



## EMPLOYMENT TRIBUNALS

**Claimant:** Ian Drury

**Respondent:** Ministry of Defence

**Heard at:** London South                      **On:** 04/01/2023 & 05/01/2023

**Before:** Employment Judge Krepski

**Representation:**

**Claimant:** In person

**Respondent:** Jennifer Gray – Counsel

## RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded. This means the Respondent unfairly dismissed the Claimant.
2. A 25% reduction in the compensatory award for unfair dismissal will be made under the principles in Polkey v A E Dayton Services Limited 1988 ICR 142.
3. The Respondent was in breach of contract by dismissing the Claimant without notice.

4. The Tribunal will decide the remedy at a further hearing on 1<sup>st</sup> March 2023.

## **REASONS**

### **Preamble**

1. This was a claim for unfair dismissal and wrongful dismissal.
2. In the course of the hearing, I heard oral evidence from the Claimant, Karen Hill (HR), Dr Simon Port (Disciplinary decision-maker), Dr Paul Kealey (Appeal manager). I was also in possession of a statement from Martin Greenstreet (the Claimant's line manager) who did not attend the hearing.
3. I also considered a bundle of 664 documents. References to page numbers are references to that bundle of documents. Lastly, I saw two video clips which the Claimant had sent to the Respondent and accepted into evidence a hospital letter from a clinic visit on 4<sup>th</sup> April 2022 which outlined the Claimant's current medical conditions.
4. What follows are findings of fact I have reached on the balance of probabilities. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. It has not been necessary, nor would it be proportionate, to determine each and every fact in dispute.
5. I have not referred to every document I read and/or was directed or taken to in the findings below, but that does not mean it was not considered, if it was referenced to in a witness statement, in evidence or in submissions.

### **Findings of fact – Initial absence**

6. The Claimant started working for the Respondent, the Defence Science and Technology Laboratory ("Dstl"), an executive agency of the Ministry of Defence, on 5<sup>th</sup> July 1982 and was most recently employed as a Mechanical Engineer at the.
7. He was dismissed by the Respondent for gross misconduct on 6<sup>th</sup> February 2020.
8. This case relates to events in 2019. It began when the Claimant was absent from work between 19<sup>th</sup> March 2019 and 1<sup>st</sup> April 2019, and between 15<sup>th</sup> April 2019 and 4<sup>th</sup> June 2019 with back pain.

9. On 16<sup>th</sup> April 2019, the Claimant's line manager, Martin Greenstreet (MG), wrote a referral to Occupational Health (OH). In that referral, he wrote "*On the 16/04/2019 he failed to turn up for work, I phoned him at approx.. 11am and spent 20 minutes talking to him about his problems during which I became concerned about some of the statements he was making, at this point I advised him to remain at home on sick leave for now. Subsequently I spoke to two of his colleagues who confirmed that Ian had been acting out of character recently becoming easily agitated and upset, my experience when speaking to him was similar, therefore I spoke to OH who recommended this referral*" (page 68).
10. OH saw the Claimant and wrote a letter to MG, dated 5<sup>th</sup> June 2019 suggesting a phased return to work, and a gradual resumption of manual handling tasks. The letter also stated: "*He also appears to have had some concerns about his employment contract, sick pay and mental state connected to housing benefits and information received from them*" (page 85).
11. That same day, MG replied to Karen Hill (KH), a Senior Employee Relations Advisor within Human Resources, who had asked that the Claimant write his concerns down, saying "*[the Claimant] was reluctant to do so and after speaking to OH it may be something I have to help with in terms of drafting an e-mail outlining his concerns. (he is not a confident communicator via e-mail)*" (page 94).
12. On 10<sup>th</sup> June 2019, the Claimant informed MG that he was placing himself on leave and would not attend work (page 93). That same day, MG emailed KH saying "*I have had several of Ian's colleagues come to me unprompted with concerns about his mental state.*"
13. On 13<sup>th</sup> June 2019, MG sent a further email to Karen stating "*All this being said he believes there is nothing wrong with him so he isn't currently willing to seek any help, his visits to the doctors as far as I can tell have all been around his physical health*" (page 92).
14. On 27<sup>th</sup> June 2019, a further OH report was prepared. The author of the report stated she spoke to the Claimant on 25<sup>th</sup> June 2019 over the telephone, and he informed her that he was not on annual leave but had suspended himself due to concerns over historical work issues. The OH worker concluded "*The reason for [the Claimant] not being at work is a management/employee relations problem and not a medical one*" (page 100).
15. On 22<sup>nd</sup> July 2019, the Claimant travelled with MG to Porton Down to view his personnel file (page 102). This appears to have been an effort by the Respondent to placate the Claimant's concerns.

16. On 23<sup>rd</sup> July 2019, he sent an email to MG stating “*Just to let you and dstl [sic] know I’m off sick now with depression and will not be returning to work with my present issues ongoing*” (page 105), thus letting the Respondent know explicitly that he had mental health problems.
17. On 26<sup>th</sup> July 2019, MG sent an email to the Claimant saying he should provide a statement of fitness to work from his GP after 7 days. The Claimant did not provide any such sick note.
18. On 7<sup>th</sup> August 2019, the Claimant informed MG that there was “*nothing wrong with him*” and therefore he would not see his GP, but that equally he would not be returning to work with his ongoing issues. MG wrote, in an email on 9<sup>th</sup> August 2019 to KH stating “*Although I still have concerns around his mental health, we are at a stage now were [sic] options are limited and he is effectively absent without leave [...]*” (page 107).
19. On 28<sup>th</sup> August 2019, MG wrote to the Claimant concerning his “*continued unauthorised absence from work since 23/07/2019*”. In that letter, he was warned that if he failed to return to work, or provide a satisfactory explanation by 7<sup>th</sup> September 2019, action would be taken against him which could lead to suspension of his pay or dismissal (pages 124-125).
20. On 25<sup>th</sup> September 2019, MG again wrote to the Claimant stating that disciplinary action would be taken if he did not respond by 2<sup>nd</sup> October 2019 (page 130).
21. On 30<sup>th</sup> September, the Claimant responded saying “*[...] I’ve suspended myself as you couldn’t and I feel it’s for the best until issues are delt [sic] with*” (page 142).
22. On 7<sup>th</sup> October 2019, MG sent a third absence letter (page 141) and invited the Claimant to a meeting to discuss his absence before further disciplinary action was contemplated, setting a deadline of 11<sup>th</sup> October 2019.
23. The Claimant responded on 9<sup>th</sup> October 2019 saying he was happy to come in for a meeting (page 143.1).
24. On 10<sup>th</sup> October 2019, the Claimant, responding to the Respondent’s letter stating he would have to treat the day of the meeting as a “working day” (page 147), said “*You didn’t say that before. You sead [sic] to come in for a meeting.. and I agreed to do that. As for coming back to work. That I will not be doing until I’m satisfied it is safe to do so and you are in persecution [sic] of my file. So I will not be coming to your meeting now with with [sic] ongoing issues not being answered it feels a bit unfair.*” (page 146)

25. On 16<sup>th</sup> October 2019, Dr Simon Port (SP) wrote an email to MG stating *"Can we try to discuss today and I need yo [sic] to work with Hayley Hudson my SPA to org a meeting and panel for next week with a Div Head to look at dismissing. Before this I need to have all the facts to make a decision."*
26. On 18<sup>th</sup> October 2019, the Claimant was suspended by SP with effect from 21<sup>st</sup> October 2019 *"pending a formal discipline decision meeting which you will be required to attend"* (page 157).
27. On 21<sup>st</sup> October 2019, the Claimant was invited to a disciplinary meeting to take place on 29<sup>th</sup> October 2019.
28. On 23<sup>rd</sup> October 2019, the Claimant provided a sick note covering the period 23<sup>rd</sup> October 2019 to 6<sup>th</sup> November 2019. The reason for his absence was given as "stress at work" (page 535). He also stated in an email that he was *"admitted to hospital with very high blood pressure"* (page 181).
29. On 28<sup>th</sup> October 2019, the disciplinary meeting was postponed until 8<sup>th</sup> November 2019. The Claimant responded to an email from MG informing him of the postponement saying *"I'm sick and continued harassing me isn't helping. Will not be attending on the 8 as I'm going back to the doctors and will send that on when I get it. I have a right to be left alone to get better"* (page 208).
30. On 29<sup>th</sup> October 2019, MG wrote an email to KH explaining that he had had *"another somewhat agitated phone call from Ian concerning our attempts to have a meeting. He is basically saying that our approaches are making him worse and exasperating his condition in effect leave me alone, he also informed me that 'they' have lost his medical records and the doctor will keep signing him off until they are found"* (page 216).
31. Later that same day, MG completed an 'aftercare incident report' which included the following text *"The individual has been absent without leave since 23/07/2019, we have been working with OH and an HR SERA since that date to get a clear explanation regarding his continued absence and instigate a return to work without success, there have been mitigating factors in that I do think he is suffering mental health issues but he refuses to believe that is the case"* (page 220).
32. Also that same day, MG sent a further referral to OH in respect of the Claimant (page 231). MG reiterated his thoughts regarding the Claimant, stating *"I still have concerns about his mental health but Ian is convinced that what he believes is fact and cannot be convinced otherwise or to seek*

*help, his current physical illness I believe sits on top of his underlying mental health condition” (page 235).*

33. On 30<sup>th</sup> October 2019, the OH advisor wrote to MG noting that the Claimant was “frightened” of coming into the workplace (page 247).
34. On 1<sup>st</sup> November 2019, the OH advisor wrote to KH stating that the Claimant was “*unfit for work as he has high elevated blood pressure [...] In my opinion after talking to him earlier in the week, he is unfit to attend a potentially stressful meeting [...]*”.
35. On 6<sup>th</sup> November 2019, the Claimant provided another sick note stating he was unfit for work until 24<sup>th</sup> November 2019 due to “work stress and investigating hypertension” (page 536).
36. That same day, the OH advisor sent a report to MG commenting on the Claimant’s health. She states “*The reason for his absence from work since July are his strong personal concerns re historical work events and employment. [...] On speaking with him yesterday he believes that all of his claims took place and he is the subject of a ‘conspiracy’ against him. He stated that he was ‘petrified’ to attend the workplace for a meeting as he feared for his personal safety and that of his daughter. We spoke about his concerns and how irrational they appear to others but he is convinced they all took place. [...] He is currently under the care of his new GP for his blood pressure issue. Unfortunately his GP records could not be found which added to his concerns but have now been found. I have his consent to write to his GP for a report and to discuss the current concerns we have. He believes that current work correspondence sent to him is aggravating his high blood pressure*” (page 263).
37. On 15<sup>th</sup> November 2019, the Claimant was issued with another sick note stating he was unfit for work until 15<sup>th</sup> December 2019 on the same grounds (page 537).
38. On 16<sup>th</sup> November 2019, the Claimant emailed MG, stating that he had produced a video statement to “*try to explain what’s been going on*” (page 275). This was provided to the Respondent on a USB stick.
39. On 18<sup>th</sup> December 2019, the Claimant provided a sick note, stating he was unfit for work for one month, for the same reasons as before (page 538).
40. On 3<sup>rd</sup> January 2020, another report was produced by OH and sent to MG. The report stated that “*With regards to his mental health he has been seen in his present and previous surgery in 2019 many times but no concerns have been raised or noted. The diagnosis of hypertension is no barrier to him eventually returning to work but ID feels that current work stress is*

*adding to his high blood pressure. [...] He is not fit to attend a hearing at this time.*” It went on to say that *“There are no further adjustments/advice that Occupational Health can advise on at this time”* (page 305).

### **Findings of fact – “Gross Misconduct Hearing”**

41. On 8<sup>th</sup> January 2020, KH provided SP with a “draft version of the Gross Misconduct hearing letter” (page 316). The letter’s stated purpose was to *“invite [the Claimant] to a gross misconduct meeting scheduled to consider the allegations of your unauthorised absence from work and your refusal to obey a reasonable management instruction”* (page 317).
42. On 20<sup>th</sup> January 2020, the Claimant provided another sick note (page 333) stating he was unfit to work for 1 month from 15<sup>th</sup> January 2020 (page 539). The reason given on the form was *“work stress and hypertension, awaiting apt with cardiology”*.
43. On 21<sup>st</sup> January 2020, the Claimant was invited to a “gross misconduct meeting” on 31<sup>st</sup> January 2020 via email (page 341) and an enclosed letter (page 337-338). The letter also contained just over a page of questions for the Claimant to answer (page 339-340). The letter invited the Claimant, if he was not able to attend the meeting in person, to “present his case” via a video statement.
44. On 22<sup>nd</sup> January 2020, the Claimant wrote to MG stating he received the letter and email. The Claimant wrote: *“I’ve done you another video evidence and will sent it to you tomorrow. It’s on the same usb stick. Not sure if it [sic] much good but tried to cover the question [sic] I was asked to. Been to the doctors today and she’s trying to arrange an earlier appointment with the hospital as she said it was a very long wait and she wouldn’t[sic] me to be seen quickly. So will keep you informed on how that is going”* (page 358).
45. I viewed this video statement during the course of the hearing (transcript at page 647). In it, the Claimant talks, with an odd demeanour, about his personal file at work and the fact it has gone missing. He also says *“if someone wants to come and interview me and take a written statement, I don’t mind”* and repeated this offer several times. He also talks about a case that happened 16 years ago. He also says *“[...] at the moment I’m suffering with high blood pressure. I want to get sorted out and I don’t know how long that’s going to take but I’m sure when this mess all goes away, my blood pressure might come down, quite stressful actually”*.

46. On 29<sup>th</sup> January 2020, MG wrote an email to SP and KH (amongst others), stating that the second video statement *“doesn’t specifically answer all of the questions that were in the meeting invite of 21/01 but does expand on other facts. It does in my opinion raise a possible link between his actions, his mental wellbeing and the medication he is being prescribed. I have spoken to him today and he is frustrated with how slow his treatment is progressing and feels that his current illness is not being taken seriously”* (pages 364-365).
47. The Claimant’s second video statement made allegations that his personnel file had been signed out of storage (page 364). The Respondent looked into this but confirmed, on 30<sup>th</sup> January 2020, that his file had not been signed out (page 367).
48. I also viewed this second video statement in the course of the hearing (transcript at page 658). He repeats his concerns that his personal file has gone missing. He mentions that he was falsely imprisoned 16 years ago, that he won a case against someone, and that he was put on witness protection. He said that he had “shields” which meant he could walk into court and not be prosecuted, because he’s done too much good for the country. He says that he wants to come back to work but that he needs to feel better. He said *“I’ve got freezing cold fingers, my hands keep shaking, my blood pressure is up and down like a yo-yo. I need to be made better first, you know, I can’t see how I can come back to work without getting sorted”*. The Claimant’s hands were indeed shaking in the video.
49. The Claimant went on to ask *“Why work can’t send me to see a private doctor, would be the cheapest option I would’ve thought and we could get it all sorted but apparently they don’t do that kind of thing. All they want to do is try and sack me for gross mis-negligence[sic]”*. He also states *“If you read up on the side-effects of those tablets, you can hallucinate and not be in your right mind [...]. Now 4 co-codamols and my blood pressure tablets might not have had the right effect on my mind, and I might have hallucinated all those events. I don’t think I did but people around me do say, well have you made it up, or hallucinated them, your mind’s been altered, I don’t know. [...] All I know is, I’m not very well. I don’t know why at the time I thought I was doing the right thing by not coming in, because I asked to look into my personal file”*.
50. The Claimant also stated *“You know, if you wanted to send a couple of people round to my house and we’ll have a little discussion but it needs to be a discussion, sort of your know, a proper discussion. [...] At the time, if I do it well you could quite easily write it off to medicine. When I went to Porton Down, Martin and Yvonne wanted to put it down for me just taking co-codamol. Now I’m taking a lot more than just co-codamol,. I’m walking*



*about in a daze so I, we need, I need a consultant to actually look me first to say if I'm ill".*

51. He finished by saying *"I don't know if that sort of helps but you know, I've tried, tried to answer your questions. Well, don't know, don't know what half of them are, they all go over the same old stuff really".*
52. The "Gross Misconduct Hearing" took place on 31<sup>st</sup> January 2020. The panel consisted of SP described by the Respondent as a "decision maker" another individual whose role was described as "Chair" and a third individual (HR/note taker). MG was also present. The Claimant did not attend the disciplinary hearing. The panel considered an evidence pack when making their decision (page 372 onwards) which contained a table of contents. The table included a part described as "Management Case" and a further part described as "Employee Case" suggesting an adversarial process.
53. The hearing lasted 90 minutes and was documented in notes of just over one page in length (pages 380-381). Following some discussion, the following text notes the conclusion of the meeting:
- "The panel went through the time line of events presented in the evidence pack, and were satisfied that there was a statement for fitness to work certificate covering ID for the period October 2019 to current date.  
However they could not find evidence in the video statement to confirm an explanation from ID on the periods of absence without leave (AWOL) between April and October 2019.*
- The panel discussed that there was evidence to show that opportunities had been given to ID to provide a [sic] explanation for his period of AWOL and communications between MG (as the line manager) to ID was clear.*
- The panel discussed that upon viewing the video statement, there was no clear, reasonable evidence to explain to the panel the period of AWOL."*
54. On or around the 4<sup>th</sup>/5<sup>th</sup> February 2020, an undated letter was sent to the Claimant informing him that SP concluded that the Claimant *"failed to follow direct management instructions and has been absence without leave [between 23<sup>rd</sup> July 2019 until 21<sup>st</sup> October 2019], without reasonable explanation. After considering all the relevant factors, it has been decided that your employment with Dstl has been terminated. This will take effect*

*immediately, without notice and without pay in lieu of notice. Therefore your last day of service is 6<sup>th</sup> February 2020" (pages 382-383).*

### **Findings of fact – Appeal**

55. On 17<sup>th</sup> February 2020, the Claimant sent his appeal to the Respondent (page 406).

56. In his grounds of appeal, he made numerous appeal points which I summarise as follows:

- i. Sickness during the disciplinary process – The Respondent ought not to have put the Claimant through the disciplinary procedure whilst suffering from sleep apnoea, cardiac issues and hypertension, which have a detrimental, and sometimes debilitating, effect on the Claimant. The Respondent failed to give due weight to its own OH reports, which stated he the Claimant was not fit to attend a disciplinary hearing.
- ii. Concerns about mental health – That the manner in which the Claimant has been speaking, and the uncharacteristic nature of his absence, suggest he may have mental health issues. Furthermore, that those issues are work-related, and arise because of the stress, pressure, quality and isolation of the work that he has undertaken for the Respondent.
- iii. Reasons for absence from work between July and October 2019 – The Claimant was absent due to depression and because he felt it would be safer for him not to attend work. He told MG about this in text messages on 23<sup>rd</sup> July 2019 and 30<sup>th</sup> September 2019. He was not able to engage further with the Respondent's process mentally because he was paranoid about his safety. The Respondent's OH report dated 6<sup>th</sup> November 2019 noted the Claimant's concerns in this regard. The disciplinary panel failed to take this into account, which is proven by the dismissal letter stating that the Claimant failed to explain the reasons for his absence.
- iv. Concerns for safety – The Claimant was concerned for his safety at work. This was as a result of a work incident 16 years ago but also due to a conversation he had with somebody who worked for the DWP in April 2019. If the Respondent had difficulties accepting the rationality of these concerns, it should have identified a medical and/or mental health issue, and taken appropriate action such as seeking medical advice or counselling rather than dismissing the Respondent.

- v. Not being registered with a GP during the period of unauthorised absence – The Claimant stated he did not have a GP between June and October 2019. He had moved homes and was informed he could no longer see his existing GP.
- vi. Disproportionate sanction – In view of the Claimant’s length of service, 37 years, dismissal was a disproportionate sanction. The Respondent failed to consider alternatives to dismissal.
- vii. Premature sanction – Given the Claimant’s medical condition, his state of mind, and given the occupational sick pay scheme which recognises that employees can be ill and unable to work for prolonged periods of time, the dismissal was premature.
- viii. Respondent’s duty of care – The pressures, secrecy and intensity of the work conducted for the Respondent contributed to the Claimant’s current state of mind. The Respondent failed to ensure the safety of the Claimant and his well-being.

57. Dr Paul Kealey, Division Head, CIS (PK) was asked to be the independent “Appeal Manager” and form the panel together with another individual from HR and a note taker (page 442).

58. On 27<sup>th</sup> February 2020, PK invited the Claimant to attend an appeal meeting on 9<sup>th</sup> March 2020 (page 436). The Claimant agreed to attend the meeting but asked for the OH advisor to attend with him (page 438) in view of his concerns about his health “*i.e. my high blood pressure and my safety as I have spoken about before and is in the OH report*”.

59. On 6<sup>th</sup> March 2020, PK wrote to SP with questions relating to SP’s actions (pages 454-466) which included the following:

- i. *PK: How did Dstl ensure ID was not discriminated against based on potential mental health issues?*  
*SP: I nor the LM chain have had no clear evidence re potential mental health issues with regard to ID he has engaged with the LM but OH or his medical notes don’t reflect any issues and as you state these are potential MH issues there is no evidence to confirm this from ID or OH*
- ii. *PK: How did the decision panel use the OH evidence, for example 3 Jan [...] evidence?*  
*SP: Yes the panel took into account all evidence throughout the decision making processes. ID refused to attend a number of panel meetings which were rearranged a number of times to try and encourage ID to attend. Taking into account the 3<sup>rd</sup> Jan 2020 OH*

*information allowed ID to provide video evidence for the panel which was provided but don't [sic] address many if not any of the questions posed by the panel.*

- iii. PK: How did the panel decide the decision to dismiss summarily without notice to be fair and proportionate? (para. 6 of letter)  
SP: As this was a Gross Misconduct case this is standard practice and is the legal position typically taken.*
- iv. PK: After the panel established "proven" as a decision, how did the panel consider all the mitigating circumstances, including health and mental health issues? (as you cited in the dismissal letter, and required in Improving Conduct Process)  
SP: The Panel reviewed all the evidence including the video evidence that ID submitted in answer to the questions posed by the Panel, throughout the evidence there was no mitigation in the Panels[sic] view that ID was AWOL from the period 23<sup>rd</sup> July 2019 to the 21<sup>st</sup> October 2019 and that he failed to adhere to a direct management instruction on a number of occasions. Thus the case was proven to the Panel and the Decision manager.*

60. Minutes of the appeal meeting (labelled as "Disciplinary Hearing Meeting") were prepared (page 486 onwards). In the course of the meeting the following exchanges occurred:

- i. PK: Asked [how] did [the Claimant] engage with medical support during June-Oct 2019 having moved out of the catchment area?  
C: I was put on witness protection and the lady told me all my files would go missing*
- ii. PK: Why did you feel unable to return to work?  
C: I felt threatened, they put me on witness protection as people were trying to kill me*
- iii. PK: We don't have a sick note  
C: No it starts from October 2019  
PK: July, there's no sick note  
C: there are 2 and a half months with no sick note, I didn't have a doctor, I tried, begged them to take me back  
PK: Did you go to any walk in Doctors?  
C: No, I wasn't going out*

- iv. *PK: In your video I couldn't work out why you couldn't attend work July to October?*  
*C: I was sick with stress and depression. I don't think there is anything wrong but the doctor says there is. But I am obviously sick.*

61. On 11<sup>th</sup> March 2020, PK wrote to the Claimant informing him that the appeal was not upheld, and the original decision stands (pages 478-479). In the letter, he wrote "*I have ascertained that there are no identified procedural errors and the decision was fair*". He went on to say that "*your GP and Occupational Health records do not highlight any previous mental health issues. I have also reviewed the GP medical record you provided and seen evidence of your engagement with your GP surgery the day before you stopped coming to work (22 July). I judge on the balance of this evidence that you chose not to engage with medical support*". PK also stated "*[...] you indicated that no one at work was making you feel unsafe*".

### **Findings of fact – Claimant's mental health**

62. For the avoidance of doubt, I was satisfied that the Claimant was able to fully participate in the tribunal hearing despite concerns for mental health and his indication that he has dyslexia.
63. Whilst he has no formal diagnosis, I am satisfied that, by early 2019 at the latest, the Claimant was experiencing difficulties with his mental health. I find this to be the case because MG was concerned about some of the statements the Claimant was making in a telephone call in April 2019. Additionally, MG informed KH on 10<sup>th</sup> June 2019 that he had several of the Claimant's colleagues come to him unprompted with concerns about his mental state. I also find it is more likely than not that the Claimant was *not* in any sort of witness protection scheme and that these were manifestations of the Claimant's mental health issues. The fact that he did not previously have a history of mental health issues does not alter my finding.
64. I find that these mental health difficulties lasted until at least the end of his appeal, as during the course of that meeting he continued to make claims about being in witness protection.
65. The Claimant repeated some of those claims in the course of the hearing, however accepted on cross-examination that it is possible medication was causing him to have hallucinations.

## **Discussion – Unfair dismissal**

66. The Respondent relies on s98(2)(b) Employment Rights Act 1996 (conduct) in relation to its potentially fair reason for the Claimant's dismissal.
67. The burden of showing the reason rests with the Respondent.
68. Subject to showing a reason, I need to consider whether the dismissal was fair or unfair. The test is from the well-known case of British Home Stores Limited v Burchell [1978] IRLR 379:
- i. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
  - ii. If so, was that belief based on reasonable grounds?
  - iii. Had the employer carried out such investigation into the matter as was reasonable?
  - iv. Did the employer follow a reasonably fair procedure?
  - v. Was it within the band of reasonable responses to dismiss the Claimant?
69. I must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure (Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23).
70. It is immaterial how I would have handled the events or what decision I would have made, and I must not substitute my view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563).
- (i) Genuine belief in misconduct*
71. I find that the Respondent had a genuine belief that the Claimant was guilty of misconduct. It is clear from the evidence I have both read and heard that SP and PK both had a genuine belief that the Claimant was deliberately failing, without reasonable excuse, to attend his place of work between July 2019 and October 2019, and that he failed to obey reasonable management instructions in that he failed to provide sick notes.

(ii) Belief based on reasonable grounds

72. I find that the Respondent's belief, that the Claimant was guilty of misconduct, was *not* based on reasonable grounds.
73. The Respondent's finding of misconduct suggests that the Claimant's actions were an unjustified refusal with no other motivation or reason.
74. And yet MG, the Claimant's line manager, raised concerns about the Claimant's mental health from the very beginning of this tumultuous period in the Claimant's employment.
75. KH, in oral evidence, also stated that she had concerns about the Claimant's mental health and the comments that he was making. She spoke to MG and asked him to speak to the Claimant about Mental Health advocates.
76. KH suggested in oral evidence that the turning point with regards to how the Respondent would deal with the matter was when OH had stated on 27<sup>th</sup> June 2019 that the reason for the Claimant not being at work was a management issue as opposed to a medical one.
77. Whilst in some circumstances it may have been reasonable to have relied upon the opinion of OH, I find it was not reasonable to do so in this instance for multiple reasons.
78. Firstly, the Claimant was an employee of 37 years' service without any previous symptoms of mental health issues. As such, a sudden display of potential mental health issues should have overridden a single statement by OH. This did not occur, despite videos of the Claimant talking about unusual topics, the Claimant himself saying he was unwell, and his closest colleagues and indeed KH saying that they believed he was having mental health difficulties.
79. The Respondent should also have considered the repeated nature of MG's concerns regarding the Claimant's mental health, which were aired by MG on at least the following occasions:
- i. 16<sup>th</sup> April 2019;
  - ii. 10<sup>th</sup> June 2019;
  - iii. 13<sup>th</sup> June 2019;
  - iv. 7<sup>th</sup> August 2019;
  - v. 29<sup>th</sup> October 2019.
80. Whilst the Respondent did not have a sick note confirming a mental health issue, the Respondent had *a significant amount of non-medical evidence*

*to suggest a mental health problem on the part of the Claimant. A reasonable question to ask is “What would a sick note have added?” given the (sometimes very) limited information contained therein.*

81. Additionally, the Claimant being away from the workplace was itself out of character and the Respondent should not have assumed a simple refusal to attend work. Indeed MG stated, in his statement at paragraph 9, that prior to his being away from the workplace in March 2019 due to back pain, he did not recall any significant periods of sick leave whilst managing the Claimant, other than in 2011 due to sleep apnoea and hypertension. As such, it was not reasonable to assume that such a blatantly out of character absence was a conduct issue in the circumstances.
82. Furthermore, although OH originally stated on 27<sup>th</sup> June 2019 that this was a management/employee relations problems rather than a medical one, OH noted on 30<sup>th</sup> October 2019 that the Claimant was frightened of coming into the workplace. On 1<sup>st</sup> November 2019, OH wrote that after talking to the Claimant, they came to the conclusion he was unfit to attend a stressful meeting. On 6<sup>th</sup> November 2019, OH sent a report to MG confirming that the advisor had spoken to the Claimant and had discussed the ‘conspiracy’ he felt involved in, and that his concerns appeared irrational. As such, even OH was, by a later stage, suggesting that this was not a simple conduct issue.
83. In the circumstances, therefore, I find that the Respondent did not have reasonable grounds on which to conclude that the Claimant was deliberately failing, without reasonable excuse, to attend the workplace or comply with reasonable management instructions.

*(iv) Reasonably fair procedure*

84. Even if I am wrong with regards to whether the Respondent had a belief in the Claimant’s misconduct based on reasonable grounds, I find that the procedure it followed was not fair.

Impact of mental health on Claimant’s ability to cooperate

85. When this matter was listed for case management on 3<sup>rd</sup> February 2021, one of the issues identified by the judge was as follows:

*“It will also be necessary to consider, both from the medical reports available to the respondent and the general circumstances of the case, whether Mr Drury’s failure to engage with the respondent might itself have been a consequence of his mental health, and how far that ought to have been taken into account.”*



86. I have not been presented with evidence that satisfies me that the Respondent's decision-makers seriously considered the possibility that the fact that the Claimant was having mental health difficulties might of itself prevent him from providing a sick note and/or engaging fully with his employer.
87. Indeed, I find that it is likely that that is what happened in this case; the Claimant's mental health issues were what prevented him from having more meaningful conversations with his employer, from seeking a new GP with the haste that an average person might exhibit, or indeed from fully realising the extent of his mental health issues.
88. That the Claimant might have mental health issues which would prevent his full cooperation was not considered even when the Respondent later received fit notes saying the Claimant was unfit to attend work due to "work stress".
89. Furthermore, no consideration was seemingly given to whether continuing to contact the Claimant at the pace with which the Respondent did, might have aggravated his condition, as he was claiming.
90. Whilst the Respondent's policies require a sick note to be provided after a period of self-certification, this cannot be a rigid rule, applied even if the person is incapable of providing sick note, whether through physical or mental reasons.

Matter that formed basis of decision not put to Claimant during appeal

91. PK's appeal decision letter of 11<sup>th</sup> March 2020 states "*I have reviewed the GP medical record you provided and seen evidence of your engagement with your GP surgery the day before you stopped coming to work (22 July). I judge on the balance of this evidence that you chose not to engage with medical support*".
92. According to the notes of the appeal meeting, however, this matter was never put to the Claimant.
93. On cross-examination, when asked whether he knew that this was a repeat prescription that was never collected, PK confirmed that he had not enquired about this.
94. Given this was important enough to include in the appeal decision, I find that reliance on this point, without giving the Claimant a chance to explain himself, made the process unfair.

Consideration of mitigation

95. I am also not satisfied that the disciplinary panel understood the concept of mitigating circumstances or applied them correctly to this case.
96. When PK asked SP, on 6<sup>th</sup> March 2020, how the earlier panel considered the issue of mitigation having found the allegations proven, SP responded in a manner that did not distinguish between a *defence* to allegations and *mitigation* in respect of a sanction.
97. Furthermore, even if mitigation was considered correctly, I am not satisfied that the Claimant's 37 years of service, which makes for powerful mitigation when compared to an abnormal period of a few months, was considered in any meaningful way.
98. Accordingly I find that that the disciplinary panel did not adequately consider the issue of mitigation, that this was not remedied on appeal (indeed PK does not mention it in his witness statement), and that this made the process unfair.

Consideration of sanction

99. When PK asked SP on 6<sup>th</sup> March 2020, how the panel concluded the decision to dismiss summarily without notice was fair and proportionate, SP's response was that "*As this was a Gross Misconduct case this is standard practice and is the legal position typically taken*".
100. This suggests that, if Gross Misconduct were proven, a decision to dismiss summarily would inevitably follow.
101. This is also suggested by SP's email of 16<sup>th</sup> October 2019 where he stated that he will need a panel for next week "*with a Div Head to look at dismissing*".
102. Whilst PK did describe consideration of the sanction in his witness statement, he described the actions forming the misconduct as being "sufficient examples" to warrant the sanction but does not describe whether he considered lesser sanctions could also be sufficient or whether there were mitigating circumstances.
103. He also states he considered whether the attendance policy should have been used instead of the conduct policy, "*but felt that SP had examined this and taken the time to form his decision that it was the appropriate policy to use*". I find that PK did not adequately consider whether the correct policy was being used, and that the attendance policy may have led to a different outcome given its different provisions.

104. Accordingly I find that that the disciplinary panel did not adequately consider the issue of sanction, that this was not remedied on appeal, and that it made the process unfair.

Conclusion

105. Having considered the above, I find that the Claimant was unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

**Discussion – Polkey**

106. I invited submissions from the parties as to whether, if I concluded that the Claimant had been unfairly dismissed, I should consider making an adjustment to the compensation on the grounds that if a fair process had been followed by the Respondent, the Claimant might have been *fairly* dismissed in accordance with the principles in Polkey v AE Dayton Services Ltd [1987].

107. In terms of possible outcomes, I may find that the claimant would clearly have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, it may be impossible to say what would have happened, and I should make a percentage assessment of the likelihood that the employee would have been retained.

108. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so previously (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).

109. I find that if the Respondent had followed a fair process, then there is a small chance the Claimant may still have been dismissed. Had the Respondent considered the Claimant's mental health issues properly, and considered whether a lesser sanction could have been imposed on appeal, there is a very substantial chance they would have kept him as an employee. I do not regard it as inevitable that they would have kept him, but I find it to be very likely. In making the assessment, I take into account the Claimant's long service and the high regard in which he was held by

colleagues including MG. Conversely, I also take into account that as of 15<sup>th</sup> April 2021 the Claimant was still signed off as not fit for work (page 545.2) due to hypertension, but that this could be related to the Claimant's dismissal from work.

110. I therefore consider that there is a 25% chance that the Claimant would still have been dismissed and the dismissal would have been within the range of reasonable responses.

### **Discussion – Contributory conduct**

111. I was also addressed on the issue of contributory conduct. The Tribunal may reduce the basic and/or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

112. Section 122(2) provides as follows:

*“Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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.”*

113. Section 123(6) provides that:

*“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”*

114. Whilst the Claimant's conduct is at the core of this case, I find it would not be just and equitable to reduce his award as his conduct was not culpable. Having found that his conduct was the result of a mental health issue, I do not believe it would be appropriate to reduce his award due to something out of his control.

### **Discussion – Wrongful dismissal**

115. An employee is entitled to be given notice of his dismissal in accordance with the terms of his contract unless he has committed gross misconduct in which case dismissal can usually be effected summarily.

116. Where a claimant has been dismissed without the appropriate contractual notice, the claimant is entitled to claim the damages which are the equivalent to wages he would have earned between the time of the actual termination and the time at which the contract might lawfully have been terminated.
117. In contrast to the Claimant's claim of unfair dismissal, I must decide whether the Claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.
118. I find that the Claimant was away from work and could not provide a sick note due to his mental health issues. In the circumstances therefore, do not find that the Respondent has proven, on the balance of probabilities, that the Claimant was actually guilty of the alleged gross misconduct.
119. The Respondent was therefore in breach of contract by dismissing the Claimant without notice.

**03/02/2023**

Employment Judge Krepski

JUDGMENT SENT TO THE PARTIES ON

**06/02/2023**

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