EMPLOYMENT TRIBUNALS

Claimant: **Mr J Dubiczenko**

Respondent: **Samworth Brothers Limited**

Heard at: Nottingham (via CVP)

On: 19 January 2021

Before: Employment Judge Smith (sitting alone)

Representation
Claimant: Mr F Kostecki (Representative)
Respondent: Mr C Finlay (Solicitor)

Interpreter: Ms M Savage (Polish language)

JUDGMENT

The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Background

1. This has been a remote which has been not objected to by the parties. The form of remote hearing was V: video whether partly (someone physically in a hearing centre) or fully (all remote). A face to face hearing was not held it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 228 pages, the contents of which I have recorded. The order made is described below.

2. By an ET1 claim form presented on 2 July 2020 the Claimant presented a claim of unfair dismissal and a claim for unauthorised deductions from wages (in respect of holiday pay) to the Employment Tribunal. The holiday pay claim was withdrawn and dismissed by Employment Judge Blackwell at a preliminary hearing (PH) on 28 October 2020. The remaining unfair dismissal claim was fully defended by the Respondent in its ET3 response form dated 3 August 2020. The matter was the subject of case management by Employment Judge Blackwell at the PH and the nature of the Claimant's claim was substantially clarified.

Issues

3. It did not appear to be in dispute that the Respondent's ostensible reason for dismissal was one relating to the Claimant's conduct. In an unfair dismissal case it is for the employer to prove a potentially fair reason for dismissing the employee (**s.98(1) Employment Rights Act 1996**) before a Tribunal considers matters relating to the actual fairness of the dismissal.

4. On the question of the fairness of the dismissal (**s.98(4) Employment Rights Act 1996**) Employment Judge Blackwell was able to identify two principal points which the Claimant contended rendered his dismissal unfair. These were:

    (1) One of the allegations against the Claimant was that he had failed to attend meetings which the Respondent reasonably required him to. The Claimant contended that his dismissal was unfair because he did not in fact receive the letters inviting him to such meetings.

    (2) The Claimant contended that he appealed his dismissal but that the Respondent did not take any action in respect of it. This, he said, made his dismissal unfair. For its part, the Respondent denied ever receiving a letter of appeal from the Claimant and denied that the dismissal was unfair on this basis.

5. I was presented with a bundle amounting to 228 pages. I heard live evidence from the Claimant on his own behalf and from Mr Bob Taylor (Production Manager) for the Respondent. Both provided witness statements for the purposes of this hearing.

Findings of fact

6. The Claimant commenced employment with the Respondent on 3 August 2008 as a Machine Operator, based at the Respondent's Madeline Road site in Beaumont Leys, Leicester.

7. The Respondent is a producer of sandwiches, prepared salads and other chilled foods for the retail market. It trades under the name "Bradgate Bakery" and employs around 9,000 people. At the Madeline Road site the Respondent has around 1,500 employees.

8. On 7 June 2019 the Claimant was involved in a road traffic collision and his back was injured. This caused him to be absent from work through ill-health.

9. On 22 July 2019 the Respondent wrote to the Claimant inviting him to a sickness absence review meeting, to be held on 25 July 2019. The Claimant did not attend that meeting and attempts made to contact him by telephone on the same day were unsuccessful. On 31 July 2019 attempts were made to contact the Claimant through his nominated emergency contacts, and on that date Ms Gibson of the Respondent was able to speak to the Claimant through his secondary emergency contact.

10. On 5 August 2019 Occupational Health (OH) reported that the Claimant remained unfit for work but stated that he was able to attend meetings even though he was at that time unable to drive.

11. On 9 August 2019 the Respondent wrote to the Claimant again, inviting him to a rearranged sickness absence meeting to be held on 12 August 2019. The Claimant attended on that occasion, along with Ms Kasia Lesinska (his line manager) and Ms Michelle Berry (People Advisor) as note-taker. Towards the end of that meeting Ms Lesinska and Ms Berry noticed a strong smell of alcohol in the room. Ms Lesinska asked the Claimant whether he had been drinking. The Claimant confirmed that he had, but *"not a lot."* Ms Lesinska and Ms Berry recorded these matters in short witness statements shortly afterwards.

12. On 16 August 2019 the Claimant was invited to a disciplinary investigatory meeting, to be held on 19 August 2019. The matter for discussion was the allegation that the Claimant had attended the sickness absence meeting of 12 August 2019 under the influence of alcohol. In the invitation letter the Claimant was warned that if the allegation was found proven it could result in his dismissal.

