EMPLOYMENT TRIBUNALS

Claimant **Respondent**

MR. B. JOSHI v ISS FACILITY SERVICES LIMITED

Heard at: London Central On: 23 and 24 April 2019

Before: Employment Judge Mason

Representation
For the Claimant: In person
For the Respondent: Ms. A. Sidossis, counsel.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed and his claim for unfair dismissal is dismissed.

2. The Claimant's claims for holiday pay and wages during suspension are dismissed on withdrawal.

REASONS

Background and procedure at the Hearing

1. In this case Mr. Joshi ("the Claimant") claims that he has been unfairly dismissed and claims compensation for unfair dismissal. The Respondent denies that he was unfairly dismissed. The Claimant also brought claims of unlawful deductions from wages but confirmed to me at the hearing that these were withdrawn on settlement by the parties.

2. The issues to be determined by the Tribunal are as follows:

2.1 Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).

2.2 Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

2.3 In accordance with the test in **British Home Stores v Burchell** [1980] ICR 303, has the Respondent shown that:

(i) it had a genuine belief that the Claimant was guilty of misconduct?;

(ii) it had in its mind reasonable grounds upon which to sustain that belief?; and

(iii) at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?

2.4 Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances? The Tribunal must be careful not to substitute its own view.

2.5 If the Claimant's dismissal was unfair, is the Claimant entitled to a basic award and/or compensatory award, and, if so, should there be:

(i) any reduction in the compensatory award on the basis the Claimant has failed to take all reasonable steps to mitigate his loss?

(ii) any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with **Polkey**?

(iii) any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code?

(iv) any reduction to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

3. It was agreed that the Tribunal would hear evidence and determine liability and issues relating to possible adjustments to any compensation awarded in accordance with **Polkey** and/or contributory conduct and/or any failings to comply with the ACAS code of Practice on Disciplinary and Grievance Procedures ("ACAS code").

4. I was provided with an agreed bundle of documents and the witness statements.

5. On the first day, having established with the parties the issues, I retired to read the witness statements and the bundle. I then heard, on behalf of the Respondent, from Mr. George Havenga (TFL Security Contracts Manager and dismissal officer) and Mr. John Cook (Account Manager and appeal officer). I also heard, on behalf of the Claimant, from Mr. Suleman Hussain, (former supervisor MRT (Mobile Response team) left 6 January 2018) and the Claimant started his evidence.

6. On the second day, the Claimant concluded his evidence. I then heard submissions from both Ms. Siddosis and the Claimant. Ms. Siddosis also provided written Closing Submissions. I reserved my decision which I now give with reasons.

Findings of fact

7. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

8. The Respondent is part of a UK group of companies which provides facilities management services. It employs 47,000 people. Between April 2013 and 6 January 2018, the Respondent contracted with Transport for London to provide cleaning and security services ("the Tube Lines Contract").

9. The Claimant's employment with the Respondent commenced on 10 December 2014. He was employed as a Relief Security Officer on the Tube Lines Contract, based at Northfields Underground Depot but also working at other sites. He reported to his Line Manager, Mr. Michael Goldsmith, Deputy Operations Manager. Mr John Cook was responsible for the operation of the Tubelines Contract.

10. The Claimant was an hourly paid employee. He earned around £1,800 per month gross (£1,500 net) [payslips 186-188 and P60 193]; he was in the pension scheme but had no other benefits.

11. The Claimant worked when rostered and generally worked 4 days on and 4 days off on a regular basis [64-79]. The Mobile Response Team ("MRT") administered the day to day rotas of the Tube Lines Contract. Shifts were allocated by MRT and the Claimant had the option to accept or decline offered shifts. Mr. Suleman Hussain was an MRT Supervisor and gave evidence on behalf of the Claimant. He explained [w/s para. 2] that MRT's role includes preparing the rota on a monthly basis and finding cover when staff are off sick or on annual leave.

Claimant's terms and conditions:

12. The Claimant's written terms and conditions of employment are set out in a letter of appointment dated 3 December 2014 [29-30], Statement of Main Terms of Employment [31-32], Employment Handbook [33- 61] and ISS Security Notice, Lateness and Absence 29 September 2016 [62-63] ("the Security Notice").

12.1 The key relevant terms of the Employment Handbook are as follows:

(i) Attendance [42-43]

"All absences due to sickness must be notified in accordance with the sickness reporting procedures laid down in this Employment Handbook"

"lateness or absence may result in disciplinary action and, in addition, loss of appropriate payment".

(ii) Time off Work (holidays) [42-43]

a. The holiday year is 1 January to 31 December and employees are entitled to the statutory minimum of 5.6 weeks inclusive of Bank Holidays. Any accrued holiday entitlement not taken in any leave year will be lost.

b. Holiday requests should be signed as approved by the Line Manager before making any firm holiday arrangements.
c. Four weeks written notice is required.
d. Employees may normally not take more than two weeks holiday at any one time.
e. Holiday may normally not be taken during the period from 15 December to 5 January.

