EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001846/2024

Held in Glasgow on 7& 8 April 2025

Employment Judge Doherty

Mr A Rodden	**Claimant** **In Person**
Mitie Limited	**Respondent** **Represented by,** **Mr Bradley,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the tribunal is that the claim is dismissed.

REASONS

1. This was a hearing over 2 days to consider the claimant's complaint of unfair dismissal. The claimant represented himself and the respondents were represented by Mr Bradley, Council.

2. It emerged from discussions at the beginning of the hearing that there are significant issues around the quantification of the claim, and therefore it was agreed that the hearing would deal only with the merits of the claim and if the claim succeeds a separate hearing will be fixed to deal with remedy.

3. The issues in the case are whether the claimant was dismissed for a fair reason, and whether dismissal for that reason was fair in terms of section 94 of the Employment Rights Act 1996 (the ERA).

4. The claimant attacks the fairness of the dismissal in his ET1 on the basis that the respondent's invitation to the disciplinary hearing was sent to him at on old e-mail address, which he no longer used, after that he had advised the respondents of his new email address. It is also said that he was called to attend a disciplinary hearing on a date when he was on pre-authorised annual leave

5. As a preliminary matter it was confirmed that there is no issue as to the identity of the claimant's employer, which is Mitie Ltd.

The Hearing

6. For the respondent's evidence was given by Mr Stephen Kerr, the claimant's line manager and the dismissing officer. The claimant gave evidence on his own behalf.

7. A joint bundle of documents was produced by the respondents, however the claimant also produced a supplementary bundle of documents.

Findings in Fact

The respondents

8. The respondents are a large facilities management company operating throughout the UK. The services they provide include security services to

customers including HMRC and Network Rail. The respondents have obligations to meet KPI's in terms of the provision of security services. One of the KPI's is that they provide 100% cover in terms of security services. Failure to meet this KPI result in a financial penalty. It is therefore important to the respondents that their security officers attend work when they are scheduled to do so.

9. The respondents have a number of HR policies and procedures in place for the management of staff. These include an AWOL (absent without leave) Procedure and a Disciplinary Procedure.

10. The AWOL Procedure applies to all of the respondents' employees. It provides that if an employee does not come to work and does not tell their manager and or provide a legitimate reason for their absence, then it will be treated as unauthorised absence and be unpaid. It provides that anyone whose absence is regarded as unauthorised will be subjected to Disciplinary Procedure.

11. The AWOL policy provides for "*the process for informing my manager if I'm unable to come to work?*" It states;

"*You should contact your manager by phone on the first day of absence at least one hour before your start time to explain why you can't come in.*"

12. Under the heading "*What will happen If I don't contact my Manager*" the policy states;

"*Your manager will attempt to contact you from the first day of your unauthorised absence. This may include calling your emergency contact number if your manager believes that is cause for concern.*
*If you continue to be absent for three working days without making contact, a letter will be sent to your home address asking you to call your manager. Your manager might arrange a home visit if they think it's appropriate after discussing with an ER (*HR*) advisor.*
If you still haven't made contact by the 6th working day of your absence, then you'll be invited to a disciplinary hearing in line with the disciplinary procedure. If you do not attend, then the hearing may go ahead in your absence.

You should be aware that all unauthorised absence is unpaid. Prolonged unauthorised absence is defined as six or more working days and is considered to be gross misconduct and it may result in summary dismissal. This means you might be dismissed without notice or payment in lieu of notice."

13. The disciplinary policy provides a non-exhaustive list of offences which might be seen as gross misconduct. This includes unauthorised absence or repeated instances of unauthorised absence after prior warning.

The claimant

14. The claimant whose date of birth is the 6th June 1964, commenced working with the respondents on 25 February 2020, as a Security Officer. In this role the claimant worked shifts . Shifts were scheduled on a weekly basis

15. The claimant accessed his personal information and his workplace arrangements through a digital hub, by the name of Workplace plus. E-training was provided to employees by the respondents.

16. It was the claimant's responsibility to complete his personal information on this digital platform, and to update it if it changed.

17. The personal information included the claimant's address, mobile phone number, and e-mail address. The e-mail address provided by the claimant was arthur.rodden@gmail.com. The claimant could easily access this platform. During the course of his employment the claimant's home address changed, and he amended his personal information page of the digital hub to update it with his new address. His e-mail address and his mobile telephone number where never changed.

