



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Radio

**Respondent:** Bapp Industrial Supplies (Huddersfield) Limited

**Heard: via CVP in the North East Region**

**On: 30 November 2023**

**Before:** Employment Judge Ayre, sitting alone

## Representation

**Claimant:** In person

**Respondent:** Miss T Ahari, counsel

**JUDGMENT** having been sent to the parties on 6 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

## REASONS

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### Background

1. The claimant was employed by the respondent as a Warehouse Operative from 22 October 1990 until 14 February 2023. Early conciliation started on 16 March 2023 and ended on 31 March 2023. The claim was presented on 11 May 2023 and included complaints of unfair dismissal, for holiday pay and for unpaid wages.
2. The claim was initially rejected by the Tribunal because the claimant did not give an early conciliation number and, although he ticked a box to explain why he did not have an early conciliation number (namely that the claim included an application for

interim relief) that explanation appeared to be incorrect.

3. On 24 May 2023 the claimant wrote to the Tribunal asking for reconsideration of the decision to reject his claim and providing an early conciliation certificate number. By letter dated 10 August 2023 Employment Judge Lancaster, after reconsidering the rejection of the claim, decided to accept the claim, with the claim being treated as having been received on 24 May 2023.
4. The respondent defends the claim. It says, in summary, that the claimant was dismissed for being absent from work without permission and without reporting his absence or contacting the respondent for a period of four weeks.
5. In a letter sent to the parties on 10 August 2023 the Tribunal listed the case for final hearing today and made Case Management Orders including the following:
  1. 21 September: Schedule of Loss by the claimant;
  2. 5 October: disclosure of documents by both parties;
  3. 19 October: preparation of an agreed bundle of documents by the respondent;
  4. 2 November: exchange of witness statements; and
  5. 20 November respondent to send one hard copy and one electronic copy of the bundle and witness statements to the Tribunal.
6. The parties having apparently failed to comply with these Orders, on 27 November 2023 Employment Judge Deeley ordered that:
  1. The claimant must write to the Tribunal and the respondent setting out how he had calculated his loss of earnings and whether he had received any benefits or earnings since his dismissal;
  2. The claimant must prepare a written witness statement for himself and any witnesses and send these to the Tribunal and the respondent by 4pm on 28 November 2023;
  3. The respondent must send its witness statements to the Tribunal and the claimant by 4pm on 28 November 2023; and
  4. Any application for strike out of the claim would be considered at the start of the hearing today.
7. The claimant has not complied with the Orders of Employment Judge Deeley.

## **The hearing**

8. Today's hearing took place by Cloud Video Platform. The respondent had prepared a bundle of documents running to 132 pages. I heard evidence from the claimant and, on behalf of the respondent, from Neil Smith, Warehouse Manager and Christopher Garwood, Managing Director.

9. The claimant had not complied with the Orders made by Employment Judge Deeley on 27 November. He had not prepared a witness statement or a Schedule of Loss.
10. At the start of the hearing the respondent applied for strike out of the claim on the ground that the claimant had failed to comply with Case Management Orders. For the reasons set out below, I declined, on balance, to strike out the claim, and decided to proceed with the hearing, using the claim form as the claimant's witness statement.
11. In reaching my decision I have considered the following factors:
  1. The magnitude of the non-compliance;
  2. The fact that it is solely the claimant's fault;
  3. The lack of excuse by the claimant;
  4. What disruption, unfairness or prejudice has been caused;
  5. Whether a fair hearing would still be possible, and
  6. Whether striking out or some lesser remedy would be an appropriate response to the disobedience – ***Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371***.
12. The claimant attended the hearing today and wished to proceed. The respondent was prepared and in a position to go ahead. There was a bundle of documents and witness statements for the respondent. The respondent is legally represented. The claim includes a complaint of unfair dismissal in which the burden of proving a potentially fair reason for dismissal lies on the respondent.
13. A fair trial is, in my view, still possible today and some lesser remedy (namely going ahead with the hearing and taking the Claim Form as the claimant's witness statement) is appropriate. It is proportionate to hear the case based on the respondent's evidence and the Claim Form.