(iii) Sickness and Absence [45-46]

a. Employees must give notification by telephone on the first day of absence. Hourly paid staff (including the Claimant) must notify the Communications Centre. Salaried staff must notify their Line Manager.
b. "*Any absence, which is not authorised or notified within the rules of the sickness and absence policy will be regarded as a breach of contract of employment and will be treated in accordance to the Sickness/Absence procedure*".
c. "*If your absence has been (or you know that it will be) for longer than seven days (whether or not they are rostered working days) you should consult your doctor and ensure you are given a medical certificate. This must be forwarded to your Line Manager without delay*"
d. "*The Company reserves the right to query the justification for your absence, even if a medical certificate is submitted. The Company will take a serious view if time off through sickness or injury is found not to be the genuine reason for absence, and this may lead to disciplinary action*".

(iv) Disciplinary Procedure [53-57]

a. This sets out the steps in the disciplinary procedure (suspension, investigation, notice of hearing and complaint and the right to be accompanied).
b. Under the heading Disciplinary Sanctions, it sets out four stages which apply other than in the case of gross misconduct: verbal warning, written warning, final written warning and dismissal. It states that all warnings will inform the employee that the next stage will be taken if there is no improvement or another offence is committed during the currency of the warning.
c. Under the heading Disciplinary Offences, examples are given of misconduct including persistent absenteeism or lateness and various examples are given of gross misconduct.

12.2 Security Notice[62-63]

a. This applies specifically to employees engaged on the Tube Lines Contract and was introduced as a new process to deal with increased lateness and "blowouts". It is signed by Mr. Goldsmith. On 3 October 2016, the Claimant signed to acknowledge that he had read and understood this notice [63].
b. It states as follows:

"When calling in sick or to say you are running late you still follow the normal process of calling the Control Room as soon as possible to inform them.

Added to the process will now be two forms that will be filled out by the person's supervisor when next on shift, these are a "Return to Work Form" and a "Lateness Form". On these forms there will be questions you need to answer and the form will be kept by management.

Security Officers posted to the TUBE LINES contract are to note:

- *You are to inform the Control Room at your earliest opportunity of either being late or not coming to work via a phone call.*
- *If you have been late or absent from work your supervisor will complete a "Return to Work Form" or a "Lateness Form".*
- *The form will be completed the next time you are on shift and will be sent to management to store.*
- *You are not to book on until you are on shift, should you be found to be booked on or book on a colleague before they are on site, it may result in the company's disciplinary process being followed.*

- *We will work on the rule of 3, so after 3 bouts of sickness or lateness you may have to go through the company's disciplinary procedure.*
  If you are relieved late or a colleague turns up late you can send your manager an email to inform them so pay adjustments can be made if necessary and the process followed"

13. Time off for holidays had to be approved by the Claimant's Line Manager, Mr. Goldsmith, following an application online. When sick or running late, I am satisfied that the correct reporting procedure the Claimant was obliged to adopt was to report to the Control Room, my reasons are as follows:

13.1 This is clearly specified in both the Employee Handbook and in the Security Notice and the Claimant accepted this was the case in verbal evidence. It is clear on the Claimant's own evidence [w/s para. 17 and 40(c)] that the Control Room and MRT are not the same entity and therefore it was incorrect to report only to MRT.

13.2 The Claimant says that when he has contacted the Control Room in the past, he has been directed to contact MRT; this may well be the case but it does not alter his contractual obligation to contact the Control Room in the first instance.

13.3 The Claimant says [w/s para. 17] that he always dealt with MRT about his shifts and directly reported sickness to MRT and therefore in effect there was an implied term as a matter of custom and practice that it was acceptable only to contact MRT and then complete Return to Work Forms. However, I do not accept this:

(i) There is no supporting evidence of this; the evidence the Claimant has provided of previous communications with MRT [175-180] only relate to the Claimant either accepting or rejecting shifts offered to him by MRT; they do not show that he reported absences to MRT. Likewise the Return to Work Questionnaires he has produced dated October 2016, January and February 2017 [171-174] do not assist as these would have been completed on return to work and give no indication of who he reported his absence to.

(ii) Whilst Mr. Hussain says in his witness statement [w/s para. 2] that security officers "*directly call MRTs if they are running late, report sickness or for any other reason ... "* I prefer his (contradictory but clear and repeated) verbal evidence that MRT could not in fact authorise holiday or sickness absence. He said (and I accept) that only management authorise absence; once authorised, the Control Room contacts MRT and MRT arranges cover; the fact that he arranges cover does not mean that the absence has been authorised

(iv) I do not accept the Claimant's assertion (in verbal evidence) that it was MRT's responsibility to contact his Line Manager.

13.4 It was not the Claimant's responsibility to find cover if he was absent - that was part of MRT's role.

14. <u>First Written Warning dated 27 March 2017</u>

14.1 The Claimant had the following absences/ lateness:

- 16 and 17 October 2016: off sick (bad stomach) [171].
- 31 October 2016: late reporting for duty.
- 25 December 2016: absent because his car broke down [172].
- 15 February 2017: off sick (fatigue) [173].
- 25 February 2017: off sick (fatigue/stress) [174].