13. The Claimant did not attend that investigation meeting. It was rearranged for 22 August 2019, but he failed to attend that as well despite having agreed that he would attend.

14. On 30 August 2019 the Respondent wrote to the Claimant again, inviting him to a disciplinary investigation meeting. This was a second rearrangement and the meeting was to be held on 2 September 2019. In the letter of invitation the Claimant was warned once again about the potential consequences of the disciplinary allegation against him, and this time he was also warned that his repeated failures to attend meetings thus far could amount to a failure to follow a reasonable request and therefore misconduct.

15. The Claimant failed to attend the 2 September 2019 meeting and the Respondent's decision-maker, Mr Oscar Dobson, decided that it would proceed in his absence. The result was that Mr Dobson decided to progress the allegation of the Claimant's repeated failures to attend meetings to a disciplinary hearing.

16. On 11 September 2019 the Respondent wrote to the Claimant inviting him to a disciplinary hearing, to be held on 16 September 2019. The allegation to be discussed at that meeting was solely that relating to the Claimant's repeated

failures to attend meetings. The author of that letter was Mr Dobson, who also made it plain to the Claimant that the earlier allegation – attending a meeting under the influence of alcohol – was no longer being pursued by the Respondent. The Claimant was afforded the right to be accompanied by a colleague or Trade Union representative at that meeting.

17. The 16 September disciplinary hearing went ahead and was chaired by Mr Bob Taylor (Production Manager) accompanied by Ms Berry as note-taker. The Claimant did not himself attend, but his representative Ms Lorraine Brook did. The basis upon which Ms Brook came to be in attendance was not clear to me, but nothing turns on that. Nevertheless, the notes of that meeting do not include Ms Brook (or indeed anyone else) offering a reason why the Claimant was not himself in attendance. Mr Taylor decided to proceed in the Claimant's absence.

18. The outcome of the disciplinary hearing was that Mr Taylor decided that the Claimant's repeated failures to attend the aforementioned meetings amounted to a failure to follow a reasonable request. He therefore found the Claimant guilty of misconduct. The sanction imposed was a final written warning, which was sent to the Claimant in a letter dated 30 September 2019. The final written warning was to remain live for period of 12 months and the Claimant was told that any further failures to attend meetings could result in further action being taken against him, including his dismissal.

19. The Claimant informed the Respondent that he had not received this letter in the post, so Ms Berry emailed a copy to his email address on 3 October 2019.

20. The Claimant did not appeal the final written warning, although Mr Taylor's letter explained that he had a right to do so within one week of his receipt of the letter. In this hearing the Claimant did not seek to challenge his final written warning or suggest that in some way it had been inappropriately issued.

21. The Claimant remained absent from work through ill-health thereafter.

22. On 9 October 2019 the Claimant was admitted to hospital following a seizure. He had also injured his shoulder and was discharged the following day. Another absence review meeting which had been arranged in the meantime was ultimately postponed to 22 October 2019 because of this. In advance of that meeting the Claimant was assessed by OH once again, whose report indicated that he remained unfit for work. The Claimant attended the meeting on 22 October together with Ms Lesinska and Ms Berry. The outcome of the meeting was that the Respondent referred the Claimant to its internal physiotherapy service to assist with his recovery.

23. On 12 December 2019 the Respondent wrote to the Claimant inviting him to another absence review meeting, to be held on 17 December 2019. The Claimant attended that meeting together with Ms Lesinska and Ms Berry. The Claimant was continuing to undergo explorations and treatment regarding his injured back and shoulder. The outcome of the meeting was that the Claimant agreed to keep the Respondent updated as to the results of the explorations and that the matter would be further reviewed.

24. No update was forthcoming from the Claimant, so on 27 and 28 January and 3 February 2020 the Respondent made attempts to contact him by telephone to enquire about his welfare. Those attempts were unsuccessful. On 30 January 2020 the Respondent was able to speak to one of the Claimant's nominated emergency contacts – Ms Marena Dubiczenko – but she was unable to confirm the Claimant's whereabouts at that time. Therefore, on 3 February 2020 Ms Berry wrote to the Claimant inviting him to contact her by telephone and provided a number for him to do so. That letter was sent by email and by recorded delivery to the Claimant's address but Royal Mail's attempt to deliver it was unsuccessful as no-one was present at the Claimant's home on 5 February 2020.