18. The claimant could access his scheduled shifts via Workplace plus. There was also a phone app which he used to access shifts.

19. The claimant had access to the respondents' employee handbook, and the respondents' policies and procedures including the AWOL policy and the disciplinary policy via Workplace plus.

20. Workplace plus also allowed queries to be sent by an employee to managers via a page called Workplace Queries.

21. Holiday requests were made on Workplace plus. Holiday requests were approved by the line manager and approval was notified via the same platform. If a security officer had approved holiday leave this would be marked on his employee shift calendar. The claimant had requested annual leave for the period from 26 to 31 July 2024 and this had been approved by Mr Kerr.

22. From around 2022 the claimant was covering duties at a Network Rail site in Glasgow. He worked night shift, and his shift pattern was regular. He did not work as part of a Security Team alongside other security officers, although there were generally people on site during his working hours. He received advanced notice of his shifts.

23. The claimant did not attend shifts in August 2023, and his then line manager took advice from HR about commencing an AWOL procedure. The claimant however then got in touch with his line manager, and further action was taken.

24. In November 2023 the claimant failed to attend a scheduled shift on 12 November 2023 and failed to respond to attempt to contact him for two weeks. A letter was sent to him by Mr Kerr under the AWOL procedure on 24/11/23 asking him to get in touch by 27 November. The claimant did get in touch by that date but did not provide a reason for his absence, and a letter was sent to him on the 1st of December 2023 inviting him to a disciplinary hearing. A copy of the disciplinary procedure and the AWOL procedure was included in that letter.

25. The claimant did get in touch in response to advising he could not make the meeting. He subsequently provided self-certification for his absence backdated to 15 November 2023. No further action was taken.

26. The claimant continued to be absent from work due to ill health until the end of April 2024.

27. Mr Kerr held a welfare meeting with the claimant at some point in March 2024. There was a discussion about what would work best for the claimant and the respondents, and due to the claimant's reliability and health issues it was agreed that it would be better if he worked as part of a team of security officers.

28. Prior to the claimant returning to work Mr Kerr met with him on 1 May 2024 to discuss his return to work. It had been Mr Kerr's intention that the claimant would work at HMRC, which has a security team. The claimant however provided him with information which meant that he would be unable to pass the vetting to work at HMRC. This meant that Mr Kerr had to put together shifts for the claimant on a more ad hoc basis and that he was in a position akin to relief officer. It was more difficult for Mr Kerr to schedule shifts in advance for the claimant, as he sometimes had to allocate him shifts at short notice depending on the availability of other officers.

29. The claimant could view his shifts for the following week in his shift calendar.

30. The claimant worked his first shift on 4 May at a Network Rail site and he continued to work at Network rail sites, even although that involved him working unaccompanied. The claimant did not consider that he was allocated enough shifts, and he did not like the fact that shifts were not scheduled with much notice. On 26 May he e-mailed Mr Kerr advising that he was looking for other jobs with the respondents.

31. On the 27th of June the claimant e-mailed Mr Kerr saying that he had a shift in August but none in July and asking him to explain. The claimant e-mailed later that afternoon to say that he would not make his scheduled shift that

day. This was marked on the respondent's shift calendar for the claimant, which shows shifts actually worked, as a Blowout(BL). BL signified that a member of staff had called off work on very short notice or failed to turn up without explanation. The latter was referred to as a *no show*. If a security officer cannot attend at short notice they could contact the Control Room to advise of that.

32. Throughout the period from 4th May up into 7th July the claimant and Mr Kerr corresponded by e-mail about shifts. The e-mail address which the claimant used throughout this was arthur.roddenn@gmail.com.

33. Mr Kerr was aware that the claimant had issues with his mobile phone in making or taking calls, but he understood that the claimant could make or take calls on WhatsApp and message on WhatsApp. The claimant could use WhatsApp to make or take calls or receive or send messages, and in addition to e-mail, he used this means of communicating with the respondents.

34. The claimant e-mailed Mr Kerr on the 7th of July stating that if he was going to only be working on Fridays it was not worth his while. The claimant however worked a shift on 10 July.

35. Mr Kerr sent him a message on WhatsApp on 11 July asking if he was scheduled to work a shift that evening due to a late call off. The claimant did not respond to that.