14.2 On **8 March 2017** the Claimant attended an Investigation Meeting regarding his level of absences. On **13 March 2017**, the Respondent wrote to the Claimant to inform him that the investigation had been completed and there was a case to answer [80]. On **16 March 2017**, the Respondent wrote to the Claimant inviting him to attend a disciplinary hearing on 24 March 2017 [81] with regard to his "*excessive number of occasions of absence*". On **24 March 2017**, the Claimant attended the Disciplinary Hearing which was conducted by his Line Manager, Mr. Goldsmith. The Claimant was not accompanied or represented at that hearing.

14.3 On **27 March 2017**, Mr. Goldsmith wrote to the Claimant giving him a first written warning regarding his lateness/absenteeism [82-83] [165-166]. This states in the body of the letter that it is a final written warning; however, both sides accept that this was an error and that this was a first written warning. Mr. Goldsmith states:

"I have made this decision based on the following reasons:

1. *During the hearing you did not give an underlying issue as to all the absences and will try to improve this.*
2. *I have taken into consideration your length of service and your clean record in the last 12 months.*
3. *During the hearing you mentioned you visited your GP and had a blood test, you also stated you would keep me informed of the outcome.*

Whilst I understand we all get ill from time to time we work to the rule of three. Please try to minimise the amount of absences you have.

Attending agreed shifts are important and whilst I understand that sickness sometimes cause inability to attend work, it causes operational difficulties to the contract and/or client and sometimes results in loss of revenue to the company. I urge that you try and improve your level of attendance and as mentioned in the hearing, I urge you to carefully consider "extra" shifts before confirming them."

Mr. Goldsmith then sets out the Claimants right of appeal.

14.4 The Claimant did not appeal.

15. <u>Final Written Warning 7 September 2017</u>

15.1 On **17 July 2017**, Mr. Russell Dean, Security Systems Operations Manager, wrote to the Claimant [84] inviting him to attend an Investigation Meeting on 31 July 2017 to discuss the following allegations:

"That you were late reporting for duty on the following dates:.

- *Monday 31 October 2016*
- *Tuesday 6 June 2017*
- *Tuesday 11 July 2017*
- *Friday 14 July 2017"*

15.2 On **31 July 2017** the Claimant attended the Investigation Meeting conducted by Mr. Dean. On **23 August 2017**, Mr. Dean wrote to the Claimant to inform him that there was a case to answer [85].

15.3 On **7 September 2017**, the Claimant attended the Disciplinary Hearing which was conducted by his Mr. Goldsmith. The Claimant was not accompanied or represented at that hearing.

15.4 On **7 September 2017**, Mr. Goldsmith wrote to the Claimant [86-87] [167-168] giving him a final written warning regarding his "*excessive number of occasions of lateness*". Mr. Goldsmith refers to the provisions in the Employee Handbook and the Security Notice and states:

"After careful consideration of the information and facts it was my decision that you be issued with a final written warning in accordance with the Company Disciplinary Procedure, which will remain on

your personal file and be active for a period of 12 months. I have made this decision based on the following reasons:

1. During the investigation/hearing you did not give an underlying issue as to lateness.
2. I have taken into consideration your length of service and the fact you have a written warning.
3. I have taken into account the one time you had a prior arrangement with a MRT.
4. You have already been issued with a written warning for persistent absenteeism or lateness.

Whilst I understand you cannot guarantee trains running on time, it is something that could be resolved by getting an earlier train. Being late happens from time to time the issue with this case is the persistence of which it happens, I urge you to leave a little earlier to ensure you get to work on time.

As for the being out of London this is not acceptable. You should better manage your work and personal life to ensure they do not clash and cause issues".

Mr. Goldsmith then sets out the Claimants right of appeal. This letter does not explain what will happen in the event of further lateness or absenteeism; however, in accordance with the Claimant's verbal evidence, I find that he did understand that this was a final warning and that the next step in the procedure was dismissal in the event of further lateness or absenteeism.

15.5 The Claimant did not appeal.

<u>Events leading to the Claimant's dismissal</u>

16. On **26 August 2017**, the Claimant booked return flights to India with an outbound flight on 26 October 2017 and return flight on 28 February 2018 [127-131]. At this stage, he had not sought approval for these holiday dates.

17. On **1 September 2017**, the Claimant requested 16 days holiday (26 October to 29 November 2017); this was approved.

18. On **22 September 2017**,he requested additional holiday (30 November to 3 December 2017) [88]; this was refused by Mr. Goldsmith on **26 September 2017** [88] as the Claimant already had "*16 days holiday leading to that*".

19. On **26 October 2017**, the Claimant went on holiday to India as planned. He accepts that he only had authorised leave until 29 November 2017 and that he was next due to work on 30 November 2017.

20. On **16 November 2017**, the Claimant first became aware he was sick (whilst still on holiday) [96].

21. On **22 November 2017**, the Claimant says he contacted a colleague Ben via WhatsApp and asked if he could cover the Claimant's shifts on 30 November and 3 November 2017; there is no supporting evidence of this.

22. On **23 November 2017** [184] the Claimant contacted Ben via Whatsapp [184] and asked Ben if Mr. Hussain (Supervisor MRT) had asked him to cover the Claimant's shifts on 30 November and 3 December 2017; Ben replied "*Nope*".