25. An OH appointment was arranged for the Claimant, to be held on 4 February 2020. The Claimant failed to attend.

26. The Claimant's most recent fit note expired on 5 February 2020. Ms Berry's enquiries revealed that as at 10 February 2020 her letter had not been collected from the local Royal Mail collection point. She therefore wrote to the Claimant again, by email and first-class post on 10 February 2020, again inviting him to contact her but also notifying him that without a fit note his absence could be deemed unauthorised. The letter also included a warning that persistent unauthorised absence could be viewed as gross misconduct under the Respondent's disciplinary policy.

27. On 10 and 11 February 2020 three further attempts to contact the Claimant were made by telephone, on each occasion by Ms Lesinska. Only the last was successful (though calling the Claimant's housemate) and the consequence was that a further absence review meeting was arranged, for 18 February 2020. That invitation was confirmed in writing by Ms Berry in a letter dated 14 February 2020 and sent by first-class post.

28. The Claimant failed to attend the 18 February 2020 meeting.

29. A further OH appointment was arranged for the Claimant, to be held at 2.30pm on 25 February 2020.

30. As a result of the missed appointments up to that point, on 21 February 2020 the Respondent wrote to the Claimant inviting him to a disciplinary investigation meeting, to be held at 10pm on 25 February 2020. The allegation was that he had failed to attend the absence review meeting of 18 February. The letter informed the Claimant that his failure could amount to a minor breach of the Respondent's sickness absence policy. No mention was made of this allegation being any more serious than that, and no warning was given that if it were proven the consequence might be the termination of his employment.

31. The Claimant failed to attend both the OH and disciplinary investigation meetings arranged for 25 February 2020.

32. On 28 February 2020 the Respondent wrote to the Claimant inviting him to a rearranged disciplinary investigation meeting, to be held on 5 March 2020. The allegations levelled at the Claimant were that he had failed to attend the meetings

of 4, 18 and 25 February, and that he had failed to keep in regular contact with the Respondent during his period of sickness absence despite the attempts made by Ms Berry and Ms Lesinska. The Claimant was informed that if proven, these allegations could amount to repeated acts of general misconduct which could constitute gross misconduct. He was also informed that if the allegations were proven, a potential consequence was that he could be dismissed. To ensure the Claimant received this letter, it was sent by Ms Berry both in first-class post and by recorded delivery.

33. The manager appointed to conduct the disciplinary investigation meeting was Mr Slawomir Lewek, who attended on 5 March 2020 along with Ms Berry as note-taker. The meeting was also attended by a Trade Union representative, Mr Atish Ram, but not by the Claimant. Mr Lewek decided to proceed in his absence and established that the Claimant had indeed failed to attend the meetings in question, and that no explanation had been provided. He also established that there were contractual requirements for the Claimant to attend meetings of this nature and to keep in regular contact with the Respondent during periods of sickness absence, and that the Claimant had failed to comply with those requirements. Mr Lewek's conclusion was that the matter should be referred up to a disciplinary hearing and that the allegations against the Claimant should be categorised as gross misconduct.

34. On 6 March 2020 the Respondent wrote to the Claimant inviting him to a disciplinary hearing, to be held on 12 March 2020 and chaired by Mr Taylor. The letter was sent by first-class post and recorded delivery. The allegations levelled at the Claimant were the same as those which featured in the letter of 28 February 2020, with the addition of his failure to attend the rearranged disciplinary investigation meeting on 5 March 2020. The Claimant's attention was drawn to the potential for his dismissal, and in this letter he was reminded that he had a live final written warning on his file. The Claimant was also told that if he failed to attend, the hearing may proceed in his absence.

35. On 9 March 2020 Ms Lesinska was in contact with the Claimant via the telephone. She emailed Ms Berry with a summary of what they had discussed. She reported that the Claimant had informed her that he had been unable to attend the meetings on 25 February 2020 because on 24 February he had been notified of the death of his cousin and had to make an emergency trip to Poland to attend the funeral. He said he had travelled by car with a friend, and had remained in Poland for four days. Ms Lesinska asked the Claimant to obtain documentary evidence supporting this version of events (specifically his ferry or Eurotunnel ticket) and suggested that family members might be in a position to provide him with evidence relating to the funeral itself.

