Case Number: 2223944/2024

EMPLOYMENT TRIBUNALS

Claimant: David Kawooya

Respondent: Yarrow Housing Limited

Heard at: London Central **On:** 12 and 13 December 2024

Before: Employment Judge Bunting

Appearances

For the Claimant: In person
For the Respondent: Ms J Laxton (counsel)

JUDGMENT

The Judgment of the Tribunal is that :

1. The Claimant's claim for unfair dismissal is not well founded and is therefore dismissed.

2. The Claimant's claim for unpaid holiday pay is withdrawn and is dismissed.

3. The Claimant's claim for unpaid notice pay is withdrawn and is dismissed.

REASONS

INTRODUCTION

1. By a claim form received by the Employment Tribunal on 08 August 2024, the Claimant brings a claim for unfair dismissal, failure to pay notice pay and unlawful deduction of holiday pay.

2. On 12 and 13 December 2024 I heard the claimant's claim. On 13 December 2024 I gave judgment finding for the respondent, with reasons given orally at that point.

3. Subsequently, on 01 January 2025, the claimant requested written reasons in accordance with r60(4)(b). These are set out below.

4. The date of dismissal is 18 March 2024. Early Conciliation stated on 10 June 2024 and the ACAS certificate was issued on 15 July 2024.

FACTUAL BACKGROUND

5. In brief, the claimant states that there is a procedure for booking annual leave through a computerized system (QUINYX). The claimant states that he booked two period of annual leave as follows:

    5.1. 27 July 2023 – 16 August 2023
    5.2. 28 December 2023 – 14 January 2024

6. His case is that these were approved online (the company uses an online 'app') and, as a result, he did not attend work on those dates, taking what he states was authorised leave. However, the respondent tampered with the date and deleted the relevant authorisation which left it looking like this was not authorised.

7. Following him taking these periods of leave, the respondent initiated (on both occasions) disciplinary proceedings against him.

8. On the first occasion, there was a disciplinary hearing on 09 November 2023. At that, the claimant told the respondent that he had booked annual leave over the New Year period. He states that this was acknowledged by them.

9. However, again, the respondent tampered with this and removed the authorization for the leave at the beginning of January 2024. Following that, there was a further disciplinary hearing on 08 March 2024. This led to his dismissal ten days later.

10. The claimant also stated that the respondent shared his personal data with third parties, although this was not articulated, and was not pursued at the hearing to any extent.

11. Whilst the boxes for holiday pay and notice pay were ticked, there are no details of this given in the box at 8.2.

12. In discussions at the start of the hearing it was confirmed that the claimant's actual complaint was the dismissal, and the losses that flowed from that, and he was not seeking to pursue those claims which were dismissed on withdrawal, so I need say no more about them.

13. In a response that was attached to the ET3 (dated 09 September 2024), the Respondent disputed the date when the claimant started work for them (stating that it was 23 June 2007, rather than 01 March 2008. It is not suggested that this would make any material difference, and it is not necessary to resolve this. It is clear that the claimant has well in excess of the two year minimum period for an unfair dismissal claim.

14. In relation to the substance of the claim, the respondent agreed that the process was as described by the claimant. The respondent agrees that the claimant got a written warning on 17 November 2023 for being absent without authority between 01 and 21 August 2023. That was not appealed.

15. It is said that the claimant failed to attend work between 01 and 15 January 2024 and could not be contacted until 09 January 2024 when a colleague managed to get in touch with him. At that point he said that he was on annual leave, which had been approved by Mr Brathwaite.

16. There then followed a number of investigation meetings. During this, the claimant's position was that he had submitted a request, which had been approved in the proper way in the 'app'.

17. This was not accepted by the respondent and, as a result, a disciplinary hearing was held on 08 March 2024. The notes for this hearing was included in the hearing bundle.

18. The conclusion reached was that the claimant was guilty of gross misconduct by failing to follow the correct procedure for booking holiday, and thereafter being effectively absent with leave.

19. As a result, the respondent denied that the claimant was entitled to notice pay given his dismissal was for gross misconduct.

PROCEDURAL HISTORY

20. As noted, the ET3 was dated 09 September 2024. However, the Notice of Hearing for today's Final Hearing was sent on 13 August 2024. This contained the usual instructions to the claimant.

21. Included in this there were the following orders:

    21.1. Schedule of loss –– 27 August 2024 (2 weeks after the notice)
    21.2. Disclosure of documents – 31 October 2024 (6 weeks before the hearing)
    21.3. Agreed bundle – 14 November 2024
    21.4. Witness statements – 28 November 2024
    21.5. Certificate of readiness – 06 December 2024

22. It is fair to say that the claimant did not comply with any of these, at least until the beginning of December 2024.

23. On 28 November 2024 the respondent applied to Strike Out the claim for non-compliance on the basis that there had not been any response.