23. In oral evidence the Claimant said that on or around **25 November 2017** he knew he would be unable to return to the UK to work his shifts on 30 November and 3 December 2017 due to illness.

24. On **24/25 November 2017**, the Claimant contacted Mr. Hussain, MRT:

24.1 The WhatsApp messages [135] [182-183] show that the Claimant informed Mr. Hussain that he had spoken to Ben and that Ben was happy to cover the Claimant's shifts on 30 November and 3 December; the Claimant asked Mr. Hussain for his "*help with this*" as he [the Claimant] was coming to the UK on **4 December**. The Claimant did not mention his illness or give any reason why he was unable to work these shifts; Mr. Hussain did not know why the Claimant was unable to attend (verbal evidence).

24.2 Mr. Hussain replied:

"Badri what happened?
Did you always know you'll be coming 4th dec."
"Why don't you just send email to Michael [Mr. Goldsmith]"
"Your coming on 4th and immediately you can work on 4th Night"

24.3 The Claimant says he did not tell Mr. Hussain he was off sick because Mr. Hussain did not ask him why he was unable to work the shifts; I do not accept this as Mr. Hussain asked him "*what happened*?" and the Claimant chose not to explain.

24.4 The Claimant did not respond to Mr. Hussain and did not contact Mr. Goldsmith (his Line Manager) or anyone else whether by phone, WhatsApp, email or otherwise.

24.5 The Claimant says he did not phone because of "communication issues". In verbal evidence he was asked why he did not send an email to Mr. Goldsmith and replied that he had authentication issues which were resolved by 1 December.

25. I accept Mr. Hussain's evidence [w/s para. 7] that he contacted Ben on **26 November 2017** and Ben confirmed to him that he would cover the Claimant's shifts on 29 November and 3 December; Mr. Hussain then allocated these shifts to Ben.

26. On **26 November 2017**, the Claimant changed his return flight to 7 December 2017 [129-131]. He says (w/s para. 21) "*from the whatsapp chat with MRT Suleman Hussain I didn't get the impression that he will decline my request*".

27. On **28 November 2017**, the Claimant contacted Ben via WhatsApp [184] asking if Mr. Hussain had asked him to cover the Claimant's shifts on 30 November and 3 December; Ben responded indicating that he had and the Claimant thanked Ben for covering the shifts.

28. On **28 November 2017**, the Claimant first saw a doctor in India. A note from Dr. Satya Rayo of Abhaya Clininc dated 28 November 2017 [123] shows a diagnosis *"Acute fissure*" and states *"REST FOR WEEK DAYS To come back for review after week days*"; certain medication is prescribed. In oral evidence, Mr. Havenga said he accepted this note is genuine. This note does not say that the Claimant cannot travel and the Claimant says he did not ask the doctor if he could travel.

29. On **1 December 2017**, Mr. Goldsmith emailed the Claimant [93] [111] regarding his "*unauthorised absence from work*". The Claimant replied by email the same day [92-93] [110-111] to advise that the reason for his absence was his health condition and that he had rescheduled his return flight to the UK and would now be returning on 6 December. He concludes:

"*As there was no source of communication so I messaged Suleman [Mr. Hussain] on whats app about my delayed return to UK*".

The Claimant accepts that this was the first time he mentioned his sickness to anyone at the Respondent.

30. On **3 December 2017**, Mr. Goldsmith emailed the Claimant [109-110]:

"*If this is a health issue, how did an Officer know to cover you as the first we hear of this absence is tonight?*
When you return you need to come and see Russell Dean on 7th December at 10:00hrs and I have had to remove you from all shifts so far.
When you come to see Russell you will need to bring the following:
Passport
Original plane tickets showing you should have come home earlier
Proof of change of booking
Any doctors certificates you would have been given
We also need to know:
When you became ill.
When you was planning on returning
Why did you fail to follow absence reporting procedure?
You have not followed the absence reporting procedure which will need to be investigated, we need to consider if we need to investigate this AWOL as well"

31. On **3 December 2017**, the Claimant replied [91] [109] stating:

"*Im outside UK and I didn't have a means of communication that allow me to proper reporting of my sickness to management".*

Mr. Goldsmith responded on 4 December 2017 [90] [108] stating:

"*Reporting sickness is your responsibility. It also does not explain how an officer knew to cover your shift when we did not know*".

32. The Claimant says he lost one of two mobile phones on **6 December 2017**. He explained in verbal evidence that whilst in India he had use of a "local" Sony phone (which belonged to his sister) and a Samsung phone. As the Sony phone would be staying in India, he transferred his WhatsApp account from the Sony phone to his Samsung phone. Whilst travelling, he lost the Samsung phone and there was then no way he could access his WhatsApp history.

He relies on an insurance claim form he completed on 7 December 2017 [152- 155] in which he stated that his phone was lost/stolen on a bus on 6 December in India and reported it to the police on the same day.

33. On **7 December 2017**, the Claimant returned to the UK and the same day he saw his GP in the UK and obtained a prescription for medication [125]. In oral evidence, Mr. Havenga said he accepted this prescription is genuine.