36. In the same email Ms Lesinska recorded the Claimant as having told her that he did not attend the other meetings because he had not received notification of them. It also recorded that Ms Lesinska checked the Respondent's record of the Claimant's address and that he confirmed it was accurate. It also shows Ms Lesinska as having requested that the Claimant bring to the disciplinary meeting *"all paperwork relating to GP and hospitals."*

37. As to the general lack of contact, the email records the Claimant as having told Ms Lesinska that normally his colleague (and housemate) Krzysztof would pass messages to the Respondent about his situation but that he did not know why no-one had done so *"this time"*.

38. The disciplinary hearing of 12 March 2020 went ahead and the Claimant attended. Mr Taylor was accompanied by Ms Berry as note-taker, and the Claimant was accompanied by Mr Marcel Durik who was also able to interpret English into Polish for the Claimant's assistance. Mr Taylor gave evidence to the Tribunal. I found him to be a plain-talking, honest witness who was able to recall the disciplinary hearing with clarity and explain his decision-making in an uncomplicated way. His evidence was not substantially challenged by Mr Kostecki on behalf of the Claimant.

39. Mr Taylor asked the Claimant about the trip to Poland, the reason the Claimant contended he could not attend the meetings on 25 February 2020. The Claimant told him that he had received a letter of invitation to a meeting on this date. Mr Taylor told me, and I accepted, that the Claimant told him he no longer had any documentation relating to this trip. The notes of the meeting record the Claimant as having said that his friend had *"thrown away"* any documents relating to the trip.

40. In cross-examination Mr Finlay asked the Claimant whether he thought to ask his friend for a note to corroborate his version. The Claimant said that he could not have done that because his friend lives in Wales. I asked the Claimant how he normally communicates with his friend. He told me that his friend normally calls him but changes his telephone number frequently, so generally he did not know where his friend was at any one time. Nevertheless, the Claimant confirmed to Mr Finlay that on this particular occasion he had in fact been able to speak to the friend about the matter of the documents in order to establish that there were none available. I found the Claimant's evidence on this matter to be of dubious credibility.

41. Mr Taylor also asked the Claimant about the reasons he failed to attend the other meetings. The Claimant told him he had not received letters inviting him to those meetings, but he accepted that mail normally was delivered to his home if occasionally to his next-door neighbour. However, he also said that his non-attendance might have been because he was in hospital at the time. In cross-examination Mr Finlay took the Claimant to the medical documents he had provided by way of disclosure in these proceedings. In answer to the suggestion that none of the dates coincided with times the medical documents said he was in hospital, the Claimant said he would have to check. I found this answer surprising because the Claimant had disclosed those medical documents himself.

42. Nevertheless, in the disciplinary hearing itself the Claimant produced none of the medical documents Ms Lesinska had asked him to bring. In the disciplinary hearing Mr Taylor asked the Claimant how he was typically notified of hospital appointments. The Claimant replied that it was by text message. Following up, Mr Taylor asked him whether he could show him some of the text message notifications from the material time. The Claimant replied that he could not,

because he had bought a new mobile telephone on 2 March 2020. However, upon inspection of the Claimant's mobile telephone Mr Taylor was able to see that there were messages on it dating back to November 2019, which was substantially before the period in question. Those messages showed the Claimant being invited to hospital appointments in November 2019 but also in March 2020. When pressed on this matter by Mr Taylor, the Claimant changed his version and said that he had in fact deleted the notifications from the period in between. I accepted Mr Taylor's evidence on this matter because of his general credibility as a witness and because that exchange is corroborated by the notes of the disciplinary hearing.

43. The Claimant explained to Mr Taylor that in relation to the attempts made to contact him by telephone, he may not have answered the calls because he did not recognise the number calling. The Claimant's explanation for not having taken steps to contact the Respondent himself was because he did not appreciate he had to.

44. Towards the end of the disciplinary hearing the Claimant admitted that he had in fact received the letter of 28 February 2020, his invitation to the disciplinary investigation meeting chaired by Mr Lewek on 5 March 2020. That was evident from the notes of the meeting, and was a change in position to that expressed by the Claimant at the start of the disciplinary hearing.

45. Mr Taylor took time to deliberate on the matters discussed in the disciplinary hearing. It was agreed that the Claimant had not attended the meetings in question and not been in contact with the Respondent but the crucial decision for Mr Taylor was whether he accepted the Claimant had proper reasons for having failed to so. As to the particular allegations levelled against the Claimant:

    (1) Mr Taylor accepted that mail sometimes does go missing but found it implausible that so many letters would have suffered that fate. He therefore did not accept this part of the Claimant's explanation for not having attended meetings.

