warning letter of 21 September 2021 that the Claimant says he received for the first time.

    b. The second letter simply advised that the accounts department would resolve any outstanding pay issues.

49. The Claimant appealed the dismissal by letter dated 20 April 2022 on the basis that the Procedures had not been followed. The Claimant did not seek to justify

the holiday he had taken, but he did make it known that it was the first he knew of the previous written warning.

50. By e mail dated 3 May 2022, the appeal was dismissed on the basis that the Claimant had supplied no new evidence. This was without, Mr Perrin accepts, any further discussion or any meeting taking place.

51. The Claimant says that he was able to find alternative employment as a carpenter apprentice in or about October 2022, so about 6 months later. The Claimant does not suggest that he had actively looked to find any form of alternative work in the interim (including casual work) and he adduced no documentary evidence relating to this issue at all.

52. The Claimant referred the matter to ACAS who issued a certificate on 20 June 2022. ET1 was presented on 7 August 2022 (in circumstances where any jurisdictional time limit in respect of the matters raised was to expire on 27 August 2022). ET3 was lodged in response.

THE CLAIMS

53. In these proceedings the Claimant raises five complaints.

54. Firstly, the Claimant now says that his dismissal was unfair because it was procedurally irregular. The Claimant points, in particular, to procedural flaws involving the absence of an investigation or meeting as required by the Procedures. The Respondent denies unfair dismissal and says that the effect of the Claimant's conduct would inevitably have led to dismissal whatever process had been adopted.

55. Secondly, the Claimant says that his dismissal was wrongful in the sense that the Claimant was not paid in lieu of notice. I have found that the Claimant was entitled to 4 weeks' notice, of course (unless summary dismissal was justified). The Respondent says that as it was right to summarily dismiss the Claimant, he was not entitled to notice.

56. Thirdly, the Claimant maintains that at various times the Respondent made an unlawful deduction from his wages (and that the Claimant was historically unaware of this as he only received his payslips in March 2022) and the deductions were not, anyway, identified on those payslips. The deductions (and Mr Perrin accepts this) were made by reducing the sum paid into the Claimant's bank account to reflect the apparent agreement that £50 per month should be deducted to meet the cost of tools. The underpayments now claimed total £681.63 (agreed by the Claimant) as follows:

    a. In 2021, the Claimant was due to be paid £8,706.22 according to his payslips but only received £8,216.84 as evidenced by his bank statements. This is an underpayment of £489.38

b. In 2020 the Claimant was due to be paid £9,955.40 according to his payslips but was only paid £9,763.15 as evidenced by his bank statements. This is an underpayment of £192.25.

(The Claimant confirmed at the hearing that he had not been underpaid in 2022, aside for his claim for notice and holiday pay)

57. Fourthly, Claimant also says that he was denied the chance to take holiday at various times in his employment and that this caused him loss, not least in the form of personal injury (and specifically headaches and anxiety). The Respondent denies that holiday was unreasonably refused or that any personal injury was caused by an absence of holiday.

58. Fifthly, the Claimant says he was not paid holiday pay that he had accrued up until the point of his dismissal in which respect:

a. The holiday year provided for by the Particulars of Employment was 1 January to 31 December.

b. The Respondent and Claimant agreed holiday was payable at a daily rate of £80 (gross).

c. The Claimant says he had taken just 3 days holiday up to his dismissal on 18 April, including one bank holiday. The Respondent did not dispute this.

d. The Claimant was entitled to 8 days holiday (being his 29.5% of his 5.6 week entitlement) up to 18 April 2022 (being the effective date of dismissal). The Respondent did not dispute this.

e. The Claimant was thus entitled to 5 days of payment in lieu of holiday and the sum of £400 is claimed.

The Respondent says that it did not pay accrued holiday pay on account of the fact that the Claimant was summarily dismissed.

THE LAW

Unfair dismissal

59. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed.

60. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee.

61. In this case, it is not disputed that the Claimant was dismissed on conduct grounds, and specifically the Claimant's decision to take unauthorised holiday.