<u>Disciplinary procedure</u>

34. On the morning of **7 December 2017**, the Claimant says [w/s para. 28] that he attended an informal meeting with Mr. Dean who advised him to resign, told him that he would definitely be sacked by Mr. Havenga and that it would be hard for him to find another job as he would get a negative reference. The Respondent denies this and I accept Mr. Havenga's evidence [w/s para. 13] that he spoke with Mr. Dean about this

and was assured by him that "*he would never do something like that which would affect the integrity of the process*".

35. On **7 December 2017**, Mr. Dean wrote to the Claimant asking him to attend a formal investigation meeting the following day [94] [112] with regard to his alleged "*unauthorised absence*".

36. On **8 December 2017**, the Claimant attended the investigation meeting conducted by Mr. Dean [notes 95-104 and 113-122] to discuss his alleged unauthorised absence from work. The Claimant provided the doctor's note [123], prescription from his UK GP [125], original flight details and re-booked flight details. Screenshots of Whatsapp conversations between the Claimant and Mr. Hussain (MRT) were provided by the Respondent.

37. The Claimant says [w/s para. 30] that Mr. Dean again advised him "*to think about resigning*"; I find on the balance of probabilities that this was not in fact said.
Mr. Dean concluded that there was a "*case to answer"* and in an Investigation Report [105-107] (which the Claimant has not challenged) Mr. Dean records the chronology and his reasons as follows:

37.1 Unauthorised absence from work
Mr. Dean comments that the Claimant was *"extremely inconsistent with his answers and they were at best conflicting".* He notes:
"[The Claimant] admitted at the end of the meeting that he had unauthorised absence but claimed it was due to illness. With the admission and the clear disparities in his story shown in the meeting minutes it is reasonable to believe this absence was intended from the beginning of his holiday. This is supported by the fact that his initial flight details show his return date as 28th February 2018 and also on 22nd September 2017 he submitted an FMS request for an additional 4 days from the 3th November to 3rd December which was later rejected by Michael Goldsmith.
It is reasonable to believe that the Claimant had every intention of not returning for his agreed shift on 30th November and that he has gone to lengths in order to try and hide this fact."

37.2 Failing to adhere to absence reporting procedure
Mr. Dean notes:
"[The Claimant] stated that on 22nd of November he contacted MRT Suleman via whatsapp to inform him he would not be returning. However, when asked to provide copies of this conversation again he was conflicting in his responses and stated he could not due to losing his phone. However after further questioning he admitted he had not lost the phone in question and had left it in India. Suleman was contacted and provided copies of the conversation which was actually time stamped at 24th November and made no mention of an illness. He was even advised to email MG [Mr. Goldsmith] directly in relation to the request which he did not and did not respond to the MRT why he would or could not".

38. On the same day, Mr. Dean wrote to the Claimant [132-133] advising him that the investigation had been completed and that he had concluded that there was a case to answer:
"*During the investigation you failed to provide sufficient evidence to support your claim that you intended to return to work when agreed and the evidence you did provide was inconsistent. You also admitted at the end of the meeting to not having followed the absence reporting process however claimed that this was due to communication issue but again when questioned on this your responses were vague and conflicting"*
The Claimant was suspended on full pay.

39. On **19 December 2017**, the Claimant received a letter asking him to attend a disciplinary hearing; enclosed with the letter were copies of the evidence the Claimant had submitted together with the WhatsApp chat history between Mr. Hussain and himself [C w/s para. 33]. The Claimant accepted in verbal evidence that he understood the allegations against him.

40. On **28 December 2017**, the Claimant attended a Disciplinary Hearing chaired by Mr. Havenga (former TFL Security Contracts Manager, left Feb 2018) regarding the Claimant's (alleged) unauthorised absence on 30 November and 3 December 2017 and his (alleged) failure to follow the correct reporting procedure. The Claimant was not accompanied or represented at that meeting; he denied that his absence was unauthorised. The notes [137-151] show that the meeting started at 11.10 and concluded at 12.50. Mr. Havenga says [w/s para 7] that he reviewed beforehand the notes of the investigation and Mr. Dean's report. The Claimant accepted in verbal evidence that he was given the chance to state his case.