    (2) Mr Taylor did not believe the Claimant's version about the trip to Poland being the reason he did not attend meetings on 25 February 2020. He found it implausible that the no documentary evidence could be produced to demonstrate that such a trip occurred.

    (3) Based on the absence of supporting evidence and the implausibility of the Claimant's suggestion that he had deleted only particular text messages from his telephone, Mr Taylor did not believe that the Claimant had been in hospital at a time when any of the meetings in question occurred.

    (4) Finally, Mr Taylor did not accept that the Claimant had failed to answer his telephone because he did not recognise the number. Mr Taylor noted that as far as he was aware the Respondent's telephone number had not changed in the time the Claimant had been employed.

46. Mr Taylor's reasoning was not challenged by Mr Kostecki on behalf of the Claimant. In answer to my questions (asked to elicit the evidence and to put the Claimant on an equal footing in line with the overriding objective) Mr Taylor's evidence was confirmatory as to the conclusions he reached. For these reasons and because Mr Taylor was generally a credible witness, I accepted that those were indeed the genuine conclusions he reached in relation to the allegations and the Claimant's purported reasons for not having attended the meetings in question.

47. Mr Taylor decided that the Claimant was guilty of gross misconduct in having committed repeated acts of misconduct, relating to his failure to attend meetings and his failure to keep in contact with the Respondent whilst absent on sick leave. I accepted this was his genuine belief.

48. Determining the sanction, Mr Taylor took into account that the Claimant's length of service, what losing his job would mean for him personally, what losing the Claimant as an employee would mean for the Respondent. He noted the specialist skills the Claimant possessed in operating a specific piece of machinery used by the Respondent. Mr Taylor also took into account the seriousness of the offence and the fact that the Claimant was on a final written warning. He concluded that in circumstances where the Claimant had been given a final written warning for the same offence, the Claimant could not be trusted to comply with the Respondent's procedures and instructions in future. His conclusion was that the appropriate sanction was that the Claimant should be dismissed.

49. By letter dated 17 March 2020, Mr Taylor communicated to the Claimant that he was summarily dismissed for gross misconduct with effect from 12 March 2020. That letter was sent recorded delivery and was signed for by the Claimant on 19 March 2020. The dismissal having been communicated to him on that date, the Claimant's effective date of termination was 19 March 2020. The letter included notification that the Claimant could appeal Mr Taylor's decision within one week of his receipt of the letter.

50. In his claim form the Claimant contended that he had appealed Mr Taylor's decision to dismiss him, and that the Respondent had failed to action his appeal rendering his dismissal unfair. For reasons I was not able to ascertain, two competing letters of appeal appeared in the bundle. In his witness statement that Claimant said, *"I made an appeal but have not received a response from my employer."* However, in cross-examination the Claimant conceded that neither letter of appeal had in fact ever been sent to the Respondent. The Claimant said that the furthest he had got was to ask a friend to translate an original letter (presumably written in Polish) into English, and then to send it to the Respondent on his behalf. The reality is that the Claimant did not in fact appeal his dismissal.

The Law

51. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their

employer, subject to the qualification (under **s.108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the Claimant's case is not one of them. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**s.98(2)(b)**). The burden of proof is on the employer to show a potentially fair reason for dismissal (**s.98(1)**).

52. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **s.98(4) Employment Rights Act 1996**. The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending *"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 *"in accordance with equity and the substantial merits of the case"*.

53. In conduct cases the there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **s.98(4)**. The leading case remains **British Home Stores Ltd v Burchell [1978] IRLR 3** (EAT), which sets out three principal points for the Tribunal to consider, namely:

    (1) Did the employer genuinely believe in the employee's guilt? That is a factual matter which looks at the mind of the dismissing officer.

    (2) If so, did the employer have reasonable grounds upon which to sustain that belief? That involves looking at the evidence that was available to the dismissing officer.

    (3) If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case? The assessment of what amounted to a reasonable investigation will differ from case to case but it would generally involve looking at the steps the employer actually took in addition to those it could reasonably have taken but did not. Generally, what is reasonable will to a significant degree depend on whether the conduct is admitted or not (**ILEA v Gravett [1988] IRLR 497**, EAT), and the question is to be determined from the outset of the employer's procedure through to its final conclusion (**Taylor v OCS Group Ltd [2006] IRLR 613**, Court of Appeal).