## The issues

14. The issues that fell to be determined at this hearing were the following:

### Unfair dismissal

1. What was the reason or principal reason for the dismissal? The respondent says the reason was conduct.
2. If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
  - i. there were reasonable grounds for that belief;

- ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
- iii. the respondent otherwise acted in a procedurally fair manner;
- iv. dismissal was within the range of reasonable responses.

Holiday pay

3. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when his employment ended?

Unauthorised deductions from wages

4. Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted?

## Findings of fact

15. The claimant was employed by the respondent as a Warehouse Picker and Counter Operative in its warehouse in Brighthouse. His continuous employment began on 22 October 1990. For the last 15 years of his employment the claimant reported to the Warehouse Manager, Neil Smith.
16. There are 18 employees in the business where the claimant worked and no dedicated HR function. The respondent is part of a larger group which has one dedicated HR professional.
17. On 24 April 2019 the claimant was provided with a written statement of employment particulars which contained the following relevant terms :

*“Please note that you MUST contact your line manager directly by telephone and inform them of your absence, and the period of time you envisage being absent, by your usual start time on your first day of absence....*

*Full details relating to the Sickness Absence Policy are set out in the Employee Handbook. A Copy of the Handbook can be found in the Company Office.....*

***Disciplinary Procedure:*** *The Company's Disciplinary Procedure, Code of Conduct and Standards are set out in the Employee Handbook and in the Disciplinary Policy and Procedure, both of which are available from your manager. You are strongly advised to familiarise yourself with them....*

***Appeals Procedure:*** *if you are dissatisfied with any disciplinary decision taken in respect of you, you may appeal to the Company Director. Further details of the appeal procedure are set out in the Disciplinary Procedure section of the Staff Handbook.”*

18. The respondent also has an Employee Handbook which contains the following

relevant provisions:

***“Rules and Regulations***

*....Failure to abide by any of the Rules and Regulations may result in disciplinary action being taken against you, which could include dismissal....*

***Sick leave***

*If you are unable to attend work because of your sickness or injury you must telephone your manager directly at your work location no later than your usual starting time....*

*If your absence lasts for seven calendar days or less you will need to complete a self-certification form.*

*If your absence exceeds, or is likely to exceed, one calendar week....you must consult your doctor and obtain a medical statement....This must be sent by post or delivered to your manager at the earliest opportunity....*

***Disciplinary, capability and grievance procedures***

*....Conduct issues may be deemed to be so serious that they may result in instant dismissal (Gross Misconduct)....*

***Sickness absence policy and procedure***

*....*

***Notification and certification***

*If the employee is unable to attend, he or she must notify their manager by their usual start time on the first day of absence....*

*If the employee does not follow this procedure, they may be dealt with under the organisation’s disciplinary procedure....”*

19. The disciplinary policy includes, in its examples of misconduct, ‘refusal to comply with a reasonable management request’ and attendance related misconduct, for example, unauthorised leave of absence and failure to follow the correct absence reporting procedure.
20. It includes in the list of examples of gross misconduct, serious breach of or failure to comply with company policies and procedures including repeated non adherence to company absence procedure, and repeated failures to follow reasonable management requests. Can go in at any stage.
21. The claimant suffers from Addison’s Disease, and one of the symptoms of that illness is fatigue. During the course of his employment the claimant was intermittently

absent from work and did not always communicate immediately with the respondent about his absence. These absences were however short term, normally lasting only one day, and Neil Smith decided not to escalate them into disciplinary action because he was aware of the claimant's health condition.

22. So, for example, on 11 October 2022 the claimant did not attend work. Neil Smith sent a text message to the claimant, and the claimant replied later that day indicating that he was not well enough to come to work.
23. On the occasions prior to January 2023 that the claimant was absent from work he responded to contact made by the respondent and returned to work within a day or two. In September 2022 the claimant was off work for three weeks but submitted a doctor's note certifying his absence. The claimant was therefore aware of the need to contact the respondent when he was unable to work due to ill health, and of the need to submit fit notes for absences lasting more than seven days.
24. On Friday 13 January 2023 the claimant did not attend work. Mr Smith sent him a text message at 8 am asking if he would be in work that day. In response to that message the claimant telephoned Mr Smith to say that he was not fit for work due to tiredness. Mr Smith told him to come back into work on Monday 16 January, which the claimant did. When the claimant returned to work Mr Smith reminded him that he had to contact Mr Smith if he was absent through ill health.
25. The claimant worked as normal on 16 and 17 January 2023. He did not turn up for work on 18 January or on any subsequent days until his employment was terminated on 14 February. Throughout this period of time the claimant did not contact the respondent at all and did not respond to attempts made by the respondent to contact him.
26. Mr Smith sent text messages to the claimant at 8 am, 9 am and 10 am on 18 January but received no response. He also sent an email to the claimant enquiring as to his whereabouts and wellbeing. He received no response.
27. The following day, 19 January, Mr Smith sent a further text message to the claimant saying that he was worried about him and asking him to make contact. He also sent a further email to the claimant.
28. The claimant still did not respond, so later on 19 January Mr Smith contacted the claimant's brother who he knew socially. The claimant's brother was unable to tell Mr Smith where the claimant was.
29. On 20 January, as the claimant still had not turned up for work or been in contact, Mr Smith texted him again explaining that he was considering visiting his mother to enquire about his whereabouts. He then contacted the claimant's brother again, and the brother agreed to speak to his mother to try and find out where the claimant was.
30. The claimant remained off work the following week (the week beginning 23 January) and did not get in touch. This put the team that he worked in under pressure as they

had to cover his work. The claimant worked in a team of 7, so the remaining 6 members of the team had to do additional work. As a result of not knowing when the claimant would be back in work, Mr Smith was not able to arrange cover or plan the work.

31. By 30 January 2023 the claimant was still off work and had not got in contact. Mr Smith contacted the claimant's brother again and spoke to him by telephone. The claimant's brother told Mr Smith that he had managed to speak to his mother who had told him that the claimant was OK, that he was not seriously unwell and that he was 'resting' from work. Mr Smith told the Managing Director Mr Garwood of this, and it was agreed that the respondent would write to the claimant asking him to get in contact as soon as possible.
32. On 31 January 2023 Chris Garwood wrote to the claimant asking him to contact him urgently by the 6th of February to explain his absence from work and let the respondent know his expected date of return to work. Mr Garwood explained in the letter that the respondent viewed the claimant's absence as unauthorised, unpaid and in contravention of the company's absence reporting procedures. He also set out that unauthorised absence without good cause was considered to be gross misconduct which could result in disciplinary action including summary dismissal. The claimant was asked to provide medical evidence if the reason for his absence was ill health. The claimant did not respond to that letter.
33. On 13 February 2023 at 9.06 am Neil Smith sent an email to the claimant attaching a letter inviting him to a disciplinary hearing the following day at 11 am. The letter explained that the claimant had been absent from work since 18 January without any indication as to why he was absent, and without responding to the respondent's attempts to contact him.
34. The letter warned the claimant that a possible outcome of the meeting could be the termination of the claimant's employment and stated that the claimant had the right to be accompanied by a colleague. It finished by stating that:  
  
*"...if you fail to attend this meeting, or do not make telephone contact to explain why you cannot attend, I will have no alternative but to consider the above in your absence. This will include making a decision on any disciplinary action, up to and including dismissal, to be taken against you...."*
35. The claimant accepted in his evidence to the Tribunal that he had received both of these letters. He did not however get in contact with the respondent, reply to either letter or attend the disciplinary hearing. He did not ask for a postponement of the disciplinary hearing or provide any explanation for his absence. He still has not done so.
36. Mr Garwood therefore went ahead with the hearing in the claimant's absence. He decided to dismiss the claimant for unauthorised absence. He sent a letter to the claimant on 14 February 2023 dismissing him with immediate effect. In the letter he wrote:

*“This letter is to inform you of our decision to terminate your contract with Bapp Industrial Supplies (Huddersfield) Limited with immediate effect (14<sup>th</sup> February 2023).*

*The reason for this dismissal is you have been AWOL from the business since the 18<sup>th</sup> January 2023, despite many attempts to contact yourself by Recorded Letter, Telephone & email we have been unsuccessful....*

*Please do not attend Bapp Brighouse for any reason following this letter....”*

37. The decision to dismiss the claimant was not one that Mr Garwood took lightly. He considered the claimant’s length of service with the business but concluded that notwithstanding this, dismissal was the appropriate sanction. By this stage the claimant had been absent without authorisation for almost four weeks.
38. The claimant was not expressly offered the right to appeal against the decision to dismiss him, although that right was contained in the employee handbook and in his contract of employment so the claimant was, or ought to have been, aware of it.
39. The claimant suggested in evidence that if he had been offered the right of appeal he would have exercised it. I find his evidence on this point incredible. The claimant has made no effort to contact the respondent at all since 17 January 2023.
40. Mr Garwood’s evidence, which I accept, was that the claimant had the right of appeal and that the appeal would have been heard by the chairman of the company, who is more senior than Mr Garwood. Mr Garwood omitted to refer to this in the dismissal letter. This was a genuine error on his part.
41. There was no evidence before me of any unpaid wages or any outstanding holiday pay due to the claimant.

## **The Law**

42. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.
43. Section 98(1) provides that: *“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”*
44. Section 98(2) states that *“A reason falls within this subsection if it .... (b) relates to the conduct of the employee....”*



45. The burden of establishing a fair reason for dismissal lies with the respondent. The reason for dismissal is the factor or factors operating on the mind of the decision maker which causes them to make the decision to dismiss (**Croydon Health Services NHS Trust v Beatt [2017] ICR 420**).
46. Conduct does not have to be culpable, blameworthy or reprehensible in order to amount to a fair reason for dismissal, although this can be a factor when deciding the fairness of the dismissal (**Jury v ECC Quarries Ltd [1980] WLUK 116** and **JP Morgan Securities Plc v Ktorza [2017] 5 WLUK 237**). In the latter case the EAT held that the Tribunal was wrong to find that in order for an employee to be fairly dismissed for conduct that conduct had to be culpable, and that sections 98(1) and (2) of the ERA did not require that an employee was aware that their employer would not approve of their behaviour.
47. Misconduct can be either deliberate or inadvertent (**Philander v Leonard Cheshire Disability [2018] 11 WLUK 4**) and can include gross negligence as well as deliberate wrongdoing, even where the behaviour is neither blameworthy nor wilful. In **Burdis v Dorset County Council [2018] 8 WLUK 322** the EAT upheld the findings of an Employment Tribunal that misconduct may encompass serious neglect, omission or carelessness. That case involved the dismissal of a director for failing to put in place rigorous financial management systems and the EAT accepted that the Tribunal was entitled to conclude that the reason for dismissal was conduct rather than capability or some other substantial reason.
48. Section 98(4) states as follows:
- “Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
- (a) Depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
- (b) Shall be determined in accordance with equity and the substantial merits of the case. “*
49. Where conduct is established as the reason for dismissal, the starting point for the Tribunal when considering whether the dismissal was fair is the test in **British Home Stores Ltd v Burchell [1980] ICR 303**, namely:
1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct?
  2. Did the respondent have reasonable grounds for holding that belief; and
  3. At the time it formed that belief, had it carried out as much investigation as was reasonable ?

50. One of the considerations under section 98(4) is whether dismissal was within the range of reasonable responses, i.e. was it an option that a reasonable employer could have adopted in all the circumstances. The Tribunal must not substitute its view of the appropriate disciplinary sanction for that of the employer (*Iceland Frozen Foods v Jones [1983] ICR 17*). The range of reasonable responses test is not a perversity test, and it applies also to the procedure followed by the respondent including the investigation (*Sainsbury's Stores Ltd v Hitt [2003] IRLR 23*)

#### Holiday pay

51.

### **Conclusions**

#### Unfair dismissal

52. I am satisfied, on the evidence before me, that the claimant was dismissed by reason of gross misconduct. Specifically, that he was absent without leave for a period of almost four weeks, during which time he repeatedly failed to respond to attempts made by the respondent to contact him. No alternative reason for dismissal was advanced by the claimant and there was no evidence to suggest an alternative reason.

53. The respondent has therefore discharged the burden of proving that the dismissal was by reason of conduct, which is a potentially fair reason for dismissal falling within section 98(2) of the Employment Rights Act 1996.

54. I have then gone on to consider the *Burchell* tests.

55. The first of these is whether, at the time it decided to dismiss the claimant, the respondent genuinely believed that the claimant was guilty of misconduct. I accept the evidence of Mr Garwood, which was corroborated by Mr Smith, that he genuinely believed the claimant to be guilty of misconduct.

56. The second question is whether, at the time it formed its opinion on the claimant's guilt, the respondent had reasonable grounds for concluding that he was guilty of misconduct. I find that it did. There are no disputed facts in this case. The claimant was absent from work for a number of weeks without informing the respondent and did not respond to numerous attempts to contact him. The respondent's disciplinary policy makes clear that this is potentially gross misconduct.

57. The last of the *Burchell* tests is whether the respondent carried out as much investigation as was reasonable in the circumstances. The claimant has not suggested any further investigation, and it is difficult to see what investigation was required. The facts in this case were not in dispute. The respondent made repeated attempts to contact the claimant to find out why he was absent and spoke to his brother when it could not contact the claimant. The claimant was invited to a meeting

to explain his absence and his lack of communication but failed to attend that meeting.

58. The respondent has, therefore satisfied the *Burchell* tests.

59. When considering the procedure followed by the respondent in dismissing the claimant, I have taken account of fact that this was a small employer with limited administrative resources and no dedicated HR function. I have also taken account of the ACAS Code of Practice on Disciplinary and Grievance Procedures which states that employers must:

1. Raise and deal with issues promptly and without unreasonable delay;
2. Act consistently;
3. Carry out any necessary investigations to establish the facts;
4. Inform employees of the basis of the problem and give them an opportunity to put their case in response;
5. Allow employees to be accompanied; and
6. Allow an appeal.

60. The respondent has in my view complied with the ACAS Code. The respondent acted promptly, carried out as much investigation as was necessary in the circumstances, wrote to the claimant to tell him of the disciplinary matters, and invited him to a meeting at which he would have had the opportunity to put his case. The claimant was offered the right to be accompanied at this meeting. The claimant was warned in advance of the meeting that dismissal was a potential outcome. He chose not to attend the meeting or to communicate with the respondent at all.

61. There is no requirement in the ACAS Code to expressly inform the claimant of the right of appeal, although this is certainly preferable. The respondent did make the claimant generally aware of the right of appeal through his contract of employment and the employee handbook. The failure to refer to it in the letter of dismissal was an unfortunate omission but in the circumstances does not render the dismissal unfair.

62. Looking at the procedure as a whole I am satisfied that it was a reasonable one.

63. The final question I have considered in relation to the unfair dismissal claim was whether dismissal was within the range of reasonable responses. I have reminded myself that in deciding this issue I must not substitute my view of the appropriate sanction for the employer to take, but rather I must consider whether the view taken by this respondent was within the range of sanctions available to a reasonable employer.

64. The claimant was a long serving employee but knew the respondent's absence

reporting procedures and failed to comply with them. He had been reminded of them by Mr Smith just 2 days before he went off sick on 18 January, and yet despite this he was off for almost four weeks without contacting the respondent at all.

65. The respondent's disciplinary policy makes clear that this type of behaviour can be gross misconduct.

66. The claimant's suggestion, which was made for the very first time in his closing submissions at the end of the hearing, that he did not receive any calls or text messages from the respondent because he had changed his telephone number was not credible. In any event, the respondent had also taken steps to contact the claimant in writing, by sending emails and letters.

67. For these reasons it cannot be said that dismissal fell out with the range of reasonable responses. The dismissal of the claimant was a fair dismissal.

Holiday pay

68. The claimant has not adduced any evidence whatsoever in support of his claim for holiday pay. He made no submissions in relation to this part of his claim and has not even told the Tribunal how much holiday pay he claims to be entitled to. The burden of proof in relation to this claim rests with him.

69. This claim therefore fails and is dismissed.

Arrears of pay

70. Similarly, the claimant has not adduced any evidence whatsoever in support of his claim for arrears of pay. He made no submissions in relation to this claim and has not even told the Tribunal how much he claims to be entitled to by way of arrears of pay. The burden of proof rests with him in relation to this claim and he has not discharged that burden.

71. This claim therefore fails and is dismissed.

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Employment Judge Ayre

Date: 26 February 2024  
FOR THE TRIBUNAL OFFICE

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### **Recording and Transcription**

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>