41. On **29 December 2017**, Mr. Havenga wrote to the Claimant [156-157] informing him that he was summarily dismissed with immediate effect for gross misconduct for (i) unauthorised absence from work on 30 November 2017 and 3 December 2017 and (ii) failure to follow reporting of absence procedure.
Mr. Havenga sets out in this letter his reasons for this decision:
"*You requested to have leave between 29 September 2017 and 30 November 2017. The request was made on 1 September 2017 via FMS. You booked your tickets however on 26 August 2017. You stated during the investigation that you booked your return date on 28 February 2018 "because my holiday was not confirmed at that time". It is therefore reasonable to believe that you had booked your ticket before having authorisation for your intended leave contrary to the employee handbook section 7.1.2.*
You stated during the investigation that you decided that your illness was too severe to travel back to the UK. You stated that you made this decision on 25 November 2017 due to your symptoms getting worse. You attended a GP appointment on 28 November 2017, so it is reasonable to believe that you had made the decision to take additional leave before seeking medical advice. You stated that you contacted the company for additional leave, but from the evidence there was no authorisation given for this leave and you were advised to contact MG [Mr. Goldsmith] to obtain authorisation. It is therefore reasonable to believe that you had taken additional leave without seeking authorisation for this leave. You later during the investigation mentioned that you contacted your colleague BN [Ben] on 22 November 2017 to cover your shifts, this is backed up by the WhatsApp conversation obtained from the MRT SH [Mr. Hussain]. This information conflicts with your earlier statement that you had decided that your symptoms were so severe that you could not return to the UK in time to return to work. You later during the investigation mentioned that you had actually known by the 19th of November 2017 that you would not be returning to the UK in time to start your first shift. Prior to you going on holiday you requested additional holiday via FMS for 30 November 2017 to 03 December 2017 which was declined on 26 September 2017.
You attempted during the hearing to pass responsibility onto the MRT you contacted, but failed to provide the necessary evidence to convince me and made conflicting statements. The MRT in fact advised you to contact Michael Goldsmith, which you failed to do and did not ask the MRT to help you as you had no means of contacting Michael Goldsmith. It is therefore my belief that you had not do [sic] everything possible to ensure you were not in breach of company policy.
You could not provide any authorisation as per the holiday booking procedure and therefore are considered to have been absent without leave for your shifts on 30th November 2017 and 3rd December 2017.
I have made this decision based on the facts as I see them and what I deem is reasonable to believe.

I have taken into consideration the fact that you have active warnings on your file dated 27 March 2017 and 7th September 2017 and have also taken into account your length of service and feel that due to the seriousness of your actions and the clear lack of following company policy, this sanction is fair and appropriate."

In evidence [w/s para. 14] Mr. Havenga says if the Claimant had convinced him that his reason for not returning was that he was too ill to return, he would not have dismissed him.

Appeal

42. On **1 January 2018**, the Claimant appealed. In his letter of appeal [158-164] he states:

"I feel that the decision was too harsh even I made every effort to contact MRT well in advance to cover my shift on 24th November 2018 [2017]. I was on holiday back home from 29th October 2018 [2017] to 29 November 2018 [2017] and due to start shift on 30th November 2018 [2017].

The reason I requested cover my 30th Nov and 3rd Dec shifts because of my medical condition which started around 16th November 2017. I was suffering from condition called Acute Fissure –in-Ano. I have submitted a GP's letter from my home country also a GP prescription here from NHS GP. But management completely failed to take it into account.

Around 23rd Nov I have asked my colleague named Ben if he is available to cover my shift of 30th Nov and 3rd Dec and when he replied yes I request MRT to help cover my shift and told that Ben can cover as it will make MRTs job easy. MRT next day given my requested shifts to ... Ben... on 25th November. I conformed this with Ben, so to my knowledge my shifts given to my colleague as I requested. I thought there is no need to contact further as I felt MRT accepted my request and I took bit extra time to deal with my illness. But only on 1st December 2017 Michael Goldsmith suspended me, even though MRT given my shifts to me colleague. Ones [sic] MRT taken my shifts off from my rota on my request how I'm liable to work that shifts?

When I'm taken off from rota on 25th Nov 2017 why management took action and suspended me only on 1st December 2017. I'm on zero hour contract and feel I have the right to request for days off if asked in advance to my MRT as he handle all the roster.

MRT even given me time off when requested in past 3 occasions. I have submitted everything related to my illness in my disciplinary meeting but management failed to take into account and took the decision to dismiss me."

The Claimant then queries the previous warnings and says:

"George also stopped my 2 days of holiday pay which was approved already by my manager Michael Goldsmith. Stopping my holiday before the investigation and disciplinary meeting by the manager make me feel that it was already made that I will be dismissed before the meetings itself which it unfair dealing with employee."

43. Mr. Cook, Accounts Manager, was appointed to hear the appeal. He did not carry out any investigations beforehand [w/s para. 6] and took the view that his role was not to rehear the whole case but to review the decision [w/s para. 8]. The appeal hearing took place on **2 February 2018**. The Claimant attended but once again was not accompanied. The brief notes [169] show the meeting started at 11.00 and concluded at 11.35. Mr. Cook tried to contact Ben but was unsuccessful as by this time key personnel were no longer in the Respondent's employment; he managed to speak to Mr. Goldsmith who contacted Ben but Ben was unable to recall anything. He therefore did not have any supporting evidence that Ben had agreed to do the Claimant's shifts.

44. After the appeal hearing, the Claimant provided Mr. Cooke with copies of Return to Work Questionnaires dated October 2016, January 2017 and February 2017 [171-

174] and copies of messages passing between (i) him and Mr Hussain on 24 and 25 November 2017 [182-183] and (ii) him and Ben on 23 and 28 November 2017 [184]

45. On **20 February 2018**, Mr. Cook wrote to the Claimant advising that his appeal was unsuccessful [170], stating the following reasons:
"Critically, I was unable to find any support to you [sic] from Ben Nnamani in regards to covering your shift as you claim. Neither can I find any evidence.
You supplied no new evidence to support your appeal ... and having reviewed the minutes of the meetings and without having any further explanation form yourself I am content that the investigating and disciplining officers have covered the relevant points needed to determine a fair decision.
From the evidence to hand and your comments made in the investigation and subsequent disciplinary meetings, I believe that the sanction issued – dismissal without notice – was fair given that you already had two live sanctions on file including a final warning".
There was no further right of appeal.