54. At all stages in a misconduct case the actions of the employer are to be objectively assessed according to the established standard of the reasonable employer acting reasonably or, as it is sometimes put, whether the employer acted within a *"band of reasonable responses"* (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, EAT). The Tribunal is therefore not concerned with whether the employee actually did do the things the employer found that it did; in line with the objective tests set out above, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (**Devis (W) & Sons Ltd v Atkins [1977] AC 931**, House of Lords). Equally, the

Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (**Trust Houses Forte Leisure Ltd v Aguilar [1976] IRLR 251**, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

55. As to prior warnings, **Stein v Associated Dairies Ltd [1982] IRLR 447** (EAT) reminds Tribunals that they must not question the validity of a prior warning issued to an employee unless that warning was not issued in good faith and that there was a proper basis for it, in the sense that it was not manifestly excessive or was issued for an improper motive.

56. At all times I am required to have regard to the **Acas Code of Practice on Disciplinary and Grievance Procedures**, which is informative about the standards of procedural fairness to be expected of employers when dealing with disciplinary matters in the workplace.

Conclusions

Reason for dismissal

57. It was not in dispute that the Claimant was dismissed for a reason relating to conduct, namely his failures to attend the meetings of 4, 18 and 25 February and 5 March 2020, and that he had failed to keep in regular contact with the Respondent during his period of sickness absence. I am therefore satisfied that the Respondent has discharged the burden of proof and shown a potentially fair reason for dismissal pursuant to **s.98(1)**.

Fairness – the Claimant's case

58. I then turn to the **s.98(4)** exercise of determining whether the dismissal was actually fair. As to the points that had seemingly been raised before Employment Judge Blackwell at the October PH:

    (1) The Claimant's suggestion that the Tribunal should determine the reasons why he *in fact* failed to attend the February and March 2020 meetings *etc.* was not a task the Tribunal ought to embark upon. As mentioned above, both **Burchell** and **Devis** require the Tribunal to determine the fairness of a dismissal according to whether the *employer* reasonably believed he was guilty of misconduct in failing to attend *etc*, not whether he *in fact* was guilty. It was therefore only appropriate for me to consider whether Mr Taylor actually believed the Claimant was guilty, on reasonable grounds informed by a reasonable investigation, *etc*. That I did do, and my conclusion is set out below.

    (2) The Claimant's second point regarding not being afforded an appeal was rightly abandoned at the hearing. It was unsustainable given the concession, made by the Claimant in evidence, that he had not in fact submitted a letter of appeal to the Respondent at all.

59. Instead, the focus of the Claimant's challenge to Mr Taylor's evidence was on the subject of whether he (the Claimant) was in fact under the influence of alcohol when he attended the meeting on 12 August 2019 with Ms Lesinska and Ms Berry. That appeared to me to be irrelevant because the Respondent discontinued the disciplinary proceedings insofar as they related to that particular allegation as early as 11 September 2019. That allegation was not the reason the Claimant was issued with a final written warning on 30 September 2019; it was issued because of his failure to attend meetings, which amounted to a failure to follow a reasonable request. If it was a challenge to the final written warning, it was entirely misguided and would never have satisfied the high threshold set in the **Stein** case. The 12 August 2019 allegation had nothing whatsoever to do with the Claimant's dismissal some seven months later.

Fairness – General principles

60. As **Burchell** instructs, the first point to consider is whether the dismissing officer, Mr Taylor, genuinely believed that the Claimant was guilty of misconduct. That, as I have observed, is a factual determination and one which I have made express findings about. On the basis of my finding set out in paragraph 47 and the reasons that preceded it, I accept that Mr Taylor did genuinely believe in the Claimant's guilt. Put simply, it was common ground that the Claimant had not attended the meetings in question and Mr Taylor had to decide whether his non-attendance was misconduct or whether it was explained by a reason which would not have amounted to misconduct. He did not believe the Claimant when he put forward other reasons which, on their face, would not have amounted to misconduct.

61. The second **Burchell** point is whether Mr Taylor's belief was sustainable on reasonable grounds. Again, the issue goes not to whether the Claimant failed to attend meetings or keep in contact with the Respondent (those facts were established) but whether there were reasonable grounds for Mr Taylor's finding of misconduct and rejecting the Claimant's alternative reasons.