24. On 04 December 2024 the claimant wrote in asking for a postponement of the hearing. The reason being to :

> "Give more time to the respondent to provide me with electronic evidence crucial to my case which they have continually refused to."

25. Following that, the Tribunal sent the claimant a letter on 06 December 2024 containing a 'Strike Out Warning' on the basis of non-compliance with the Order of 13 August 2024 and that it did not appear that the claim was being actively pursued.

26. The respondent responded to the postponement request opposing it, pointing out that there had been no engagement to date from the claimant prior to then.

27. The claimant replied to that on 09 December 2024 opposing the strike out application and saying that he has 'more accurate electronic data' that he could provide by 11 December 2024.

28. EJ Webster considered the correspondence on 10 December 2024 and concluded that the question of non-compliance with orders, and the postponement application, should be addressed at the hearing starting on 12 December 2024.

29. At the start of the hearing the claimant stated that he had now served the evidence that he wished to rely on, along with a statement, the day before the hearing (11 December 2024) at 4.30pm.

30. This was screenshots that he had taken that purport to show that his annual leave in January 2024 had been booked by him and approved in the app.

31. I should say that that is the mechanism whereby employees will arrange their holiday bookings. They log in to an online platform and submit a request for a number of days on there. It will then show as pending until it is approved or, as the case may be, not approved.

32. The respondent stressed the importance of this, and the fact that as they cater for vulnerable service users it is important that leave is organized.

33. In addition, the leave policy (page 54) states an employee should not assume that just because a request is made it is authorized.

34. Ms Laxton opposed the admission of the material given its late service. I had sympathy with that, but it seemed to me fair to admit it, or rather, it would be unfair to shut it out completely, but the lack of ability to challenge it is something that goes to the weight to be attached to it.

35. I did give her overnight at the end of the first day to take instructions in relation to this as well as, if needed, call further evidence. This led to a further two page document setting out details of the rotas being provided.

36. At the start of the hearing on 12 December 2024 the claimant confirmed that he was not pursuing an application for an adjournment, and wished for the hearing to proceed. However, during the morning of 13 December 2024 the claimant made an application to adjourn for two reasons.

37. This was, firstly, to get a lawyer to assist him in preparing his claim and, secondly, to get a computer expert to analyse the data. I refused both applications for reasons given at the time.

38. In brief, I had regard to the overriding objective and concluded that it would not be in the interests to adjourn at that point, especially as this was after the evidence had been heard.

39. The claimant had had a number of months to obtain legal representation, as well as to obtain an expert report, but had not done so. In addition, he had breached a number of the directions in the lead up to the hearing with no good reason.

40. Further, he had confirmed on the morning of the first day of the hearing that he was not seeking an adjournment. In those circumstances it was simply far too late to adjourn the case part-heard for many months.

41. An additional factor is that I am not conducting an appeal against the decision of the respondent to dismiss the claimant. In those circumstances, I am considering the material that was before the respondent at the time of the decision. In those circumstances, if the claimant could obtain evidence that something had gone wrong with the computer system and that he had, in fact, made the booking, then that would not be determinative of the case.

EVIDENCE

42. In coming to my decision, I had the following evidence :

    a) The oral evidence of Derek Braithwaite and Izabela Nowak on behalf of the Respondent
    b) The oral evidence of the Claimant
    c) Witness statements from the Claimant, and Derek Braithwaite and Izabela Nowak on behalf of the respondent
    d) An agreed bundle of documents of 126 pages
    e) The claimant's supplementary bundle of 22 pages
    f) A 2 page document containing a (redacted) rota list that was provided on the morning of 13 December 2024

43. Ms Laxton provided oral submissions after the evidence on behalf of the Respondents.

44. At that point we broke for a short period to allow claimant to prepare his submissions which he then gave orally.

THE LAW

Unfair Dismissal

45. Any employee (such as this Claimant) who has accrued the relevant period of employment (two years in this case) has the right under s94 Employment Rights Act 1996 ('ERA') not to be unfairly dismissed. Section 95 ERA states:

> **95 Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),

46. There is no dispute in this case that he was dismissed. At that point we move to s98 to determine whether the dismissal was fair.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

(b) that it is either a reason falling within 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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

47. The approach to fairness that the Tribunal should follow is set out in **British Home Stores v Burchell [1980] ICR 303** (although since that case was decided the burden on the employer to show fairness has been removed).