62. Section 98(4) sets out the test of fairness to be applied in respect of, among other things, a dismissal based upon conduct. :

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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."*

63. There is guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct.

64. The relevant authorities are **British Home Stores v Burchell [1980]**, **Taylor -v- OC Group Limited [2006]** and **Sainsburys Supermarkets Limited -v- Hitt [2003].** Together**,** these authorities demonstrate that the Tribunal must consider five questions relating to the fairness of the dismissal including:

    a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

    b. If so, was that belief based upon reasonable grounds?

    c. Did the Respondent carry out an investigation into the matter that was reasonable. Regard must be had to the nature of the allegations, the position of the Claimant and the size and resources of the Respondent.

    d. Did the Respondent follow a procedure that was reasonably fair in which respect regard must be had to the Respondent's own procedures and the ACAS Code of Practice.

    e. Was dismissal, within the band of reasonable responses (as opposed to the imposition of some other sanction). If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal.

65. In terms of remedy**:**

a. An employee who has been unfairly dismissed is entitled to a basic award calculated by reference to age and length of service. Under section 122 of the Employment Rights Act 1996 that may be reduced, if it would be just and equitable, because of any conduct of the Claimant before the dismissal.

b. The Claimant is entitled too to a compensatory award under Section 124 of the Employment Rights Act 1996 1996 which begs the following questions:

i. What financial losses has the dismissal caused the Claimant?

ii. Did the Claimant taken reasonable steps to replace their lost earnings by looking for another job? If not, for what period of loss should the Claimant be compensated?

iii. Should any compensation be reduced owing to contributory fault on the part of the Claimant?

iii. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair process had been followed, or for some other reason. If so, should the Claimant's compensation be reduced and by how much? This form of deduction was recognised by the House of Lords in **Polkey v AE Dayton Services Ltd [1987] IRLR 50**.

iv. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, a Tribunal has the power to increase an award of compensation (compensatory award only), by no more than 25%, if it considers that an employer has unreasonably failed to comply with the Code, and it is just and equitable to increase the award.

Breach of contract (wrongful dismissal)

66. The Contract in this case provided for a notice period of 4 weeks.

67. The parties agree that as a matter of contract that the Respondent was entitled to terminate the Claimant's contract summarily if in serious breach of contract by means of the Claimant's conduct.

68. In distinction to the claim for unfair dismissal, where the focus is on the reasonableness of the decision and it is immaterial what decision the Tribunal would have made. The Tribunal must decide for itself whether the Claimant's conduct merited summary dismissal.

69. If the Claimant was not in serious breach of contract then any summary dismissal will have been wrongful and entitle the Claimant to damages in the form of notice pay and other consequential losses.

Unlawful deduction from wages

70. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

> *"An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

71. Although a claim must be brought within 3 months (subject to any ACAS extension), if there has been a series of deductions the three month time limit runs from the last deduction in that series. There will have been a series of deductions of there is "*sufficient frequency of repetition*" that creates a sufficient factual and temporal link **(Bear Scotland -v- Fulton [2015 IRL15]**).

72. In all cases, an employee can only claim for a series of deductions that dates back 2 years.

73. A deduction may be authorised on a contractual basis. In **Kerr -v Sweater Shop (Scotland) Limited [1996] IRLR** 424 it was suggested that an authority to deduct wages did not have to be agreed to by an employee in writing but merely notified to him and not then objected to.

74. The burden of proof is on the employer, though, to demonstrate that the event giving rise to the deduction has been made.

75. Section 23 of the Act gives a worker the right to complain to an Employment Tribunal in respect of an unauthorised deduction from wages.

Holiday pay

76. The Contract (and Particulars of Employment) provided for holiday of 5.6 weeks in each year, being the statutory minimum.

77. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment. The claim may be brought as an unauthorised deduction of wages under Section 23 of the Employment Rights Act 1996 or under the Working Time Regulations 1996.

78. The fact that an employee is summarily dismissed does not alter the right to receive accrued holiday pay.

79. Workers who are denied holiday cannot have suffered an unlawful deduction of wages but may instead complain under Regulations 13, 13A and 30 Working Time Regulations and:

    c. Seek a declaration that there has been a breach of the Regulations; and

d. Seek just and equitable compensation given the default and the loss sustained. As to this, the Court of Appeal decision in **Santos Gomes -v- Higher Level Care Limited [2018] ICR 1571** decided that the there is no loss for injury to feelings (as opposed to personal injury) and any of pecuniary loss should be evidenced.