62. In my judgment, his belief was plainly sustainable on reasonable grounds. At the disciplinary hearing Mr Taylor appropriately tested the veracity of each of the Claimant's explanations. That scrutiny produced no evidence to support the Claimant's contention that a trip to Poland actually occurred so as to explain his failure to attend meetings on 25 February 2020. In the context of international travel that could fairly and objectively be described as astonishing. In addition, the evidence centring on his mobile telephone certainly cast the Claimant's explanation that he was in hospital on some occasions in a questionable light. Mr Taylor was able to use his own knowledge of the reliability of the postal system generally and his knowledge that the Respondent's telephone number had not changed during the Claimant's employment. Mr Taylor was entitled to reach conclusions based on the evidence he had and also based upon an assessment of the credibility of the Claimant's explanations (individually and in their totality) and upon his evaluation of his general credibility as a witness through his presentation at the disciplinary hearing.

63. The third **Burchell** point is whether the Respondent carried out as much investigation as was reasonably necessary in the circumstances of the case. In my judgment, it met the expectations required of it:

    (1) The Claimant himself did not put forward any exculpatory lines of inquiry which Mr Taylor could have, but did not, follow up on.

    (2) The Respondent could not realistically or reasonably have been expected to make independent enquiries of the Claimant's friend (who, it was said, accompanied him to Poland); instead it asked the Claimant to contact his friend and specified the type of evidence it was seeking (travel documents). That request was reasonable and not onerous on the Claimant.

    (3) The Respondent could not have gained anything by making enquiries of the Claimant's treating medical practitioners. The question of whether the Claimant had a hospital appointment on a particular date was something which the Claimant ought to have ready access to evidence in support of, had it been true. That was clear because he was able to provide such documentation to the Tribunal without any apparent difficulty. The Respondent had, through Ms Lesinska, properly asked the Claimant to bring whatever medical evidence he had in his possession to the disciplinary hearing; this too was not an onerous request. That request was reasonable and, similarly, not onerous on the Claimant.

    (4) It would have been disproportionate for the Respondent to have made enquiries with Royal Mail about the reliability of the postal service to the Claimant's home address; Mr Taylor, like any other member of society, was entitled to take a general view on the reliability of the mail. He was also entitled to use his own knowledge of the Respondent's telephone number; that did not require any particularly detailed investigation because Mr Taylor knew the number.

64. Set against this background is of course the fact that these points were being raised by the Claimant as explanations for what would have in principle amounted to misconduct. Whilst from a **Burchell** perspective the focus is on whether the Respondent carried out as much investigation as was reasonably necessary, there was at least some incentive for the Claimant to substantiate his explanations. That had been made clear to him by Ms Lesinska but also Mr Taylor. It is a fact that some investigations do indeed draw a blank, but this Respondent did as much as it reasonably could to investigate the Claimant's explanations by asking for evidence from the only person that could realistically have provided it: the Claimant himself.

65. I then turned to consider whether in dismissing the Claimant, the Respondent adopted a response that a reasonable employer, acting reasonably, could have adopted. The conclusion Mr Taylor reached was that the Claimant was guilty of gross misconduct in failing to attend meetings and keep in contact with the Respondent during his sickness absence. Whilst the sanction of dismissal should not automatically follow such a finding, gross misconduct is a serious matter.

What is clear from my findings is that Mr Taylor gave careful thought to the factors that assisted the Claimant, such as his length of service and his specific skills, but that he also decided that those factors were outweighed by the seriousness of the misconduct, the trust he felt had been lost because of the implausibility of the explanations the Claimant gave in the disciplinary hearing, and of course the fact the Claimant had a live final written warning for the same kind of misconduct.

66. It is not for the Tribunal to substitute its own view as to what sanction ought to have been applied. Applying the **Jones** objective test and for the reasons expressed in the above paragraph, in my judgment Mr Taylor – and therefore this Respondent – acted within the band of reasonable responses in choosing dismissal as the appropriate sanction upon the Claimant.

67. For completeness, it was neither suggested by the Claimant nor otherwise apparent from the evidence in this case that the Respondent had breached the **Acas Code of Practice**. No unfairness could be said to arise on that basis.

Conclusion

68. For all of the above reasons, the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

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Employment Judge Smith

Date: 25 February 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
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