48. The Tribunal should also (where relevant) have reference to the ACAS Code of Practice on Discipline and Grievance Procedures 2015, and take account of the whole process including any appeal: **Taylor v OCS Group Ltd [2006] IRLR 613**.

49. Applying ***Burchell***, as well as **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**, the questions for me are :

(a) Did the respondent genuinely believe that the claimant was guilty of misconduct?

(b) Was this belief based on reasonable grounds?

In assessing this I consider the information available to the respondent at the time of the dismissal (and any appeal).

(c) Did the respondent carry out a reasonable investigation into the alleged misconduct?

In assessing this I have regard to all the factors including the nature of the allegations and the size and resources of the respondent.

(d) Did the respondent follow a reasonably fair procedure?

(e) Was the decision to dismiss with the 'band of reasonable responses'?

50. It is an important consequence of the above test that I am not carrying out an appeal against the dismissal. Nor am I conducting an open ended review of the decision. I am considering the material that was before the decision maker (here Ms Novak), at the time.

51. It follows from this that the fact that a different employer (or different person employed by the respondent) would have come to a different decision does not mean that the claimant should succeed (unless the decision of Ms Novak was an unreasonable one, as in being outside the range of reasonable responses).

52. In addition, the fact that had I been conducting the disciplinary hearing myself I would have come to a particular outcome is not (if it were the case) relevant to the decision I have to make.

FINDINGS OF FACT

53. I heard from three witnesses. I remind myself that it is often difficult to assess credibility by demeanour alone (including the way that someone gave their evidence), and that this is especially the case when conducted over a videolink.

54. In particular, there is no 'sign', or manner of giving evidence that indicates that a witness is being truthful. In those circumstances it is necessary to look at all the evidence as a whole, including whether a person's evidence is internally consistent, and whether it is consistent with the written and other evidence.

55. It seems to me that there was nothing from the respondent's two witnesses to indicate that they were evidence to indicate that they were anything other than honest witnesses.

56. In relation to the claimant, again, with one exception, it seems to me that there was nothing to indicate that he was setting out to be untruthful.

57. The exception was when the claimant was cross-examined by Ms Laxton as to whether he had taken screenshots of the app and, if so, how they came about. It is fair to say that he did have some difficulty in explaining where the screenshots had been and how he obtained them, as well as why he was unable to provide them to Ms Nowak in the disciplinary hearing

58. However, I do not consider that he was setting out to be untruthful. Rather, he seemed to be an honest witness who was convinced of his case, and he was someone that genuinely believed (rightly or wrongly) that he had been wronged.

59. In relation to Ms Novak and Mr Brathwaite, I also consider that they were both trying to assist the Tribunal.

60. The claimant made some strong allegations against them that they were both involved in a conspiracy to delete data or fabricate evidence. I saw no evidence of that at all, and reject those accusations in their entirety. There is simply nothing to suggest that anything like that has happened.

61. It would have required a high level of technical skill, as well as involving a very high level of risk given the number of people that had access to the rotas. It seems to me that the suggestion of fabrication is so implausible that I can reject it.

62. The first question I shall consider, although it may not be strictly necessary, is what did happen with the booking system, and the screenshots that he has taken. I will not go through them here in detail, they are in the papers if they need to be seen at a later stage.

63. It is still unclear how they came about. The respondent agrees that they look the way that would likely look if they were genuine, although they are unable to say at this point whether they are genuine or not.

64. It appears that they show that there were a few screenshots taken at one point that showed that a leave application was pending. Then, at another point in time (this can be seen as the timings on the screenshot is different, as is the amount of charge on the phone), it is showing as approved.

65. However, there is nothing beyond that. They are undated, and there is no meta data to say when they were taken or how they came about. This is unsatisfactory, and they do not prove themselves.

66. It is also unclear why they were not produced before. The reason for the claimant to take them was, presumably, to use if there was a dispute. It is therefore surprising that they were not produced at the disciplinary hearing.

67. The claimant's account is that they were very recently found on an external drive which he could not remember the password for. However, that would not have precluded him from stating this to the respondent during the disciplinary hearing.

68. A further reason to be concerned it that given at the time of the disciplinary hearing he would have had access to the app, it is also unclear why he didn't simply show it to Ms Novak in meeting.

69. In any event, I need to consider the situation as it was as the start of January 2024, up until the dismissal on 18 March 2025. In relation to that I start with the question of whether the respondent had a genuine belief that the claimant was committing misconduct.