36. The claimant was scheduled to work on Friday 12 and 13 July at Network Rail. The claimant did not attend his shift on 12 July. He did not contact the Control room or Mr Kerr to say that he was unable to attend. The shift was due to start at 8:00 pm. Mr Kerr received a message from the Control room shortly after 8pm when the shift was due to start to advise him that the claimant was a *no show* for the shift. Mr Kerr attempted to contact the claimant on his mobile phone number but could not get a response and Mr Kerr sent him a message by WhatsApp at 8.49pm asking if he was a going to attend. The claimant did not respond to this.

37. The claimant was removed from the 13th July shift.

38. The claimant was scheduled to work on the Friday 19th and Saturday 20th of July. Mr Kerr sent him a message by WhatsApp on the 17th of July stating that he had not heard from him and asking if he would be attending his shifts on Friday/Saturday (19 /29 July). The claimant did not respond to this message. Mr Kerr tried to phone him again, but could not get through. The control room were also trying to contact the claimant but could not get through on his mobile number.

39. Mr Kerr e-mailed the claimant on the 18th July at 10:45 stating that they were trying to make contact with him to confirm his shifts for this week after he did not attend on Friday. Mr Kerr asked him to confirm his shifts stating that otherwise he would need to look at sourcing cover.

40. Mr Kerr e-mailed the claimant again later that morning stating that both he and the control room were struggling to make contact with him and asking him to get in touch. In that e-mail Mr Kerr sent the claimant the respondents' pro forma AWOL letter which stated;

"…
You have not attended work since 10th July 2024. During this time, you have made no attempt to contact me to inform me of the reason for this. I have tried to contact you by phone, message and e-mail on a number of occasions but have been unable to speak to you. Under the company's absence policy and procedure you are required to inform us if you are unable to come to work your absence is there for classified as unauthorised,
Upon receipt of this letter, please call me on (Mr Kerr's mobile tel no) by no later than 1200 on 22/7/24 to let me know the reason for your absence."

41. A copy of the of the AWOL policy was enclosed.

42. The address on this letter was incorrect, as it was the claimant's old address. The letter however was also e-mailed to the arthur.rodden@gmail.com e-mail address.

43. The claimant did not respond to the mail and did not contact the respondents. He did not attend the 19 and 20 July shifts.

44. On 23rd of July, having taken advice from HR (the ER department), Mr Kerr sent the claimant an invitation to a disciplinary hearing. The letter advised that the hearing would take place on the 25th of July and that the purpose of the hearing would be to discuss allegations of:

- *unauthorised absence.*
- *failure to follow the absence reporting procedure. Specifically it was alleged that the claimant had not attended work since the 10th of July and during this time he had failed to follow the absence reporting procedure, and had not replied to the correspondence sent to him.*

45. The letter stated that as the claimant had been absent for 6 working days or more this constitutes prolonged unauthorised absence and therefore his contract of employment may be terminated on the grounds of gross misconduct.

46. A copy of the disciplinary procedure, AWOL procedure, and copies of the documents demonstrating contact attempts were sent to the claimant.

47. This letter was only sent by e-mail and was not posted. The email address it was sent to was arthur.rodden@gmail.com e-mail

48. The claimant did not attend the disciplinary hearing. Mr Kerr decided that the claimant should be summarily dismissed for gross misconduct. He took this decision as the claimant had not attended work since the 10th of July and had not followed the company's absence reporting procedure. He considered that under the AWOL procedure that the claimant's absence was a prolonged unauthorised absence of 6 working days or more and amounted to gross misconduct.

49. Mr Kerr considered the issue of a warning instead of dismissal, but decided that in the circumstances given the gravity of the offence, dismissal was the appropriate sanction.

50. Mr Kerr decided not to postpone the disciplinary hearing due to the claimant's failure to attend, as he considered it likely that he would simply find himself in the same position with the claimant again not attending a postponed hearing.

51. The claimant was on paid annual leave from the period from 26th to 31st July; this was marked on his shift calendar . This contract was therefore terminated on 31 July. Mr Kerr e-mailed the claimant on the 31st of July confirming the decision to dismiss and the reasons for it. The letter advised of the right of appeal.