46. The Claimant contacted ACAS on 15 March 2018 and an ACAS Early Conciliation Certificate was issued on 29 April 2018. The Claimant presented this claim on 12 May 2018.

47. At some point after the decision to dismiss and the appeal decision, the Respondent paid him monies in lieu of notice.

The Law

48. Section 98 (1) ERA:
In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:
- the reason (or if more than one the principal reason for the dismissal); and
- 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.

49. Section 98(4) ERA:
49.1 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 reasons shown by the employer):
(i) 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
(ii) shall be determined in accordance with equity and the substantial merits of the case.
49.2 In accordance with the tests set out in **British Home Stores Ltd v Burchell [1980] ICR 303** the Tribunal must consider:
(i) did the Respondent believe the Claimant was guilty of misconduct?
(ii) did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and
(iii) at the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?
49.3 Range of reasonable responses

(i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(ii) The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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.

50. Compensation

50.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA p**rovides for a compensatory award**:** "... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

50.2 Contributory conduct:

(i) Section 122(2) ERA states:
"*Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*"

(ii) Section 123(6) ERA states:
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

(iii) Before making any finding of contribution:

a. A claimant must be found guilty of blameworthy or culpable conduct; that enquiry is directed solely towards the conduct of the claimant and not towards the conduct of the employer or other employees.

b. For the purposes of a contributory fault reduction the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.

c. Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

50.3. Mitigation:

Section 123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

50.4 **Polkey**:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

50.5 ACAS Code:

Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code") provide that if it appears to the Tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

Submissions

51. A summary of Ms. Sidossis' submissions on behalf of the Respondent is as follows:

51.1 The Claimant was dismissed for conduct which is a potentially fair reason (s98(2)(b) ERA).

51.2 The dismissing officer, Mr. Havenga, had a genuine belief in the Claimant's misconduct based on reasonable grounds and after a reasonable investigation:-

(i) He had the investigation report [105];

(ii) During the investigation meeting the Claimant acknowledged that his absence was unauthorised and that he had not followed the reporting procedure [104].

(iii) The Employment Handbook and Security Notice applied and the correct procedure for reporting sickness absence was to contact the Control Room, not MRT.

(iv) The Claimant was absent without authorisation on 30 November 2017 and 3 December 2017. His only authorised absence was up to and including 29 November 2017 and yet he booked a return flight for 28 February 2018. His application to extend his absence for three days was rejected by Mr. Goldsmith [88]. On 26 November he changed the return flight to 7 December 2017; there was never a return flight booked in time for him to work his scheduled shift on 30 November 2017.

(v) On 24 November 2017, he contacted MRT but MRT did not authorise his absence and the fact MRT arranged for Ben to cover his shifts did not amount to authorisation. He did not mention his sickness to MRT, it was simply a plea to swap his shifts with Ben. He made no further efforts to authorise his absence. The first time he mentioned his sickness was in an email to Mr Goldsmith on 1 December 2017.

(vi) During the Investigation Meeting on 7 December 2017, he told the investigating officer that he fell ill around 16 November; that he knew by 25 November that he would not be returning for his scheduled shifts; that he contacted MRT on 22 November but had no copies of the correspondence that he was unable to email because he did not have access to his emails.

(vii) In the Disciplinary Hearing, he did not provide any further evidence or explanation. He argued that by MRT arranging cover for his shifts, his absence was implicitly accepted. Mr. Havenga decided to dismiss the Claimant for gross misconduct whilst a Final Warning was live.

(viii) The Claimant appealed and heavily relied on the fact that cover had been arranged but in the Investigation Meeting, he accepted that his absence was unauthorised.

51.3 The procedure was fair. A reasonable investigation was carried out; the Claimant chose not to be represented at the Disciplinary Hearing; he exercised his right to appeal.

51.4 The decision to dismiss fell within the band of reasonable responses:

(i) The Claimant's misconduct amounted to five separate breaches of the Employment Handbook and amounted to gross misconduct.

(ii) Even if this was not gross misconduct, the Claimant would have been dismissed in any event because he was subject to a live final written warning. As he had already been issued with a Final Written Warning, alternative sanctions were not available.

51.5 With regard to remedy:

(i) If the dismissal was procedurally unfair, there is 100% chance that the Claimant would have been dismissed in any event (*Polkey)*.
(ii) The Claimant contributed to his dismissal 100% and it is just and equitable to reduce both the Basic and the Compensatory Award by 100%.