FINDINGS

80. At the outset of the hearing, I set out the issues that were in dispute and this was agreed by the parties. I can address the claim by reference to those agreed issues.

Unfair dismissal

Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds?

81. Mr Perrin says that he believed the Claimant's decision to go on holiday without authorisation was serious misconduct, especially in light of his belief that the Claimant had been given a written warning in September 2021.

82. I accept Mr Perrin's evidence in this regard, which was very clear, especially in circumstances where I have found that his genuine recollection was that the written warning drafted in September 2021 had been issued (even though it had not).

83. The Claimant also did not dispute Mr Perrin's belief.

Did the Respondent carry out an investigation or else adopt a fair procedure?

84. It is clear to me that the Respondent did not follow its own Procedures in certain respects. Most notably, the Claimant did not carry out an investigation and meet with the Claimant so he could "*state his case*" (and explore with him, for example, why he had chosen to take holiday). Indeed, the decision to dismiss was taken barely 5 minutes after the Mr Perrin was told that the Claimant would not be presenting for work and would appear to have been an instinctive and even hot-headed reaction.

85. The speed with which Mr Perrin reacted means that the Respondent cannot reasonably have taken into account, as a result, the fact that the Claimant disputed having already received a written warning and also the fact that the Claimant' position was that his holiday request was reasonable.

86. In addition, the appeal process was perfunctory and the Claimant was not invited to meet with Mr Perrin and explain himself. Although Mr Perrin says that he dismissed the appeal as the Claimant did not provide any justification for his conduct, the very point of an appeal process would have been to explore that justification.

87. Mr Perrin freely accepted that he dispensed with formal procedures as the outcome was a foregone conclusion, in his view. That is, acceptance, in my judgment, that the conclusion was preordained and this points to the process being flawed in a serous way in that it was not a wholly subjective process.

88. Even accepting, as I do, that the Respondent is a very small business with no HR department or adviser available to it, the process was inherently unfair.

Was the decision to dismiss within the range of reasonable responses open to a reasonable employer when faced with these facts?

89. I have already found that in the context of the Respondent's business that it was not unreasonable for the Claimant's holiday request to have been declined and that the Claimant was very aware of this. The Claimant's decision to then go on holiday in spite of this was a wilful disregard of his obligations was consequently serious misconduct of the type that might be described as "*unacceptable behaviour*" within the meaning of the Contract. It was behaviour which did cause business interruption or else risked doing so.

90. However, in this case the failures in process were significant, as I have set out and in my judgment rendered the dismissal unfair when viewed as a whole. The procedural defects went well beyond being mere technical defects.

91. This means that I must now consider the Claimant's entitlement to a basic and compensatory award.

What is the basic award?

92. In terms of a basic award, given the Claimant's age and length of service, a basic award of £400 is normally to be paid, being a half week's pay (being £200) for each year of service (being 2 years).

93. However it would be just and equitable, because of the conduct of the Claimant before the dismissal, to reduce the award by 75% to £100. This reflects the fact that the Claimant's decision to go on holiday without the consent of his employer was plainly serious misconduct, as I have found.

What is the compensatory award?

94. In this case, I am not satisfied that the Claimant made any real effort to find alternative employment; no documentary evidence was advanced to suggest that other roles were applied for and the Claimant does not appear to have considered any form of work other than carpentry.

95. In light of this, I do not accept the Claimant has mitigated his loss and he should not be entitled to recover any loss of earnings that extends beyond 2 months or else £3,440 (gross).

96. However, I then reduce this sum by 75% to reflect the contributory fault of the Claimant in that his dismissal was caused by his decision to go on holiday

without consent (this reduction having been applied to the basic award). This reduces the compensatory award to £860.

97. I am then satisfied that it is appropriate to reduce any award by a further 75% on a **Polkey** basis because, had a fair procedure been adopted, then I accept the Claimant would probably (but not inevitably) have been dismissed in any event. To this end, I cannot discount the possibility that, had the Respondent discovered that the Claimant was not under a final written warning and also taken into account the Claimant's viewpoint that the refusal of his holiday was not reasonable, then a different outcome may have ensued. This results in final compensatory award of £215.

98. I have the power to uplift this award by 25% if there has been a breach of the ACAS Code of Conduct. The Code suggests that in the case of conduct that may lead to summary dismissal, an investigation should take place as well as a meeting with the employee. This was of course provided for in the Respondent's own Procedures but did not happen. Taking into account the small size of the Respondent and its limited resources, I consider that an uplift of 10% is justified. This leads to a final compensatory award of £236.50.

Wrongful dismissal; notice pay

Was the Respondent right to not pay the Claimant 4 weeks' notice on the basis that he was fairly summarily dismissed on grounds of misconduct.

99. I must decide whether the Claimant committed serious misconduct entitling the Respondent to dismiss the Claimant without notice..

100. For reasons that I have set out above, I am satisfied that the Claimant committed serious misconduct by taking unauthorised holiday in circumstances where a request for holiday had been expressly and reasonably denied.

101. Accordingly, I dismiss the claim for wrongful dismissal.

Unlawful deduction from wages

What was the Claimant paid and what should he have been paid?

102. It was agreed during the course of the hearing that deductions were made from the Claimant's wages, in the two years preceding the termination of his employment, of £681.63.

Was any deduction lawful?

103. The Contract, as supplemented by the Particulars of Employment, certainly permitted a deduction of wages to be made for any sums owing to the Respondent.

104. It is also clear to me that the Claimant and Respondent agreed that a regular deduction of wages should be made at £50 per month in respect of tools that were provided to the Claimant. It is further clear (from the undated text message to which I have referred) that the Claimant was aware of deductions with a value of £500 and did not object to those deductions being made and I find he agreed to them.

105. As I have said, the burden is on an employer to evidence that deductions were made lawfully and pursuant to a contract term and, in this case, the Respondent is unable to discharge that burden beyond the deduction of £500 that I find that the Claimant agreed to. The Respondent has not been able to evidence further deductions by way of receipts or specific entries on payslips, for example.

106. I therefore find that there has been an unlawful deduction from wages but limited to £181.63. This is the sum claimed less the deductions of £500 that were agreed to. This is a net sum.

Holiday pay

Was the Claimant untiled to a payment in lieu of holiday at the time of his dismissal? Was that paid?

107. Even though the Claimant was summarily dismissed, he was entitled to be paid for any holiday that had accrued but had not been taken at the date of dismissal. Although the Respondent says that it did not pay this sum on account of the Claimant's summary dismissal, that is not a ground to withhold the right to be paid for holiday that already accrued.

108. As set out, it was agreed that the Claimant had accrued 5 days of untaken holiday, payable at a daily rate of £80.

109. Consequently, the Claimant is entitled to recover £400 by way of holiday pay. This is gross.

Was the Claimant deprived of the right to take holiday?

110. The Claimant said in his evidence that the Respondent routinely refused holiday and during his employment and that he had little chance to take it. The Claimant said that he often worked bank holidays and it was suggested that a period of 10 days spent in isolation (pursuant to Covid lockdown rules in force at that time) had to be taken as holiday. The Claimant also said that on one occasion where there was no ongoing project, the Claimant was asked to clean out a tool container rather than go on holiday.

111. The Claimant did not produce any documentary evidence in the form of written holiday requests and his evidence was not precise on what holiday had been requested and what holiday and been denied and why.

112. For its part, Mr Perrin did not accept that holiday requests were routinely refused as the Claimant maintains. The Respondent did not, though, produce any evidence of any holiday requested but denied, the actual holiday taken by the Claimant and any holiday taken was not set out clearly in the payslips that were provided to the Claimant. This lack of record keeping is most unsatisfactory.

113. On balance though, and having regard to the limited evidence available produced by the Claimant I am not satisfied that the Claimant was deprived of the right to take holiday but it is more likely that he simply agreed -even if unwillingly- not to take it.

114. In any event, I have seen no evidence of any pecuniary loss flowing from any holiday not taken and there is no evidence (in the form of a medical report) to support a claim for personal injury being directly caused by the lack of holiday. I therefore cannot see that any loss flows form any refusal to allow holiday.

115. Accordingly, this aspect of the claim is dismissed

Employment Judge Oldroyd
Date: 10 January 2023
Corrected On: 09 March 2023

Amended Judgment sent to the Parties: 20 March 2023

FOR THE TRIBUNAL OFFICE