70. I consider that the evidence clearly shows that the respondent was unaware that the claimant was on annual leave (if, indeed, he was). This can be seen by the fact that not only were they trying to contact him during this period, on 9 January 2024 they were sufficiently concerned (see page 86) to contact the police and ask them to conduct welfare checks on the claimant.

71. That seems to me to be clearly inconsistent with the claimant's case, and with his assertion that the respondent was aware that he was on annual leave. I consider that it is completely implausible that the respondent would have contacted the police without checking their own records to see if he was on holiday, or whether there was any message from him.

72. Further, there is no evidence of any 'handover' from the claimant, or other contact to colleagues (even to wish them a happy New Year, or otherwise remind them that he would be away), prior to going on what would be a substantial period of leave. If he had done, then when the respondent was trying to contact him, one of his colleagues could have raised the fact that he had gone on leave.

73. In those circumstances, I find that Ms Novak, and the respondent, genuinely believed that the claimant's absence was unauthorised.

74. In considering the disciplinary hearing, there was nothing provided there by the claimant to suggest that the respondent's belief was not a genuine one.

75. Further, in the previous disciplinary hearing (see page 74 of the bundle) the claimant stated that he had a screenshot of his annual leave booking, although this was not produced. He said in evidence that he realised that having a screenshot was useful. However, in the March hearing (see page 95) there is the following exchange

> *TG - Do you have anything to back this up? In your last hearing, if you look at the attached minutes, you mentioned that in hindsight you should have taken a screenshot. Would it not have been wise in this situation to take a screenshot given your mistrust of the system and what had happened barely a month or two earlier?*
>
> *DK Is that the advise from HR because you should have told us that we should take a screenshot.*
>
> *TG This is not advice. This is me asking based on what you have mentioned in the past?*
>
> *DK If I am not on a phone that can take screenshots, how would I have been able to take a screenshot? I have an idea of what mode of cloud computing that this can do. As an end user, I have limitations in terms of what I can do.*

76. Here, the claimant does not say that he, in fact, had screenshots, and produced them. Or, even if he did not have access to the screenshots, he could have said that, but could have shown his phone.

77. If, as he said, there was evidence of the booking then this would have been strong evidence that would inevitably caused the respondent to pause the proceedings and review the position.

78. However, there was no evidence at all of a computer glitch, or anything like that. The claimant was asked (again, at page 95):

> *TG If I understand you correctly, you are saying that you checked your approved leave and you actually saw that it had been approved from the 28th of December to the 14th of January?*
>
> *DK Yes*

79. It is very surprising that he did not say at that point that he had taken screenshots but they were on a device that he could not, at that point at least, access.

80. For the above reasons, it seems clear to me that the respondent had a genuine belief that the claimant had 'gone absent without leave'.

81. It is then necessary to consider whether that belief was a reasonable one, and whether there was a reasonable investigation carried out.

82. There was a full investigation, followed by a disciplinary hearing which is not criticised. I accept that Ms Novak approached the investigation, and the disciplinary meeting, with an open mind. It is necessary to ask whether computer systems can go wrong, and it is obvious that that is always a possibility.

83. However, her evidence was that she considered the possibility of an error, but noted that the respondent employed more than a thousand people, and none of them had this issue before.

84. In those circumstances, the respondent was entitled to reject the explanation of this being a computer glitch, especially as this was not supported by any evidence at all, other than the assertion of the claimant. It does seem to me that the respondent was willing to hear and consider the explanation given by the claimant.

85. This can be seen by the fact that she gave the claimant time after the hearing to submit any further evidence, and did not make a decision until after that time had expired. Nothing was submitted by the claimant, whether evidence itself or a request for more time.

86. It seems to me that there was a more than reasonable investigation on the part of the respondent. However, the respondent did not stop at that point, but went on (see page 100) to make enquires of Quniyx to see whether what the claimant was saying could be accurate.

87. The first email there was from 11 March 2024, which was within the time period given by the respondent to the claimant after the disciplinary hearing. I have considered whether this should have been put to the claimant before a decision was made.

88. However, I do not consider that it needed to be in light of the fact that this was not the reason for the decision. This was done as a further check for completeness. Again, I remind myself that the claimant was given a full opportunity to give over any evidence that he had, or say that he needed more time.

89. It is hard to see what else the respondent could reasonably be expected to have done by way of investigation. I accept that the respondent had done more than what was reasonably required of them by way of an investigation.

90. They were faced with a situation where all the evidence was pointing to the fact that the claimant had not had approved annual leave when he was away from work. In those circumstances it seems to me unsurprising, and certainly not unreasonable, to proceed on the basis that the claimant's account was incorrect.