52. A summary of the Claimant's verbal submissions is as follows:
52.1 The Respondent did not carry out a fair investigation.
52.2 The Respondent wanted him to resign and prior to inviting him to a formal Investigation Meeting, he attended an informal meeting on 7 December with Mr. Dean who told him Mr. Havenga would terminate his employment and encouraged him to resign.
52.3 He only received the letter asking him to attend the Investigation hearing the day before at 8.00 pm.
52.4 There was a delay and the ACAS code says issues should be raised promptly. However, he accepts that he was not disadvantaged by the delay.
52.5 Mr. Havenga stopped the Claimant's holiday and suspension pay prior to the Disciplinary Hearing which shows he had made up his mind to dismiss the Claimant.
52.6 Mr. Havenga said he would not have sacked the Claimant if he believed the Claimant was genuinely sick but at the Tribunal hearing he accepted the validity of the sick note.
52.7 Mr. Havenga failed to interview Mr. Hussain as part of the investigation other than to obtain the WhatsApp exchange. Mr. Hussain did not communicate with the Claimant's Line Manager; this was misconduct but no action was taken against him. The Claimant disagrees with Mr. Hussain's evidence that he was unable to authorise absence.
52.8 The Respondent relies on the Employee Handbook but they themselves are unsure of the procedure and have failed to prove the right procedure.

Conclusions

53. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant was not unfairly dismissed.

54. I am satisfied that the Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically his conduct (s98(1) ERA). Whilst the Claimant maintains that the decision to dismiss him was unfair, he does not dispute that the reason for his dismissal was his conduct nor does he suggest that there was any other underlying reason.
.
55. I have then moved on to consider the fairness of the Claimant's dismissal (s98(4) ERA and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the Respondent acted reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case. I have reminded myself that I must not substitute my own decision as to what was right or impose my own standards.

56. Having considered together all the circumstances of the case, I have concluded that dismissal was fair as both the procedure and the decision to dismiss fell within the range of reasonable responses of a reasonable employer for the following reasons.

57. The investigation

57.1 The initial investigation was sufficiently thorough to fall within the band of reasonable responses of a reasonable employer. The Claimant says the Respondent should have interviewed Mr. Hussain. However, they contacted him in order to obtain the WhatsApp exchange and given Mr. Hussain's verbal evidence that MRT did not have the authority to approve absence, it would not have assisted the Claimant.

57.2 I have not accepted the Claimant's assertion that he was "encouraged" to resign prior to the investigation.

58. The disciplinary hearing and decision to dismiss:

58.1 The Claimant was given due notice of the disciplinary hearing and the relevant documentation beforehand; he was aware of his right to be accompanied but declined to exercise that right. He was given the opportunity to state his case.

58.2 The Claimant failed to follow the correct reporting procedure (see para. 13 above) and Mr. Havenga's decision to dismiss the Claimant fell within the band of reasonable responses taking into account the following aggravating factors:

(i) The Claimant failed to mention his sickness to MRT (or indeed to anyone at the Respondent) until 1 December 2017 by which time he had missed his shift on 30 November 2017.

(ii) He booked his holiday flights before obtaining prior authority to take holiday.

(iii) His application to extend his absence for three days was rejected by Mr. Goldsmith [88].

(iv) He never at any time booked a return flight which would enable him to work his scheduled shift on 30 November 2017.

(v) There was a live final written warning (which he did not appeal) for persistent absenteeism/lateness. Whilst the final written warning did not set out what the next step in the disciplinary process would be, I am satisfied that the Claimant understood that it would be dismissal.

58.3 In light of the above, it was within the band of reasonable responses for Mr. Havenga to conclude that the Claimant's actions in failing to properly report his absence were premeditated and deliberate and that, regardless of any sickness, he had no intention of returning to work in time for his shift on 30 November 2017.

59. Appeal hearing and decision to uphold dismissal.

59.1 Mr. Cook conducted the Appeal hearing; again the Claimant was given due notice and he was aware of his right to be accompanied but declined to exercise that right. Whilst the appeal hearing was relatively brief, I am satisfied that the Claimant was given the opportunity to state his case and to provide any documents prior to Mr Cook making his decision.

59.2 Mr. Cook's decision to uphold Mr. Havenga's decision to dismiss the Claimant fell within the band of reasonable responses.

60. In conclusion, in accordance with the tests set out in *Burchell*, the dismissal was fair:

60.1 Mr. Havenga and Mr. Cook genuinely believed he Claimant was guilty of misconduct and had in their minds reasonable grounds upon which to sustain that belief and, at the stage at which that belief was formed, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

60.2 The procedure followed fell within the range of reasonable responses of a reasonable employer.

60.3 Dismissal fell within the range of reasonable responses of a reasonable employer given all the circumstances of the case (as rehearsed above) both substantive and procedural and the size and administrative resources of the employer's undertaking. I fully accept that another employer may well have chosen not to dismiss the Claimant but as I have concluded that the procedure and decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted, the dismissal was fair and the Claimant's claim of unfair dismissal must fail.

61. In view of this, it is not necessary to consider compensation and the Remedy Hearing provisionally listed for 25 June 2019 will be cancelled.

62. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 2; all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 7 to 47; a statement of the applicable law is at paragraphs 48 to 50; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 53 to 62.

Signed by _____

Employment Judge Mason

6 May 2019

Judgment sent to Parties on
10 May 2019