52. The claimant did not appeal the decision to dismiss, as he was already in the process of obtaining other employment.

53. When the claimant checked his work schedule in August after his return from holiday it appeared to him that he was still employed. He e-mailed the respondents on the 21st of August, from his new email address, asking them to explain when he left the company.

Note on Evidence

54. While the tribunal did not have to determine every conflict in the evidence before it, there were some factual matters which were in dispute, and which were relevant to the issues it had to determine, and which it therefore had to resolve.

- The tribunal formed the impression that Mr Kerr was in the main a credible and reliable witness. He gave his evidence in a straightforward fashion and made appropriate concessions, for example accepting that he sometimes had to schedule the claimant's shifts at short notice, and that the AWOL letter

of 18 July contained an incorrect address. His evidence was generally consistent with contemporaneous documentation produced. There was one point where Mr Kerr's evidence appeared to be challenged by the claimant. That related to the employer's version of the claimant's shift patterns which were produced for May, June and July (pages 165,166 and 167). The tribunal accepted Mr Kerr's evidence that these documents showed shifts actually worked, as opposed to shifts scheduled but not worked, and this explained why shifts which the claimant was scheduled to work, but did not attend, did not appear on the calendar. In particular, it explained why the shifts of 13, 19 and 20 July did not appear. The tribunal was satisfied that the claimant had been scheduled to work these shifts. This was consistent with Mr Kerr messaging the claimant on the 17th asking him to confirm his attendance on 19/20 July.

55. While the tribunal did not form the view that the claimant deliberately set out to mislead, it did form the impression that his evidence on a number of matters was unreliable and incredible. The claimant sometimes struggled to answer questions in a straightforward manner and on occasions was unable to make appropriate concessions, for example suggesting the first time he saw the respondents' letter of 1/12/23 was in the tribunal bundle, despite the fact that he had responded to the letter at the time indicating he could not attend the disciplinary within the time scale identified in it. There were inconsistencies between the claimant's evidence, the contemporaneous documentation, and his ET1. For example, while nothing material turned on it, the claimant's position was that he met Mr Kerr on 4 May, despite the fact an e-mail trail indicating the meeting took place on 1 May, and he only accepted after being pressed in cross-examination that this was a mistake on his part.

56. The first material point in dispute was what occurred on the 12th of July. It was Mr Kerr's evidence that the claimant was scheduled to work that date, but did not attend work and it was marked BL.

57. The claimant accepted that he did not attend work on that date. His position was that he checked his schedule before he was due to start work and found that his shift had been removed. He also said that he had contacted the Control room on the 12th to advise he would not be at work.

58. On balance the tribunal preferred Mr Kerr's evidence. In reaching this conclusion it takes into account that there were inconsistencies in the claimant's responds to questions about what happened on the 12th. In cross-examination he suggested that he had contacted the Control Room to advise that he could not attend. That explanation is however inconsistent with his position that the respondents had withdrawn his shift. Further there would have been no reason for Mr Kerr to message the claimant on the 12th after 8pm when the shift was due to commence, asking if he intended to attend if the respondents had withdrawn the shift, or if the claimant had contacted the Control room. It was credible that Mr Kerr had messaged the claimant in response to a message he had received from the Control Room stating the claimant was a *no show* (failure to attend without explanation) for his shift on the 12th. Further, the tribunal was satisfied that the claimant was scheduled to work on the 19 and 20 July, even although those shifts were not recorded in the document produced at page167, which was the respondents' record of shifts actually worked. Had that not been the case, Mr Kerr would not have messaged him on the 17 July asking if he '*will be attending your shifts on Fri, Sat'.*

59. The second conflict related to whether the claimant had provided the respondents with a new e-mail address, and if so when. It was Mr Kerr's evidence that the only e-mail address he had for the claimant was the one the claimant had provided through the workplace hub, and that it was the claimant's responsibility to keep this updated. The tribunal accepted that the claimant had this responsibility and that he could easily access his personal page on the workplace hub. The fact that this was the case was supported by the claimant's own evidence to the effect that he immediately changed his home address when he moved house.

60. The tribunal did not accept the claimant's evidence that he had provided the respondents with his new e-mail address at any point prior to his dismissal. The claimant did not correspond with the respondents with his new e-mail address at any point prior to August after his employment had come to an end. The claimant's ET1 specified that he had provided a new e-mail address on the 4th of May. This however was entirely inconsistent with the fact that he continued to correspond with the respondents from his Gmail address up until July. Later in evidence the claimant suggested that his new email address was provided on 10 July. The claimant's evidence appeared to be that he contacted the Control Room with a new e-mail address and telephone number, and that he provided this to Mr Kerr on a Workplace Query. His evidence on how or when he provided his new e-mail address was therefore inconsistent and the tribunal did not find it to be plausible, in circumstances where the claimant had frequently had direct contact with Mr Kerr, and he could easily have provided details of his new e-mail on the workplace hub.

61. The 3rd conflict related to the claimant's agreed annual leave. It was Mr Kerr's evidence that annual leave had been approved by him for the period from 25th to 31st July. This was marked up on the respondents' shifted calendar for the claimant, which showed shifts actually worked after the event.

62. The claimant's evidence as to his agreed leave was inconsistent. He gave evidence to the effect that it started on the 24th of July, but he also gave evidence to the effect that it commenced on the 21st of July.

63. The tribunal preferred the evidence of Mr Kerr, given the inconsistency in the claimant's position. It also appeared to the tribunal that it was inherently implausible or unlikely that Mr Kerr would have arranged a disciplinary hearing for a date when he knew the claimant was on annual leave.

Submissions

64. Both parties made oral submissions. It was the respondents' position that the dismissal was fair, and a fair procedure had been followed. If not, it was

submitted that any compensatory award should be reduced on the grounds of the principles to be derived from the case of ***Polkey***, and there should be a further reduction for contributory conduct. Mr Bradley assessed this at 75%. He submitted there should also be a reduction in compensation for the claimant's failure to follow the ACAS procedure in that the claimant did not appeal.

65. The claimant submitted that his dismissal was unfair. His shift of 12 July had been withdrawn. He had provided a new e-mail address and the AWOL Letter of 18 July had been sent to his old address. He submitted he was treated too harshly given his years of loyal service to the respondents.

Consideration

66. Section 94 of the Employment Rights Act 1996 (the ERA) creates the right not to be unfairly dismissed.

67. Section 98 (1) provides:

> *"(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) …..*
>
> *(b) relates to the conduct of the employee,*
>
> *…….*
>
> *(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."

68. The burden rests with the respondent to establish the reason for dismissal. The 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. If on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to the question of reasonableness.

69. The respondents' position is that the claimant was dismissed for a conduct related reason which was unauthorised absence and failure to follow the respondents' absence reporting procedures. Their records indicated that the claimant had not attended for his shift on the 12th of July and that he failed to contact them on that date or thereafter. This included failing to confirm his availability for shifts which he was scheduled to work on the 19th and 20th of July. By the 18 of July he had not been in touch, and he failed to respond in the time frame provided in the the respondents letter of that date. There was therefore on the face of it facts on which respondents could conclude that the claimant had unauthorised absence from 12 July on the basis he had no followed the absence reporting procedure, and had been absent for 6 working days or more without contacting the respondents. The Tribunal was therefore satisfied that the respondents had established the reason for dismissal.

70. The issue for the tribunal is whether the decision was fair or unfair under section 98(4) of the ERA. In considering this, the Tribunal reminded itself that the burden of proof was neutral and that the objective test of reasonableness, judged by the standards of a reasonable employer, applies to consideration of the test of fairness under Section 98(4).

71. As this is a conduct dismissal the tribunal took into account the guidance given in the well-known case of ***British Home Store v Burchill*** *to* the effect that:

- The employer must believe the employee guilty of misconduct;
- That the employer must had in mind reasonable grounds upon which to sustain that belief; and
- at the stage at which that belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

72. The tribunal considered firstly if the respondents believed the claimant to be guilty of the misconduct for which he was dismissed. For the reasons set out above the tribunal was satisfied that the respondents did believe the claimant was guilty of this misconduct on the basis that he had not attended his shift on the 12th of July; he had failed to contact them about this absence in breach of the absence management procedure, and he had failed to contact them or respond to their efforts to contact him; and by 23 July he had not been in touch to confirm his availability for work, including for the shifts he has been scheduled to work.

73. The tribunal then considered whether the respondent had reasonable grounds upon which to sustain their belief in that misconduct at the point when they took the decision to dismiss the claimant. From the information which Mr Kerr had, the claimant had not been in touch since the 10th of July, which was the last shift he worked. He failed to respond to attempts made by both the Control Room and Mr Kerr to contact him, and had made no contact with the respondents. This was information which Mr Kerr had at the point when he took the decision to dismiss and the Tribunal was satisfied that at the point when he took the decision he had reasonable grounds upon which to conclude that the claimant had not followed the absence management

reporting procedure. He had failed to report his absence on 12 July, which meant that his absence was then authorised in terms of the AWOL policy and he had failed to contact the respondents, including failing to respond to telephone calls and WhatsApp messages. The period from 12 to 25 July was 13 working days during which the clamant could have been scheduled to work.

74. The tribunal then considered whether at the point when the decision to dismiss was made a reasonable investigation had been carried out. An employer acting reasonably would hold a disciplinary hearing to which the employee was invited, and the employee would be aware of the conduct alleged against him.

75. The Tribunal considered the fact that Mr Kerr's letter of 18 July to the claimant under the AWOL procedure was incorrectly addressed. It was however also e-mailed to the claimant. The letter calling him to the disciplinary hearing, was not posted but was e-mailed to him. The tribunal was satisfied as a matter of fact that the respondents believed that the correspondence was sent to the correct e-mail address and that they had no basis on which to think otherwise. The respondents use a digital platform to communicate with the claimant about all aspects of his job, and the correspondence between the claimant and Mr Kerr had all been conducted electronically. The Tribunal was satisfied that it was the claimant's responsibility to keep his personal information, which included his email address updated via workplace plus and that he was aware of that responsibility, but did not update his email address. Applying the objective test of a reasonable employer, it was not on unreasonable for the respondents to use the medium of e-mail to invite the claimant to a disciplinary hearing and to send that communication to the email address they had for him,

76. The claimant was advised of the misconduct alleged against him, and that it could be regarded as gross misconduct resulting in dismissal.

77. The Tribunal considered the fact that Mr Kerr conducted the disciplinary hearing in the claimant's absence. While it could be said that the decision to do was harsh, applying the objective test of a reasonable employer, it could not be said it was one which fell out with the band of reasonable procedural responses. The claimant had not been in touch with his employer from 10 July, and Mr Kerr had a rational for proceeding, which was he considered that delaying the hearing would be likely to simply result in the same situation in August after the claimant's leave had expired, with the claimant still not attending. Further the respondents' policy, which the claimant had access to and had been provided with in December 2023 as well as in July 2024, stated that the disciplinary hearing could go ahead in his absence.

78. For reasons which are detailed above under Note on Evidence the tribunal was satisfied that the claimant was not on annual leave on the date upon which the disciplinary hearing was fixed.

79. The tribunal was satisfied that at the point when the decision to dismiss was taken the respondents had carried out a reasonable investigation.

80. The tribunal went on to consider the reasonableness of the dismissal. It reminded itself of the guidance in the well-known case of ***Iceland Frozen Foods Ltd v Jones*** 1983 ICR 17, EAT, referred to by Mr Bradley. It was said in that case that;

(1)the starting point should always be the words of S.98(4) themselves;
(2)in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;
(3)in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
(4)in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
(5)the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

81. Their decision in this regard has to be judged by the standards of a reasonable employer, and the range of responses open to such an employer. The respondents had a disciplinary policy in place which provided that if an employee had not been in contact by the 6th working day of his absence this would be treated as gross misconduct resulting in dismissal. By the time the claimant was dismissed on 23 July he had not been at work since the 12th of July, had made contact since 10 July. He had failed to report his absence on the 12th which rendered his absence unauthorised absence in terms of the respondents AWOL policy. He had failed to contact the respondents in response to their email of 18 July , which advised him to get in touch by 22 July and advised him of the consequences of failing to do so. The period from 12 to 25 July was 13 working days during which the clamant could have been scheduled to work and during which he had not been in touch, in breach of the absence reporting procedure. In these circumstances, while some employers might have chosen not to dismiss, it could not be said that the decision to dismiss the claimant was one which fell out with the band of reasonable responses open to a reasonable employer.

82. The effect of this conclusion is that the tribunal did not find that the claimant was unfairly dismissed, and the claim is dismissed.

16 April 2025

Date sent to parties