IN THE EMPLOYMENT TRIBUNAL

Claim Number: 13/2017

BETWEEN:

COLIN O'DONNELL

Claimant

-AND-

GREENARC LIMITED

Respondent

JUDGMENT

Chairperson: Gabrielle O'Hagan

The Claimant in person
Joseph Nunez of Counsel instructed by Nunez & Co for the Respondent

The Decision of the Tribunal is that the Claimant was unfairly dismissed.

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1. The Respondent is a company which provides gardening, horticultural, landscaping and tree surgery services. The Claimant was employed by the Respondent as an Arborist/Tree Surgeon from 27 May 2014 until 16 February 2017 when he was dismissed summarily for gross misconduct.

2. The Claimant filed a Claim Form on 5 May 2017 claiming unfair dismissal, arrears of pay and arrears of holiday pay. The Claimant's Details of Claim stated that he had been given verbal warnings and a written warning (which was withdrawn) for absenteeism, but that prior to termination of his employment he had not been given a written warning and was not given an opportunity to explain the circumstances of his absences. He also stated that he was often required to take annual leave when on sick leave.

3. The Respondent filed a Response Form on 25 May 2017 giving the facts it would rely on to defend the Claim as the Claimant being continuously late for work, leaving his place of work without authorisation and taking prolonged tea breaks of up to 3 hours, continuous absenteeism and "*sick leave claims without cert*". It stated that innumerable verbal warnings had been given and denied that the written warning had been withdrawn. The Respondent also stated that the Claimant was given "*a lengthy explanation as to why his employment was being terminated by both directors in private*" in the Respondent's directors' office. This was also the case in respect of verbal and written warnings it had given the Claimant.

4. A Preliminary Hearing took place on 29 October 2018 and a Case Management Order was made. This not having been complied with by the Claimant, at a pre-trial review hearing on 5 February 2019, an Order was made that unless the Claimant completed the requisite case management steps by 12 February 2019 the Claim would be struck out. The Claimant complied with the 5 February 2019 Order and the Claim was heard on 26, 27 and 28 February 2019.

The law

Unfair dismissal

5. A dismissal of an employee will only be fair if, and the employer can establish that, it was for one of the potentially fair reasons prescribed in Section 65(2) of the Employment Act (**the Act**), which include the employee's conduct.

6. Thereafter, the determination of the question of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for the dismissal; and that question shall be determined in accordance with equity and the substantial merits of the case (Section 65(6) of the Act). In misconduct cases, the principles in *British Homes Stores-v-Burchell* [1980] ICR 303 apply. Did the employer (i) genuinely believe, (ii) on reasonable grounds and (iii) following an appropriate investigation, that the employee was guilty of misconduct?

Substantive fairness

7. This test for substantive fairness in respect of the decision to dismiss is whether when considering the case as a whole the employer's decision fell within the band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods-v-Jones* [1982] IRLR 439). It is not relevant whether the Tribunal would have taken the same decision or action; and the Tribunal must not substitute its view for the employer's view (*Folev-v-Post Office: Midland Bank Plc-v-Madden* [2001} IRLR 82). The reasonable responses test also applies to the investigation which led to the decision.

8. It is established that a reasonable employer may treat an employee's persistent absences as a sufficient misconduct reason for dismissal (*Williams-v-Cheshire Fire and Rescue Service* [2008] 7 WLUK 678), in most cases (although always subject to the band of reasonable responses test) provided the employee has been given prior warning (*International Sports Company Ltd-v-Thomson* (1980 IRLR 340)):-

"'What is required in our judgment is firstly, that there should be a fair review by the employer of the attendance record and the reasons for it and secondly, appropriate warnings after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases, the employer would be justified in treating the persistent absences as a sufficient reason for dismissing the employee."

9. When deciding the appropriate penalty for any offence, employers can take into account any live warnings on the employee's personnel file and can also have regard to expired warnings where they do not then become the principal reason for any subsequent dismissal, in other words, where the circumstances would have justified dismissal anyway. What is important is whether the

dismissal decision falls within the range of reasonable responses or, put another way, the reasonableness of the decision to treat the misconduct as a reason for dismissal.

Procedural fairness

10. The requirement of employer reasonableness in Section 65(6) of the Act relates not only to the outcome in terms of the penalty imposed by the employer (substantive fairness), but also to the process by which the employer arrived at that decision (procedural fairness). Therefore, the test is not only whether the dismissal fell within the band of reasonable responses, but also whether the procedure used in reaching the dismissal decision satisfied the test (*Whitbread Plc-v-Hall* [2001] IRLR 275). In this regard, the importance of the UK ACAS Code of Practice on Disciplinary and Grievance Procedures (**the ACAS Code**) has always been emphasised by the UK Employment Tribunal and EAT as a "*guide ... to what is good sound industrial relations policy and practice*" (*Lock-v-Cardiff Railway Co Ltd* [1998] IRLR 358 EAT).

11. Guidelines on procedural fairness have been given by numerous cases, for example, *Whitbread and Co plc-v-Mills* [1988] IRLR 501, quoting from *Polkey-v-A E Dayton Services Ltd* [1987] IRLR 503 HL, in which the UK Employment Appeal Tribunal (**the EAT**) held that in the case of a dismissal for misconduct, an employer will normally not be acting as a reasonable employer unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation. Generally, case law has established that as a very minimum (and the Acas Code goes much further) an employee must be made aware of the case against them (*Hutchins-v-British Railways Board* [1974]) both at the stage when charges are put and when the employee is provided with supporting evidence of the allegations, must be allowed to state their case and make representations (*Tesco (Holdings) Ltd-v-Hill* [1977]) no matter what the circumstances are (usually at a meeting or hearing), must know if they are at risk of dismissal and why, and usually should be informed of their right to appeal. In addition, to assist the employee to explain their case, the disciplinary procedure should allow facilities for representation, which means that another employee or representative should be allowed to accompany the employee (*Rank Xerox (UK) Ltd-v-Goodchild* [1979]).

12. Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" i.e. that the dismissal should be regarded as fair because a fair procedure would have made no difference to the outcome (*Polkev-v-AE Dayton Services Ltd*). The only exception is in extraordinary cases where the misconduct is so heinous that an employer would be justified in taking the view that no explanation or mitigation would make any difference.

Warnings

13. As well as warnings usually being a necessary component of substantive fairness in a dismissal for absenteeism specifically (see above), it is important for a reasonable disciplinary procedure that the employee is on notice that their conduct might lead to dismissal (*JJ Food Service Ltd-v-Kefil* UKEAT/0320/12) (see above).

14. The Acas Code recommends that employees should be told how long a warning will remain current and (in the case of a final warning) the consequences of further misconduct within that period. But the accompanying Acas Guide does not rule out the possibility of an unlimited warning in appropriate cases, particularly where an employee has a history of allowing their conduct to lapse just after the expiry of warnings.

15. Employers sometimes use verbal warnings for less serious matters than written warnings or sometimes as a preliminary stage to a written warning. However, there is "no special magic" in a written warning as opposed to a verbal warning:

"The position in the present case is that the Appellant who was found by the Tribunal to be an intelligent man who knew full well that he was contravening a rigid requirement of the Respondents when he continued dealing in other people's goods. He had been warned about this conduct not once but on several occasions. It was suggested that he had never had a written warning; there is no special magic about a written warning. To an intelligent man a verbal warning should be just as effective. The only advantage in a written warning might be for evidential purposes later on. No such problem arises in the present case" (*McCall-v-Castleton Crafts* [1979] IRLR 289).

16. In this case, the crucial point was that Mr McCall had received several warnings (and it was irrelevant that these were verbal), knew that what he was doing was wrong and could lead to his dismissal, yet persisted in it nonetheless. The fact that the warnings were not in writing was not of itself an impediment to dismissal.

The facts

17. Somewhat paradoxically, one of the aspects of this case with which I have struggled is the credibility of all of the witnesses. None (with perhaps one exception) gave me reason to doubt their own belief in the truthfulness of their evidence on any of the issues in dispute (which in the end were quite limited). Where there was a conflict of evidence, it seemed to me that each of the witnesses in question genuinely believed their accounts of the incidents, albeit that this may have been mistakenly, and I have made findings with this in mind.

18. All of the Respondent's witnesses painted a picture of the Respondent as a stable, reasonable and congenial employer; and this was not disputed by the Claimant. The employee turnover is very low with few dismissals and the company, through its directors, Mr Alan Brownbridge Snr and Mr Tyrone Serra, tries to help employees when they have personal problems and also takes on disadvantaged employees and those with behavioural issues with the aim of assisting as far as possible. Equally, as regards the Claimant, none of the Respondent's witnesses (except his former tree surgeon colleague Victor Avila, as to whom, see below) described the Claimant as anything but affable and polite and there were no suggestions that he was dishonest or malicious in any way, just unreliable.

The Respondent's allegations of the Claimant being continuously late for work, leaving his place of work without authorisation, taking prolonged tea breaks of up to 3 hours, continuous absenteeism and uncertified sick leave

19. In their witness evidence, Mr Brownbridge Snr and Mr Serra stated that the Claimant had started to be late and absent without authorisation from work in early 2015 after he returned from injury leave following an accident at work; and that initially there had been informal conversations on the subject.

20. Mr Brownbridge Snr stated in his witness statement that from that time the Claimant regularly attended work late and also often failed to attend work at all, especially on Mondays, took

extended tea breaks and drove off in the work vehicle with his colleagues' tools and equipment. All of this resulted in disruption to the company's work schedule, re-allocation of the workforce and led to delay or cancellation of projects. This was broadly re-stated in his oral evidence. He added that, by the end, the Claimant's latenesses of at least 45 minutes every day (although later he said twice a week) were "*ridiculous*" and that he had lost count of the number of times he had spoken to the Claimant about his latenesses and asked him to stop. He said that the Claimant would always apologise politely, but carry on arriving late.

21. Mr Brownbridge Snr stated in his witness evidence that due to the fact that a warning given in March 2015 did not appear to have any effect on the Claimant, he started to keep a record in his diary of the Claimant's absences, latenesses and warnings, although he said that this was far from complete. Copies of pages from his diary and also a schedule of the relevant entries were put into evidence and showed a number of absences, latenesses and verbal warnings. Copy time sheets (each page covering the whole workforce for a week) were also put into evidence and showed multiple absences and latenesses for the Claimant.

22. Another employee of the Respondent, Mr Alan Brownbridge Jnr (whose job includes supervising work projects and employees) said that he often saw the Claimant outside his place of work during working hours and that he had spoken to the Claimant about it, as well as about his latenesses and his overly long tea breaks, at least 9 times he said, both informally and formally in the work office, although usually Mr Brownbridge Snr took the conversations in the office. Mr Brownbridge Jnr's consistent evidence was that, although there may have been a handful of occasions when the Claimant may have been justified in not being at his place of work because, for example, he had had to leave to collect equipment or go to the tip, there were many many times when he was not.

23. Mr Brownbridge Jnr also said that the Claimant attended work whilst under the influence of alcohol, which was a health and safety concern for the Respondent and its employees.

24. The evidence of Ms Milagros Montegriffo (secretary to Mr Brownbridge Snr and Mr Serra), one of whose responsibilities was the Respondent's employee sick leave and annual leave records, was that the Claimant had had 17.5 sick days in 2015, 16 in 2016 and 10 in 2017 (he was dismissed on 16 February 2017). The Claimant did his best by way of cross-examination to try to persuade Ms Montegriffo that she could have made mistakes in her records, but was not successful. It seemed unlikely that she had made any mistake. Ms Montegriffo presented as an entirely competent administrator and honest witness with no axe to grind as regards the Claimant.

25. The other 2 tree surgeons in the Claimant's team complained to the Respondent about how the Claimant's conduct was impacting on them and they refused to work with him. Mr Andre Loose (tree surgeon) described in his witness statement how: "*on many occasions the Complainant failed to turn up for work on time or at all and on these occasions, due to health and safety considerations related to our work the intended works ... for the team had to be changed or postponed or even cancelled. ... Moreover, on those days when he did turn up for work he would frequently disappear for lengthy periods during his tea and lunch breaks leaving the rest of the team to finish the designated works.*" He said that he and his other colleague, Mr Victor Jesus Avila (who is no longer employed by the Respondent) complained on many occasions and requested that the Claimant not be assigned to their team, since "*this would only delay the progress of the team's work and reflect negatively on both Mr Avila and myself*". By way of cross-examination, the Claimant tried to

persuade Mr Loose that the situation was not as negative as that described by Mr Loose, but Mr Loose did not give me any reason to doubt his evidence, and rather emphasised how he thought the Claimant's conduct at the time had been creating "*negative vibes*" at work.

26. Mr Avila on the other hand was not a convincing witness in oral evidence. Although in his witness statement, he repeated much of Mr Loose's statement, in oral evidence, it emerged that he bore a serious grudge against the Claimant following the Claimant and the Claimant's old work partner querying Mr Avila's qualifications and safety practices when Mr Avila had started working for the Respondent. Indeed, even by the time of the Hearing it was clear from their exchanges in cross-examination that there remained substantial distrust and antipathy between the Claimant and Mr Avila. This made Mr Avila's evidence significantly less credible and unreliable, and I have taken little account of it in my findings.

27. In respect of the complaint that the Claimant often left his place of work without authorisation, including in the company van leaving his colleagues without their belongings or equipment, the Claimant stated In his written evidence that he could recall only one specific occasion when he was accused by the Respondent of not being at his place of work without permission. He said that he did not think that even this was true, as he might have been on a tea break at the relevant time. He also stated that sometimes he would not be at his allocated place of work as he would have to return to the Respondent's yard for correct tools or equipment or to go to the tip or because he had been given instructions to go to another workplace. The Claimant denied that he ever took tea breaks of up to 3 hours, but admitted that his tea breaks could be "prolonged" if the café in question was busy.

28. In respect of the allegation that he often took uncertified sick leave, the Claimant said in his written evidence that he was living in Spain and so could not attend the Gibraltar medical centre when unwell and did not realse that he could attend for a backdated sick note. On the evidence however, the Claimant did on a number of occasions in 2015, 2016 and 2017 obtain sick notes from the medical centre (and these were put into evidence by way of Ms Montegriffo's witness statement).

29. In his submissions at the Hearing, the Claimant posited the possibility that the workforce time sheets and Mr Brownbridge Snr's diary entries had been altered after the event. But the documents in question on their face do not give any reason for this suspicion and the Claimant had no supporting evidence. I do not accept this submission.

Warnings

30. In evidence was a written record of a warning given by Mr Brownbridge Jnr to the Claimant on 23 February 2015: "*Mr O'Donnell seemed to still be under the influence of alcohol. Due to the nature of his job, tree surgeon, he cannot afford to be under the influence of alcohol during working hours as his life or others can be put at risk. He apologised and said it would not recur.*" In his evidence, the Claimant denied that he had ever been under the influence of alcohol at work. He said that he had told Mr Brownbridge Jnr that although he had been drinking the previous day he had stopped at lunchtime and "*would not put myself or others at risk by being under the influence of alcohol, I realise that the nature of my job [means that] safety is critical.*" He added that he apologised to Mr Brownbridge Jnr for concerning him (but this was not an acknowledgement of guilt) and offered to take a breathalyser test, which offer the Respondent did not take up. Both the Claimant and Mr

Brownbridge Jnr gave me no reason to doubt their evidence on the 23 February 2015 warning, and I find that both believed their description of this incident.

31. In his witness statement, Mr Brownbridge Snr stated that there were subsequent occasions when the Claimant was *"found to be worse for wear due to alcohol and [this] was by no means the last time that he was warned about being under the influence whilst at work."* There was no documentary evidence supporting this allegation and it seems to me not very credible that the Claimant would have been allowed to work if the Respondent considered he was under the influence of alcohol. I think it might have been more accurate for Mr Brownbridge Snr to have said that on occasion he suspected that the Claimant was suffering the after-effects of the preceding weekend.

32. In the end, I do not consider that I need to make a finding in relation to the 23 February 2015 warning (2 years before the dismissal) or the other occasions referred to by Mr Brownbridge Snr, since both Mr Brownbridge Snr and Mr Serra made it clear in their oral evidence that the decision to dismiss was based predominantly on the Claimant's absence and lateness record and the impact that this was having on his colleagues and the business.

33. The Claimant referred in his witness evidence without giving any further details to a warning letter dated 12 March 2015, to which the Respondent did not allude in its witness evidence.

34. A written warning dated 16 March 2015 for absenteeism *"on various occasions ... without leave or medical certificate"* was put into evidence. The warning states: *"We are reviewing your contract, which expires 28-8-15, and if we see no improvement this contract will expire on said date. We give you the opportunity to improve such matter"*. The Claimant stated in his witness evidence that *"this review period of 6 months had expired and my contract was extended to an indefinite contract"*.

35. Mr Brownbridge Snr's diary pages show a number of absences, latenesses and verbal warnings in respect of the Claimant in inter alia June 2015 (2 verbal warnings for lateness), July 2016 (2 verbal warnings for absence and one for lateness), August 2016 (3 verbal warnings for absence) and November 2016 (2 verbal warnings for absence).

36. Also in evidence was a final verbal warning dated 12 November 2015 recorded in writing and headed *"Re: Tree Surgeons - Meeting"*, which was given to the Claimant and a colleague: *"We spoke of their continuous absenteeism without prior permission, when they both know the tight schedule of work we have and agreed works programmes with clients – these programmes having been failed to proceed with and being a set back to the Company. Both admitted that they had no excuse for absenteeism and apologised. I informed them that it was a verbal warning and any repetition of this nature would result in dismissal."* No mention of this meeting or the warning was specifically made in any of the evidence given by the Respondent.

37. Mr Serra said in cross-examination that the Claimant had been regularly spoken to about his latenesses and failures to produce sick notes, both by Mr Brownbridge Snr and Mr Serra, but usually by Mr Brownbridge Snr alone. Mr Serra said that the Claimant was warned that the way he was behaving was wrong and that he should not repeat the offence. When asked by Counsel for the Respondent what he thought the consequences of the Claimant repeating the offence would

in fact be, Mr Serra initially said that the Respondent would carry on giving the Claimant warnings, although when pressed by his Counsel then said that they would have told the Claimant that they would not be able to keep him in employment if he kept on.

38. Mr Brownbridge Snr said in oral evidence that an employee's repeated lateness would normally be dealt with first by an informal chat, then a verbal warning and then a written warning.

39. In respect of the Claimant, Mr Brownbridge Snr said that he had been given serious warnings before (although he could not recall dates), along the lines of: *"get your act together; you are driving us to the line; we may have to take a step we don't want to take"*.

Dismissal

40. By February 2017, the Respondent, as per the evidence of Mr Serra, considered that: *"the situation had become impossible as we had disgruntled clients due to works which had either been cancelled or delayed or not finished on schedule due to [the] Complainant's failure to turn up to work on time or at all, especially on Mondays, or due to his prolonged absences from his place of work and disgruntled employees who were refusing to work with the Complainant due to his inconsiderate behaviour."*

41. Mr Brownbridge Snr said that the Respondent would have *"taken a firmer hand"* earlier had they not been so busy and had it not been difficult to find tree surgeons. Mr Serra emphasised this in his witness evidence: *"With hindsight we should not have renewed the Complainant's contract of employment in August 2015 but shortness of trained tree surgeons, pressure of work at the time and our hope that the Complainant would mend his ways all contributed to our deciding to renew the contract."*

42. The Claimant and the Respondent had quite different recollections of the events of the week of the Claimant's dismissal on (Thursday, 16 February 2017) and the period leading up to it.

43. The Respondent's evidence was that the Claimant had been on uncertified sick leave the week of 16 January 2017, although the Respondent did (erroneously) pay him for the week. 2 weeks passed but on Monday, 6 February 2017 the Respondent's evidence was that the Claimant again failed to attend work at all and did not provide any reason. Mr Brownbridge Snr said that he gave the Claimant a final verbal warning and in oral evidence said that he told the Claimant that this was: *"the end of the road. If it happens again, you will be out. [The Claimant] acknowledged it."* But Mr Brownbridge Snr did not say when this warning was given or in what circumstances and this was not supported by his diary entry for the day, which does not refer to a warning at all, just *"Colin – absent"*. There was no other evidence in support. In addition, the time sheet in evidence shows the Claimant being 90 minutes late for work on 6 February 2017, rather than absent. The Claimant made no mention in any of his evidence and seemed in blissful ignorance of this allegation that he had been given a warning on 6 February 2017 (according to the Respondent). He said only, with regard to his dismissal, that, although he had been spoken to about lateness before, he did not realise that he was on a final or any warning, as he would have expected this to be notified to him in a letter, as previously. In my view, the balance of probabilities does not weigh in support of Mr Brownbridge Snr's statement on this issue and I think it more than likely that he may have confused a different Monday incident with the Claimant.

44. On Monday, 13 February 2017, the Respondent's evidence was that the Claimant was again late for work, was instructed by Mr Brownbridge Snr to attend work at the junction of Scud Hill and Witham's Road (Mr Brownbridge Snr in oral evidence said that the Claimant was taken there, but could not recall by whom), that he did attend for work there, but according to Mr Avila (not very convincingly in my view) subsequently drove away in the company van for over an hour and again did not provide any reason. Mr Brownbridge Jnr said that he visited the site that morning, but did not encounter the Claimant. Mr Brownbridge Snr said that this was reported to him. His diary entry for the day reflects this: *"O'Donnell – Late + absent from place of work"*. Mr Serra said that he was in the office that morning and that it was rarely closed.

45. It was not in dispute that the Claimant was absent on the Tuesday, 14 February 2017. On the Wednesday, 15 February 2017, Mr Brownbridge Snr stated that the Claimant again failed to attend work at all, and did not make any contact. In oral evidence, Mr Brownbridge Snr said that he and Mr Serra discussed the situation and decided they had to terminate the Claimant's contract. In his witness statement, he said that when the Claimant did come to work (late) on the Thursday, 16 February 2017 and he asked the Claimant why he had been absent the previous day (he did not apparently raise the Monday or the Tuesday) and late that day, the Claimant did not provide any reason or excuse; and so the Respondent decided to hold a meeting with him.

46. The Claimant's recollection of the timings of this week was quite different. He said that on the morning of Monday, 13 February 2017, he attended work but as the other tree surgeons were not there (a tacit admission of lateness) he was sent to do some maintenance work in the shed. He then quite quickly left due to sickness without being able to report this as, he said, the office was closed. Under cross-examination he admitted that this was quite unusual and, given the evidence of Ms Montegriffo, Mr Serra and Mr Brownbridge Snr that the office was rarely closed, I concluded that he may not have tried very hard to check if the office was open. He said that in addition he could not later telephone in due to telephone difficulties. When the Claimant returned to work on, he said, the Wednesday (15 February 2017), he was instructed by Mr Brownbridge Snr to go home because he wanted to have a meeting with the Claimant together with Mr Serra who was not available that day.

47. In response to the Claimant's statement that Mr Brownbridge Snr had sent him to the shed on the Monday morning, Mr Brownbridge Snr said that on various occasions he would have asked the Claimant to go to the shed to do tool cleaning or sharpening jobs, but for more technical maintenance jobs he would have asked one of the other tree surgeons. In addition, this kind of work was done in the afternoons. He maintained that he did not send the Claimant to the shed on the morning of Monday, 13 February 2017. In respect of the Wednesday morning, the Respondent's position (as stated by Messrs Brownbridge Snr and Jnr) was that it would never send home anyone who had come to work, whether in anticipation of a meeting or otherwise, as there was just too much work. The Claimant referred in live evidence to having been sent home on a previous occasion by Mr Brownbridge Jnr for being 15 minutes late on the ground that this was company policy and said that this was subsequently confirmed to him by Mr Brownbridge Snr who had told him that Mr Brownbridge Jnr had acted completely within his authority. This was categorically denied by Mr Brownbridge Jnr in cross-examination who said that he would never tell an employee who had come from Spain to work to return home and that anyway there was too much work for this to happen. In cross-examination, Mr Brownbridge Snr only said that he could

not recall the incident. Mr Serra said that Mr Brownbridge Jnr did not have the authority to take this kind of action and would have had to answer to him and Mr Brownbridge Snr if he had done so.

48. The time sheet for the week in question supports the Claimant's recollection of the week over that of the Respondent: it shows the Claimant being paid one hour for the Monday (13 February 2017), being absent on the Tuesday (14 February 2017) and working on the Wednesday (15 February 2017).

49. As can be seen from the above, there was some confusion in the Respondent's witnesses' evidence about whether on the Monday the Claimant went to the site at Scud Hill/Witham's Road at all. In this regard, I did not find Mr Avila's evidence – that the Claimant came and then left for an hour in the company van - very convincing, as (as noted above) he appeared to have maintained a bitterness towards the Claimant which may well have coloured the evidence he gave. It also contradicted the witness statement of Mr Brownbridge Jnr that the Claimant was not at the Scud Hill/Witham's Road site at all when he visited that morning. On questioning by me, Mr Brownbridge Jnr added that he had been told that the Claimant had been at the Scud Hill/Witham's Road site, had taken the van and did not return - for the rest of the day. He was unable to explain how or when the van returned.

50. On balance, I therefore find that the evidence weighed more heavily in support of the Claimant's version of the events of Monday, 13 February 2017. However, I do not find that either Mr Serra or Messrs Brownbridge Snr or Jnr were attempting to mislead the Tribunal. Mr Serra and Mr Brownbridge Jnr were only able to refer to what had been reported to them and Mr Brownbridge Snr's recollection, although I think more than likely incorrect and possibly based on another Monday around the time in question (bearing in mind his own evidence that Monday was the day that the Claimant was most often late or absent), appeared to me to be genuinely held.

51. Strangely, neither party seemed to realise that each of their accounts in fact assisted the other's case on the Claimant's unauthorised absences: if the Claimant was correct, then he was only at work for one hour on Monday, 13 February 2017 (another almost full day's absence); whereas if the Respondent was correct, the Claimant may have been at work all day with an absence of only one hour.

52. It was difficult to make a finding on what transpired on Wednesday, 15 February 2017. I accept that the Respondent would not generally send employees home given the company's heavy workload, and Mr Brownbridge Snr's evidence seemed genuine that the Claimant had not reported for work that day, as did his denial that he had sent the Claimant home. However, the Claimant's evidence that he did attend work and was sent home by Mr Brownbridge Snr pending Mr Serra being available for a meeting the following day seemed equally genuine. In addition, the timesheet for the day records a full day's work for the Claimant, which would support the Claimant's statement. It also seems to me that Mr Brownbridge Snr might well have decided to ask the Claimant to leave given that on the Respondent's own evidence by this stage the Claimant's dismissal had been discussed, and most likely I think decided, between Mr Brownbridge Snr and Mr Serra. Weighing up these points, it seems to me more likely than not that the Claimant was sent home by Mr Brownbridge Snr on Wednesday, 15 February 2017 and the latter's evidence on this

issue was incorrect, although again I find this more likely to be due to his unclear memory and the passage of time, perhaps influenced by a little wishful thinking, rather than an intention to mislead.

53. As for the meeting between the Claimant, Mr Brownbridge Snr and Mr Serra on 16 February 2017, the Claimant said that it lasted a very short time (no longer than 5 minutes) and that he was: *"informed that due to constant absenteeism my contract would be terminated forthwith. At no point was I given an opportunity to make any comment or asked for any response, I was asked to sign a termination of employment, which I declined and was then informed that my contract was terminated."* In oral evidence, the Claimant changed his account a little and said that, after he had been told he was being dismissed, there seemed little point in saying anything.

54. In his witness statement, Mr Brownbridge Snr described the meeting, which according to the Respondent lasted between 15 and 25 minutes, as follows: *"after going through matters with him at some length, and the Claimant failing to satisfy us that he had any intention to mend his ways, the decision was taken, and we so informed him, that he was being dismissed with immediate effect."* In oral evidence, he said that when the Claimant arrived later on 16 February 2017, he called the Claimant into the office and he and Mr Serra told the Claimant that by reason of his absences and latenesses his services were no longer required and they were going to terminate his contract. By contrast with Mr Serra and the Claimant, he also said in oral evidence that the Claimant did give an excuse for his absence that week – he said he had been poorly – and apologised. However, later in oral evidence he said that the Claimant did not say anything and he thought that the Claimant was accepting what he was being told.

55. Mr Serra described the meeting in oral evidence as follows: *"We asked why he was late and about him being absent. [The Claimant] gave no reply. We told him we couldn't keep him on like this ... any longer. We waited for him to give some excuse. ... He just said , 'OK, OK, fine', acknowledging what we were saying. At the end, he just got up and walked out."* He also said that the Claimant has been almost silent in the meeting, but had every opportunity to speak should he have wished to. In his witness statement, Mr Serra had said: *"We spoke to the Complainant at length about our concerns and his behaviour but the Complainant was clearly neither sensitive to our concerns or showing a willingness to change his attitude or behaviour. In consequence of this, we informed the Complainant that he was being dismissed with immediate effect."*

56. The evidence of Mr Brownbridge Snr and Mr Serra was therefore not entirely consistent on what transpired at the meeting, for example, on whether the Claimant gave any explanation for his absence that week, whether the Claimant said anything at all, how much discussion preceded the Claimant being told he was dismissed and whether the dismissal decision had been taken before the meeting so that its purpose was only to notify the Claimant of the same. When balanced, the evidence supported the conclusion that Mr Brownbridge Snr and Mr Serra had come to the decision to dismiss before the meeting. If, as the Claimant alleged, they gave him a completed ETB Termination Form to sign at the meeting, this would have been established conclusively, but unfortunately neither party referred to this in cross-examination. On the other hand, I find that the Claimant was not actively denied the opportunity to speak or make representations at the 16 February 2017 dismissal meeting. But I find, as per the above, that he was not given this opportunity before the Respondent made its decision to dismiss. This would in my view be the most natural explanation for why the Claimant is described by all of the participants (including himself) as not speaking, or speaking very little, in the course of the meeting. As Counsel for the

Respondent put it in his Closing Arguments, *"[The Claimant] stated that what was there to say when he was told he was being dismissed there and then"*.

Procedure

57. The evidence given by the Respondent highlighted a number of defects in the dismissal procedure followed by the Respondent. Neither Mr Serra not Mr Brownbridge Snr appeared to have been aware that anything more than notifying the Claimant that he was being dismissed was necessary.

58. The Respondent's position on this issue, as per Mr Brownbridge Snr's witness statement, was that: *"throughout his period of employment the Company was extremely patient and fair with the Complainant and repeatedly gave him many opportunities to mend his ways but the Complainant failed to respond to the Directors' requests and increasingly worsened his behaviour until the Company had no alternative but to dismiss the Complainant."* In oral evidence, he said that the Respondent had gone well beyond treating the Claimant fairly, but the Claimant: *"pushed the boundaries all the time. We had to get rid of him. It was becoming a nightmare."* Mr Serra said that the Claimant had been given many opportunities to change his behaviour, including informal discussions and verbal warnings.

59. When I asked Mr Brownbridge Snr whether before the final meeting on 16 February 2017, the Claimant had been informed that he could be dismissed, Mr Brownbridge said *"no"*. When I asked him whether the Claimant had been told of his right to be accompanied at the meeting or whether he had been informed of his right to appeal the dismissal decision taken, Mr Brownbridge Snr said that he could not recall. And when I asked him whether it was the case that he was not aware and had not informed himself of the company's obligations in relation to a disciplinary/dismissal procedure (for example, by taking legal advice), Mr Brownbridge Snr agreed.

60. On this issue, Counsel for the Respondent was only able to submit in his Closing Arguments:-

"... administratively the Respondent could theoretically have done more with reference to [the Claimant]. It should have put the verbal warnings into writing, it should have [pointed] out that he could bring a representative with him to the meeting of the 16th February and that he could appeal the decision. But these failures, if that is what they can be called, have to be put in a factual context. This is a small company and one with limited resources both at management and at an administrative level, which still relies on possibly an outdated paper system but should not be penalised for this. ... [The Claimant] was sat down and talked to on at least ten occasions" and was given a final warning on 6 February 2017.

Taking annual leave when on sick leave

61. One of the Claimant's claims was that he was often required to take annual leave instead of sick leave, by which he felt aggrieved. The Respondent stated in its Details of Response that no employee had ever been forced to take annual leave and that as regards the Claimant, the Respondent in good faith had given him the option to take annual leave whilst on uncertified sick leave so as not to lose out on his wages, as sick pay was not payable when no medical certificate had been produced and this meant that the Claimant would receive holiday pay for the absence. It was entirely up to the Claimant whether he wished to avail himself of this.

62. As per Mr Brownbridge Snr, the Claimant: "*was given the choice of either losing the requisite days' wages or taking the day(s) from his annual leave entitlement. The Complainant was entirely free to choose which option to take or indeed to produce the necessary medical certificate; he was never forced to take either option.*" This was re-iterated by Ms Montegriffo in her evidence. In his witness evidence, the Claimant said that this was not how the situation had been explained to him by the Respondent and that it "*felt more like coercion*".

63. Again, all of the witness evidence on this subject was completely credible. The Claimant clearly believed that he was being required to use holiday without, I think, fully understanding the situation, and the Respondent's witnesses clearly believed that they were trying to assist him. In the end, nothing much turns on this as regards the Claimant's unfair dismissal claim.

Decision

64. There does not seem to be any question that the Respondent dismissed the Claimant for misconduct, namely, frequent unauthorised latenesses and absenteeism. The Claimant admitted more than once in oral evidence that there were times (he said more than 10) when he was late for work and that he had been spoken to about this and also given a number of warnings. Although the Claimant made a good effort at trying to establish that most of his absences were justified or, as he said in oral evidence, arose from "*misunderstandings*" because: there were occasions when he would have to leave a work place to collect correct equipment or to go to the tip or because he had been given instructions to go to another workplace; his tea breaks however prolonged were never as long as alleged by the Respondent; and the reason his sickness absences were unauthorised was because he could not attend the Gibraltar medical centre when unwell and did not realise that he could attend for a backdated sick note, there was no supporting evidence for any of these allegations. I was not persuaded that any of these alleged justifications for his absences might have been relevant to any but a handful of the great number of occasions complained about by the Respondent and supported by the consistent evidence of all of the Respondent's witnesses and the documentary evidence. This established in my view incontrovertibly that the Claimant's lateness and unauthorised absence record had by February 2017 been exceptionally poor for more than a year and was further deteriorating, with it appearing unlikely to the Respondent that matters might improve (and the consequent ongoing damage to the Respondent's business).

65. Against this background, I find that the Respondent genuinely believed that the Claimant was guilty of misconduct. I also find that the investigation which the Respondent undertook, namely considering the Claimant's absence records and meeting with the Claimant, in the circumstances established that the Respondent's belief was held on reasonable grounds.

66. The Claimant's allegation that the workforce time sheets and/or Mr Brownbridge Snr's diary entries could have been altered to increase the number of incidents of lateness and absence was, as I have found above, not supported by any evidence. On the balance of probabilities, this seemed to me to have been unlikely.

67. The precise events of the week of 13 February 2017 do not in the end have significant bearing on my decision, since it was not claimed or disputed that Mr Brownbridge Snr or Mr Serra viewed the events of that week alone as their principal reason for dismissing the Claimant, but rather the Claimant's history of incidents of lateness and absenteeism whether or not coupled to warnings,

escalating from late 2016, with in their view no likelihood of any improvement and the impact this was having on their business and the Claimant's colleagues. At law, in coming to its dismissal decision, the Respondent was indeed entitled to look at the whole history (including expired warnings) and decide whether or not they were prepared to continue to shoulder the burden of an employee who had been late and absent without authorisation on so many occasions and did not appear to be looking to change his ways, against the background of the detrimental effect this was having on other employees and the Respondent's business as a whole.

68. However, it is the case that for persistent absence (as for most simple misconduct) to amount to a substantively fair reason for dismissal, the employee must be on notice of the consequences of his actions and have been given the opportunity to make improvements, for example, by way of a final warning. In this case, in respect of the warnings referred to in oral evidence and/or put into evidence in documentary form, I find that the Respondent was not entitled to have relied upon any of these in respect of its dismissal decision. With the exception of the alleged 6 February 2017 warning, they were all more than 18 months old at the time of the Claimant's dismissal and none of them were referred to in the dismissal process or indeed appear to have been relied upon by the Respondent as regards its decision to dismiss. In addition, none of them appear to have included any time period for how long they would remain effective, or any details of what conduct on the part of the Claimant would contravene them, or the consequences of further misconduct (save for the 16 March 2015 warning (almost 2 years before the dismissal), which in any event appears to have lapsed as a result of the Claimant's continued employment after 28 August 2015).

69. Further, for the reasons set out above, I find that the Respondent did not establish that a final or any warning was given to the Claimant by Mr Brownbridge Snr on 6 February 2017. Although it does not matter at law whether a warning is given verbally or in writing, bearing in mind particularly Mr Brownbridge's statement in oral evidence that the Respondent's normal warning procedure was first an informal chat, then a verbal warning and then a written warning, and the Claimant's corresponding adamant position that he would have expected to have been notified in writing if he was on a formal warning, I find that the Respondent failed to establish that on 16 February 2017, the Claimant knew that he was at risk of dismissal. As a consequence, I find that no reasonable employer would have moved to dismiss the Claimant on 16 February 2017 for absenteeism as the Claimant was not on notice that he was at risk of dismissal (and had not been given the opportunity to improve and avoid dismissal). I therefore find that the dismissal was not within the band of reasonable responses available to a reasonable employer.

Procedure

70. In respect of the disciplinary/dismissal procedure followed by the Respondent (or lack of it), although I have some sympathy with the Respondent's lack of awareness that anything more was required than a meeting to inform the Claimant of the decision to dismiss, it remains the case that before the dismissal meeting on 16 February 2017, the Respondent did not notify the Claimant of the case against him, nor that he was at risk of dismissal, nor was the Claimant advised of his right of appeal. In addition, the Claimant was not advised of his right to be accompanied at the meeting.

71. The Respondent made no attempt in its pleadings or through its witnesses' evidence to justify its apparent utter disregard for the need to undertake a fair disciplinary/dismissal procedure. Mr Brownbridge Snr admitted in evidence that in advance of the dismissal meeting on 16 February

2017, he and Mr Serra had not formally put the Claimant on notice of the possibility of dismissal, they had not notified him of the right to be accompanied and they had not informed him of his right of appeal. They appeared entirely unaware that any such procedural steps were called for.

72. Counsel for the Respondent's submissions that the omissions in the disciplinary/dismissal procedure were justified because the Respondent is a small company with limited and quite old fashioned resources are not accepted. The information which should have been given to the Claimant both before and after the final meeting on 16 February 2017 did not require any resources.

73. Repeated unauthorised absences and lateness do not constitute the "heinous misconduct" (utterly odious or wicked) exception to the requirement that employers follow a fair dismissal procedure. Nor do I see any other facts or circumstances which would except the Respondent from the requirement.

74. I find that the Respondent approached the dismissal in total ignorance of the applicable procedural requirements and did not follow a reasonable dismissal procedure.

Conclusion

For the reasons set out above, I find that the Respondent dismissed the Claimant because it genuinely believed him to be guilty of gross misconduct, namely persistent and serious unauthorised absenteeism and lateness, and had reasonable grounds for its belief on reasonable investigation. However, when considering the case as a whole, I find that the Respondent's decision to treat the Claimant's persistent absences and latenesses as a sufficient misconduct reason for dismissal does not fall within the band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted, as the Claimant was not on notice that he was at risk of dismissal. Further, I find that the failure by the Respondent to undertake a reasonable dismissal procedure also renders the dismissal of the Claimant by the Respondent unfair.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson

23 May 2019