91. From that starting point, dismissal was a reasonable response. The respondent is responsible for a number of vulnerable clients and it is important that people are available to provide cover every day. Whilst that may be the case in most business, I agree that the situation is more acute for the respondent.

92. This is made clear in the disciplinary policy (page 51 of the bundle) that gives examples of what may amount to gross misconduct. I note that this does not include being absent without leave unless, perhaps, it was under the heading of 'neglecting people we support' or 'compromising the fundamental standards of the Health and Social Care Act 2008'.

93. I do accept that these are just examples, and everything has to be judged on its own merits. The high point of the claimant's case would be that being absent without leave would fall under the hearing of 'misconduct' rather than 'gross misconduct'.

94. However, when considering the 'Time Away From Work' policy (page 53 of the bundle), paragraph 18 (page 63), which is headed 'Unauthorised Absence', draws a distinction between an unauthorised absence which is akin to fraud, which would be gross misconduct, and other kinds of unauthorised absences which may not be.

95. Again, this does not apply as would a piece of legislation, and it needs to be read against that backdrop. However, this is the broad policy under which the respondent will conduct its business.

96. I shall set out the entirety of para 18:

> Any leave taken under false pretences or is unable to be evidenced if required or for any employee to misrepresent the reasons for the absence, is fraud, which will be treated as gross misconduct under Certitude's Disciplinary Policy and Procedure.
>
> It will be regarded as a disciplinary offence if an employee fails to follow the procedures set out in this policy. Unauthorised absence from work is a serious offence and may lead to disciplinary action as well as being deductible from pay.
>
> Unauthorised absence occurs when an employee, for example:
>
> • Absents themselves from the workplace without seeking prior agreement from their manager.
> • Fails to provide notification of absence within the specified time limits with no acceptable mitigating circumstances.
> • Ceases to submit a medical statement for the period and other documentary evidence within the specified time limits with no acceptable mitigating circumstances.
>
> This list is not exhaustive.

97. It seems to me that the fact that the claimant's absence would have left vulnerable clients without support cannot, of itself, be an answer (as that would generally be the case for the respondent's clients).

98. It is not entirely clear what the intention of para 18 is in relation to ‘unable to be evidenced if required’, and whether this relates to the situation where leave that is taken that cannot be shown to be authorised, or something else.

99. However, as stated, I am not conducting an appeal myself. The policy explicitly does not limit the discretion as to what is misconduct, and what is misconduct versus gross misconduct. I am looking at the decision that the respondent made.

100. Ms Novak stated that what was alleged was a serious breach in of itself. In addition she stated that there were two factors that led her to the decision to dismiss.

101. These are firstly the background to the case, in that it followed shortly after the previous incident where it was alleged, and proven but not appealed, that the claimant had gone AWOL. This was in August 2023, which is less than six months prior to the incident that she was considering.

102. Secondly, the disciplinary hearing was in November 2023, which was less than two months before the incident that she was considering. Her view was that this showed that the claimant had not learned anything from the previous incident, and that his actions were wilful, which took the category from misconduct to gross misconduct that merited dismissal.

103. I ask myself whether I could conclude that she was wrong in that. I note that the claimant had a lengthy history of employment with the respondent, but what appeared to have happened had happened twice in six months, in circumstances where the respondent concluded that his action ‘drove a coach and horses’ through the leave policy and deliberately absented himself without permission.

104. In addition, this was not a case of missing a day, or perhaps two days, or work for a particular reason. Instead, the claimant appeared to have gone missing for nearly two weeks.

105. In those circumstances it again seems to me that whilst a different respondent may have taken a more lenient view, I could not conclude that a decision that this was gross misconduct for which dismissal was the appropriate sanction, was not an unreasonable one.

106. Again, it is not a decision that the respondent was bound to make, but it was one that they were entitled to make.

107. I am also satisfied that the procedure adopted was a fair one. It is not suggested that the claimant had not been given fair notice of the hearing, or was not warned that dismissal was a possible outcome of the hearing.

108. In conclusion, and considering the questions set up above, I conclude that the respondent genuinely believed that the claimant was guilty of misconduct, and that that believe was based on reasonable grounds. In addition, I find that the respondent carried out a reasonable investigation in light of all the circumstances of the case.

109. Lastly, I find that the decision to dismiss was within the band of reasonable responses available to it.

Conclusions

110. In light of my findings it follows that I find that the dismissal was lawful, and the claim must be dismissed.

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Employment Judge Bunting

DATE: 17 January 2025

Sent to the parties on:
23 January 2025
…….
For the Tribunal: