EMPLOYMENT TRIBUNALS

Claimant: Mr A Dillon

Respondent: Unilever UK Limited

Heard at: Liverpool **On:** 9 March 2018
22 June 2018
12 July 2018
(in Chambers)

Before: Employment Judge Horne

REPRESENTATION:

Claimant: Miss P Thompson, Trade Union Representative
Respondent: Ms A Del Priore, Counsel

RESERVED JUDGMENT

The claimant was not unfairly dismissed.

REASONS

Introduction

1. This is a sad case. A highly skilled employee, with nearly 20 years' service and a family to support, lost his job over a family holiday. What started as a minor dispute over a few days' annual leave escalated as the respondent discovered the lengths to which claimant had gone to secure his holiday and then cover his tracks. The claimant's action gave the impression of an increasingly tangled web which led the respondent to the point where it no longer had trust in him. It is almost impossible not to feel some sympathy for the claimant, whose career has been damaged for the sake of something so small. But, as this judgment explains, this fact does not prevent an employer from being able to dismiss an employee fairly.

Issues for Determination

2. By a claim form presented on 26 September 2017, the claimant raised a single complaint of unfair dismissal.

3. At the outset of the hearing it was agreed that the Tribunal would determine the following issues:

   3.1. Whether the respondent could prove the sole of principal reason for the claimant's dismissal.

   3.2. Whether that reason was one that related to the claimant's conduct.

   3.3. Whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

4. Had the dismissal been found to have been unfair, further issues would have arisen in relation to remedy. As it was, I did not consider it necessary to determine them.

Evidence

5. I considered documents in an agreed bundle which I marked CR1. Pages 294-302 of that bundle were added by consent during the course of the hearing.

6. The respondent called two witnesses to give oral evidence. These were Mr Cartledge and Mr Hinch. The claimant gave oral evidence on his own behalf. All three witnesses confirmed the truth of their written statements and answered questions.

Facts

7. The respondent is a very large manufacturing company, based at sites including Port Sunlight, Wirral. The claimant was employed by the respondent from 1 December 1997 to 3 August 2017. His role was Making Plant Operator, based at Port Sunlight. In his role he was responsible for part of the process of mixing chemicals and liquids to form Unilever products such as fabric wash capsules.

8. It was vital for the production process that the requisite number of employees was present at each shift. If a Making Plant Operator was not present on shift and one of their colleagues could not cover for that operator, then the manufacturing of the product could not continue during that shift.

9. Whilst on shift, the claimant worked on his own. He was part of a crew of Making Plant Operators who worked on a shift rota. Another member of that crew was Mr Jeff Nagle. There was also a limited of employees in other roles who had been trained to provide cover as and when necessary. From December 2016, all the Making Plant Operators reported to Mr John Whiteside, the Operations Leader.

10. On 3 December 1997 the claimant signed to acknowledge a written statement of terms of employment. Clause 9 of the statement was headed “Disciplinary Procedure”. It referred to the respondent’s “rules and regulations” which were displayed on notice boards and retained in what was then called the Personnel Department.

11. On or about 1 May 2008, the respondent, collectively with three major trade unions, agreed a written disciplinary policy. It contained a number of examples of gross misconduct. One of these was deliberate falsification of company documents.

12. The respondent widely circulated its Code of Business Principles. The Code began by declaring, “We conduct our operations with honesty, integrity and openness…”. Each year, the claimant along with other employees signed an Integrity Pledge expressly affirming the values set out in the Code.

13. The Making Plant had two main rota systems designed to cover operational need. These were known as the “four-crew” and the “three-crew” rotas. Only one of these rota systems was in operation at any given time. Between December 2016 and the last week of April 2017, the Making Plant operated the four-crew rota.

14. The two versions of the rota appeared on separate spreadsheets, stored on the shared computer drive. The version on the shared drive was sometimes known as the “live rota”. The claimant had access to the live rota from his shared workstation in the control room. Making Plant Operators were allowed to make changes to the live rota, for example, to record agreed shift swaps and approved annual leave. Operators could enter blocks of leave onto the live rota either before or after the formal approval by the Operations Leader. By custom and practice, shifts would be adjusted so that either side of an approved leave day there would be one or more days marked “U”, meaning “unavailable”. This was a way of allocating rest days so as to extend the overall length of an operator’s holiday.

15. Accommodating annual leave requests was not always easy. Some holiday periods (such as August and school half-term holidays) were more popular than others. During those peak holiday periods, not every operator would be able to take their first choice of holiday, because otherwise there would be insufficient operators available to ensure continuity of production. Leave requests therefore had to be approved by the Operations Leader. The precise mechanism by which this was done is a matter of dispute. There is, however, a substantial amount of common ground. The leave year followed the calendar year, January to December. Leave days in a particular year could be requested at any time from the first working day of January in that year. Different employees would come on shift at different times during that first day. It was therefore considered unfair to allocate leave on a strictly “first come first served” basis. That method would have resulted in the operator with the first shift in the New Year being able to take their pick of all of the holidays, with the operators on later shifts having to make do with what was left. So a different system was devised. Each employee would submit a holiday request form in early January. The Operations Leader would consider the forms and identify any clashes. In the event of a clash, he would allow an opportunity for the operators to resolve their differences by agreement. Failing that, the Operations Leader would decide how to allocate the leave.

16. During the first week in January 2017, the claimant completed his holiday request form for the year. His form contained two requests: the week commencing 29 May 2017 and the last two weeks in August 2017.

17. On 9 January 2017 Mr Nagle completed his holiday request form. He sought four periods of leave. These were 10 and 11 May 2017, 24-30 May 2017, 30 and 31 August 2017 and 27 September to 3 October 2017.

18. When Mr Whiteside saw the two forms he noticed clashes of dates in both May and August 2017. He gave the claimant and Mr Nagle some time to negotiate. Between them, they agreed that Mr Nagle could have the holidays in September

that he had requested. These were not, in any event, part of the claimant's original request. The two operators were, however, unable to reach any agreement about who should have their desired holiday in the last week of May. The claimant made strong representations to Mr Whiteside about why he should be the one to get that holiday.

19. What happened from that point onwards is a matter of some controversy. During the course of an investigation some time later, the following facts were established:

    19.1. Somebody updated the live four-crew rota to record the claimant's two week holiday in August, Mr Nagle's holiday on 24-30 May 2017, and Mr Nagle's earlier holiday on 10 and 11 May 2017.

    19.2. Nobody updated the live four-crew rota to record any holiday for the claimant in May 2017. The rota continued to show, in particular, that the claimant would working on 30 May 2017.

    19.3. Mr Whiteside marked Mr Nagle's holiday request form by crossing out his requests for 10 and 11 and 24-30 May 2017. The requests for holiday in August and September 2017 were not crossed out.

    19.4. On the claimant's holiday request form, Mr Whiteside did not cross out any dates, but marked the form "discussed NOT ALL".

20. These facts strongly suggested that Mr Whiteside had allowed Mr Nagle's requests for leave in May 2017 and refused the claimant's requests, in particular for leave during the week commencing 29 May 2017.

21. From time to time, the claimant asked Mr Whiteside for a copy of his holiday request form. Mr Whiteside replied that it was available for the claimant to look at in a folder on Mr Whiteside's desk. It is common ground that at no time did Mr Whiteside expressly tell the claimant that his leave request for 29 May 2017 was approved.

22. In the last week in April the four-crew rota was changed to a three-crew rota. This involved creating a new spreadsheet on the shared drive. Pre-booked holidays were migrated from one rota to the other. The claimant's approved two week holiday in August was carried over from the four-crew rota to the three-crew rota. There was nothing on the three-crew rota, when it was first populated, to suggest that the claimant had any booked leave during week commencing 29 May 2017.

23. On 13 May 2017 the claimant emailed Mr Whiteside to say:

    > "I've just checked the transfer of holidays from the four-crew pattern to the three-crew pattern for the plant and you have a cover issue for the week commencing 29th May. I have booked that week off (being half term) and have had this booked since January of this year…"

24. Unknown to Mr Whiteside, the claimant, a few moments before sending this email, had opened the live three-crew rota and modified it to insert holiday dates in the week commencing 29 May 2017. Yet the claimant's email implied that the leave for week commencing 29 May 2017 had already been agreed and entered on the four-crew rota, and that the present difficulty was caused by the details not having been properly migrated from the four-crew rota to the three-crew rota.

25. On receipt of the email, Mr Whiteside checked the three-crew rota for himself. Comparing it with an earlier iteration, he discovered that the leave dates for week

commencing 29 May 2017 had been recently added. He replied to the claimant's email setting out his recollection of their discussions in January of that year. As Mr Whiteside put it, “We can’t have yourself and Jeff being off at the same time, sorry”.

26. Dissatisfied with Mr Whiteside’s reply, the claimant sent a further email on 19 May 2017. He reiterated his view that he had never agreed to sacrifice his leave request for 29 May 2017. In neither this nor the previous email did he make any reference to having altered the rota himself.

27. A meeting took place on 19 May 2017 between the claimant and Mr Whiteside. They did not manage to reach agreement and Mr Whiteside stuck to his position, that the claimant was not entitled to take holiday during week commencing 29 May 2017.

28. On 22 May 2017, the claimant did not attend work and self-certified as being unwell. The following day, Mr Whiteside invited the claimant to attend an Occupational Health assessment on 25 May 2017. The claimant did not attend. The following day, the claimant saw his General Practitioner, who prescribed him antidepressant medication and signed a fit note declaring him unfit to work because of workplace stress. The claimant did not then return to work until 23 June 2017. It just so happened that the claimant's period of sickness absence included the week commencing 29 May 2017, which the claimant had hoped to take as holiday.

29. The claimant attended an Occupational Health assessment on 6 June 2017. The ensuing report recommended a stress risk assessment. As to the causes of his stress, the report stated:

> “Mr Dillon has a responsibility for child care when his wife is working and he reports that he plans his holiday in advance to cover school holidays. He reports that when he was advised that he could not take these holidays in May he became very anxious and stressed as it left him in a very difficult position.
>
> …
>
> Mr Dillon admits that he has a stressful personal life with the child care arrangements and he also reports that recent uncertainties in the workplace regarding job security and shift changes have also made him feel anxious.”

30. On 13 June 2017, the claimant attended a stress risk assessment meeting. He identified, as one of the causes of his stress, the respondent’s refusal to grant him annual leave at the time he was requesting it.

31. When the claimant returned to work on 23 June 2017, he was given a letter inviting him to an investigation interview. According to the letter, the purpose of the interview was to investigate concerns about his sickness absence and holiday. On the same day, the claimant submitted a grievance about sick pay. It is unnecessary to describe what happened in the investigation of that grievance.

32. The investigation into the claimant's annual leave was conducted by Mr Philip Hardy, Operations Leader in a different factory.

33. On 28 June 2017, Mr Hardy interviewed Mr Whiteside. During the course of the interview, Mr Whiteside explained his understanding of the system for booking annual leave in January each year. He told Mr Hardy that he believed there was

a “two week rule”, meaning that operators could only book a maximum of two weeks’ annual leave at the start of the year. According to Mr Whiteside, he had clearly told the claimant in February 2017 that his request for leave in week commencing 29 May 2017 could not be accommodated. Mr Whiteside produced the relevant booking forms and explained his system of marking them. He also showed Mr Hardy an entry that he had made in his diary for 22 February 2017, in which he had clearly written that the holiday clash had been resolved and that only the “main two week holidays” had been allowed. Mr Whiteside explained that this was a reference to the claimant's holiday request for the last two weeks in August.

34. The claimant attended an investigation meeting with Mr Hardy on 3 July 2017, accompanied by Mr Dave Randalls, his trade union representative. According to the claimant, Mr Whiteside had left the issue of the May holiday unresolved. Mr Hardy asked the claimant if he had any idea who had entered the claimant's May holiday into the live three-crew rota. The claimant's reply was that he did not know whether he had inserted those holidays or not. Later in the interview, the claimant told Mr Hardy that he believed that his May holiday had been entered into the four-crew rota and asked, rhetorically, whether his holidays had migrated over to the three-crew rota in the right way. He offered to take Mr Hardy to the control room where he said his holidays were properly recorded on the drive to which he had access.

35. Having spoken to the claimant, Mr Hardy interviewed two further witnesses about the general procedure for booking holidays. In broad terms, they confirmed that the two week rule had been well established. Mr Hardy asked one of them whether it was possible for there to have been a “rogue” rota that an employee could mistake for the live rota. Mr Rice confirmed that that would not be possible for an Operator to make such a mistake. He said that the claimant would not know what shift he was covering without looking at the live rota. This was because the teams were always working and looking at that rota. Mr Rice was not aware of any migration issues that could cause someone to have a non-live rota.

36. Mr Hardy examined the timings of the changes to the live three-crew rota. He established that changes were made to that rota at 8.27am on 13 May 2017, whilst the claimant was on shift. That time coincided almost exactly with the claimant's email to Mr Whiteside.

37. Having gathered the evidence, Mr Hardy collated it into a report. The recommendation of the report was that the claimant should face disciplinary allegations, and set out what those allegations should be. The report was passed to Mr Simon Cartledge, Operations Manager. Mr Cartledge spent approximately 10-12 hours reviewing the report and supporting documents. In Mr Cartledge’s opinion, the claimant had a case to answer. By a letter dated 20 July 2017, Mr Cartledge invited the claimant to a disciplinary meeting. According to the letter:

> “The purpose of the hearing is to consider the following allegations against you:
>
> - That you have wilfully falsified a company document (shift rota) with an intent to secure the time away from work that was previously declined at the start of the 2017 holiday year.

- That your own actions may have contributed to your sickness absence for the period 22 May to 23 June 2017, which was as a direct consequence of you having disregarded your leader's refusal of your holiday request for week commencing 29 May 2017.
- That you have failed to follow a reasonable management instruction by not attending work as instructed…"

38. Enclosed with the letter was a substantial pack containing records of the four investigation interviews, the report, and 28 further documents.

39. The claimant was not suspended. He remained free to attend work and did so the following day, 21 July 2017, to work the night shift. At 3.47am, without telling anybody, the claimant used a shortcut on the desktop of the control room computer to gain access to a version of the four-crew rota. I will call it the "desktop rota". This version of the rota was later established to be a "rogue rota". That is to say, the desktop rota was a static spreadsheet which would not change when alterations were made to the live four-crew rota. The claimant modified the desktop rota, although it was never established definitively what the modifications were. At this point in time, the three-crew rota was still in force and there was no obvious reason to change the four-crew rota at all, whether in the live or desktop version. The fact that the claimant had done this only came to light six days later.

40. The disciplinary meeting began on 27 July 2017. The claimant was accompanied by Mr Randalls. The meeting lasted approximately 3½ hours. The claimant was given a full opportunity to explain why he believed that his May holiday had been authorised. Mr Cartledge asked appropriate questions aimed at gaining a better understanding of the holiday booking process. He took the claimant through the statements of those who had been interviewed in the investigation. In the meeting, the claimant conceded that he had changed the three-crew rota on 13 May 2017 to add in his holidays. He stated that he had believed that his holidays were approved, because they appeared on the four-crew rota. He said that he gained access to the rota on his own computer user account using a shortcut on his desktop. He offered to show Mr Cartledge the desktop rota so that he could see for himself how it worked. They agreed to adjourn the meeting so that Mr Cartledge could go to the control room and investigate further. When the meeting adjourned, they all went to the control room, where the claimant showed Mr Cartledge the desktop four-crew rota. Mr Cartledge was satisfied that it was only a static version and not the live four-crew rota. As the claimant had said, it showed the claimant having had holiday booked for week commencing 28 May 2017.

41. Once the claimant had gone, Mr Cartledge carried out some further investigations. It was at this point that he discovered that the claimant had gained access to the desktop rota on 21 July 2017. His suspicions were aroused. Why, he wondered, would the claimant have wanted to make changes to a four-crew rota that was not currently in use?

42. The disciplinary meeting reconvened on 3 August 2017. Mr Cartledge asked the claimant why he had made the changes to the four-crew desktop rota on 21 July 2017. Initially, the claimant said that he could not remember what he had done or why he had done it. He said that there was nothing untoward and that he would have looked at the desktop rota for a reason. His trade union representative

asked for an adjournment. After a short break, the claimant said that the change he made to the desktop rota was to insert “banked hours”. This was in anticipation of going back onto a four-crew rota system in a few weeks’ time. There was then a further break. Mr Cartledge took the claimant back to the control room to have a further look at the desktop rota. It was established that the claimant had not been tracking, logging or managing hours on that version of the rota. When the disciplinary meeting resumed again, Mr Cartledge asked the claimant why he had previously said that he had used the desktop rota for inserting banked hours. The claimant then said, “Maybe I have put unavailables in”. He then said that it was his phone, and not the desktop rota, that he used to manage his hours.

43. After further discussion, Mr Cartledge adjourned the meeting so that he could consider his decision. Having heard the claimant's explanation, Mr Cartledge was satisfied that the claimant had deliberately changed the rota on 13 May 2017 in order to mislead Mr Whiteside into thinking that the holidays had always been there. In Mr Cartledge’s opinion, the claimant had known since the beginning of 2017 that his holiday request had been refused. Mr Cartledge found that the claimant had been trying to mislead Mr Whiteside in order to pressurise him into changing his mind. Mr Cartledge could not understand why, if the claimant's intentions had been honest, the claimant had not admitted in the investigation interview that he had inserted the May holidays into the three-crew rota himself. He believed Mr Whiteside’s evidence that he had refused the claimant's leave request for week commencing 29 May 2017. As Mr Cartledge saw it, Mr Whiteside had a consistent approach to noting the approval and rejection of holidays. It was also relevant in Mr Cartledge’s view, that the claimant had no credible explanation for having gained access to the four-crew shift pattern on 21 July 2017. In short, he did not think that the claimant was being truthful.

44. Mr Cartledge also found that the claimant’s sickness absence had arisen predominantly out of the events at work surrounding his holiday. He found that the claimant’s absence was due to his own actions. This was, in Mr Cartledge’s view, a further act of misconduct. For him, however, it was not the main issue. Far more important in his mind was his belief that the claimant had wilfully deceived Mr Whiteside. In Mr Cartledge’ opinion, the claimant had fallen short of the respondent’s Code by failing to display honesty, integrity and openness. In his view the claimant's actions amounted to gross misconduct.

45. Mr Cartledge went on to consider what the appropriate disciplinary sanction should be. He took into account the claimant's years of service and clean disciplinary record. Even making allowances for those factors, a sanction short of dismissal was not something that Mr Cartledge was prepared to entertain. This was because he thought that the claimant had continued to attempt to mislead him throughout the disciplinary process. He could no longer trust him.

46. When the disciplinary meeting reconvened, Mr Cartledge informed the claimant of his decision. He explained the rationale. The outcome was confirmed by a letter dated 9 August 2017.

47. The claimant appealed against his dismissal. His appeal letter, dated 4 August 2017, identified two grounds of appeal. The first was that the evidence had been “weighted to support the team leader’s version of events”. In particular, there had been no attempt to interview Mr Nagle during the investigation process. The second ground of appeal was that the sanction of dismissal was too severe and

had not taken into account that his absence was predominantly attributed to personal circumstances at home.

48. The appeal was assigned to Mr Andy Hinch, Supply Chain Transformation Director. He met with the claimant on 1 September 2017. On this occasion, the claimant's ompanion was Miss Pam Thompson, a trade union representative who has ably represented the claimant at this Tribunal hearing. Before the meeting Mr Hinch spent about three hours reading the relevant documents. The meeting itself lasted about an hour and a half. The claimant raised the fact that, in May 2017, he had suffered from a lot of stresses outside of work and had been unwell. Mr Hinch asked probing questions designed to establish whether the claimant genuinely believed that his request for the May holiday had been approved. Mr Hinch summarised the claimant's position as being one that the holiday request had been open-ended for a long period of time and that he had assumed everything had been agreed. The claimant confirmed that that was his case. Mr Hinch asked the claimant why he had modified the four-crew rota on 21 July 2017. The claimant said that he had put on the rota that he was unavailable to cover his colleagues due to his son's birthday on 2 August 2017.

49. After further discussion Mr Hinch adjourned the meeting. During the adjournment Mr Hinch checked the claimant's story about his son's birthday. Mr Hinch established that, in fact, the claimant had made this alteration to the rota in February 2017 and not on 21 July 2017 as the claimant had told him.

50. The appeal meeting reconvened on 11 September 2017 and lasted another two hours. Mr Hinch asked the claimant why he thought Mr Nagle should have been interviewed. The claimant replied that Mr Nagle would have been able to confirm that, back in January 2017 they had agreed that Mr Nagle could take the holiday in September 2017.

51. During the reconvened meeting Mr Hinch put this to the claimant and he conceded that that was correct. He then could not explain why he had entered the rota on 21 July 2017.

52. Following the meeting Mr Hinch took time to consider his decision. In his view the disciplinary allegations were well-founded and the claimant's dismissal had been reasonable and appropriate. He did not think that it had been necessary to interview Mr Nagle. Whether or not there had been any agreement between the claimant and Mr Nagle about the September 2017 holiday would be unlikely to help him decide whether the claimant had had his May 2017 holiday approved or not. Like Mr Cartledge, Mr Hinch found significant inconsistencies in the explanations that the claimant had given about the use of shift patterns on his work computer, and the reasons why changes had been made to the rogue rota on the claimant's desktop. He believed that the claimant had sought to mislead, breaching the Code and resulting in a breakdown of trust and confidence.

53. Mr Hinch's reasoning was also influenced by considerations that the claimant had contributed to his own sickness absence. In Mr Hinch's opinion the claimant had deliberately failed to resolve the issue of his May 2017 holiday and that his failure to do so had contributed to his sickness absence. When I asked Mr Hinch about this in his oral evidence, it was not clear to me why Mr Hinch believed this to be an act of misconduct. I am satisfied, however, that more important in Mr Hinch's mind was the fact that the claimant had, as Mr Hinch saw it, deliberately sought

to mislead the company. It was this fact in particular that led Mr Hinch to believe that the sanction of dismissal had not been too severe.

54. By a letter dated 15 September 2017, Mr Hinch informed the claimant that his appeal against dismissal had been unsuccessful.

Relevant law

55. Section 98 of ERA provides, so far as is relevant:

(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 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…(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.

56. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

57. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

58. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

59. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

60. It can be gross misconduct for an employee to refuse to obey a direct management instruction. According to *UCATT v. Brain* [1981] ICR 542, "the primary factor which falls to be considered by the reasonable employer deciding whether to dismiss the recalcitrant employee is the question, 'is the employee

acting reasonably or could he be acting unreasonably in refusing to obey my instructions?"

Conclusions

61. I am satisfied that the principal reason why the claimant was dismissed was the belief held by Mr Cartledge and Mr Hinch that the claimant had deliberately altered the three-crew rota on 13 May 2017 so as to mislead Mr Whiteside into approving annual leave which had previously been refused. This is clearly a reason which relates to the claimant's conduct. Their thinking was somewhat muddled by them also finding that the claimant had contributed to his own illness. This was not, however, the principal reason for dismissal, or anything approaching it.

62. In my view the respondent carried out a reasonable investigation, even by the standards of such a large employer as this respondent. There was a factfinding process led by Mr Hardy. He interviewed four witnesses and gathered a substantial quantity of relevant documents, including documents yielded by focussed enquiries of the respondent's computer systems. The claimant was given a full opportunity to explain himself during the investigation stage. Next, there was a disciplinary meeting which was adjourned at the claimant's invitation to investigate the control room computer. The decision to dismiss was followed by a careful appeal in which the claimant's desktop was investigated once more.

63. It was open to a reasonable employer to decide that Mr Nagle did not need to be interviewed. The respondent was entitled to proceed on the assumption that Mr Nagle would say what the claimant expected him to say. In short, the value of speaking to Mr Nagle would be to confirm that there had been an agreement over the September 2017 holiday. Mr Hinch reasonably concluded that this fact would add little to the matter of contention, which was whether the claimant had misled Mr Whiteside about the May holiday. Nor would Mr Nagle's evidence have changed Mr Cartledge's mind. He believed that the two week rule existed. The claimant had already had two weeks of leave approved for August 2017. The fact that he had sacrificed holiday for September 2017 was neither here nor there, because it would still mean that the claimant would not have been approved his request for May 2017.

64. Another criticism of the investigation was that the respondent should have interviewed more of the claimant's colleagues with a view to gaining a broader view of whether there was a "two week rule" or not. In my view, this criticism places the bar too high, even for a large employer. The fact that Mr Hardy spoke to two witnesses (beside the claimant and Mr Whiteside) about the holiday booking procedure shows that Mr Hardy made reasonable efforts to provide Mr Cartlege with that broader view.

65. In my view both Mr Cartledge and Mr Hinch had reasonable grounds for believing that the claimant had altered the rota on 13 May 2017 with the intention of deliberately misleading. The claimant's email of that date strongly implied that the claimant's May 2017 holiday had been present on the four-crew rota at the time that it was migrated over to the three-crew rota. It was unlikely that the claimant would have forgotten changing the rota at the same time as he emailed Mr Whiteside to raise the subject. On the evidence as it appeared to Mr Cartledge, the claimant knew that his May 2017 holiday had not been approved. It would be a significant step for him to seek to raise the matter again with his manager.

They were also entitled to take into account, when assessing the credibility of the claimant's explanation about 13 May 2017, the fact that he could not adequately explain his later dip into the rota on 21 July 2017. They were entitled to prefer Mr Whiteside's evidence over that of the claimant. It was reasonably open to them to consider that the claimant had acted dishonestly in changing the rota.

66. That is not the end of the matter. I must also consider whether the sanction of dismissal was within the range of reasonable responses for the conduct that Mr Cartledge and Mr Hinch believed to have happened. Here it is relevant to consider the claimant's long service and clean disciplinary record. Nevertheless, in my view, dismissal was within the reasonable range. It would be hard to trust an employee who had been found to have intentionally misled his manager, especially if the dismissing manager believed that in trying to deny the disciplinary allegations he had further misled the investigator and the disciplinary manager himself. Mr Cartledge did take into account the claimant's length of service. Even for someone as long serving as the claimant, the misconduct that Mr Cartledge found proved was so serious that it was reasonably open to him to decide that no alternative sanction was appropriate.

67. It is contended on behalf of the claimant that the respondent "chose not to consider his health status as mitigation". To the extent that this relates to the respondent's belief that the claimant had disobeyed a management instruction by not coming to work during week commencing 29 May 2017, the criticism has some force. But that was not the main reason for dismissal. The claimant's health provided little or no mitigation for his actions in trying to deceive Mr Whiteside on 13 May 2017. According to the Occupational Health Report, it was only once Mr Whiteside refused the leave in May 2017 that the claimant became very anxious and stressed. But by then, the misconduct had already happened.

68. The claimant's written submissions make a number of further points. By and large, these points would tend to show, if I accepted them, that the claimant had not actually tried to mislead Mr Whiteside. But that is not the test I have to apply. What I must do is look at whether Mr Cartledge and Mr Hinch acted reasonably.

69. Taking a step back, I have asked myself whether the respondent acted reasonably or unreasonably in treating its belief in the claimant's conduct as a sufficient reason for dismissing the claimant. In my view it did. The dismissal was therefore fair.

Employment Judge Horne

Date: 23 July 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 July 2018

FOR THE TRIBUNAL OFFICE

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