EMPLOYMENT TRIBUNALS

Claimant: Mr I Rafiq

Respondent: Hutchinson 3G Limited

Heard at: Manchester **On:** 7 June 2019

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Mr M Menseh, Counsel
Respondent: Mr K McNerney, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed.

2. The respondent was not in breach of the claimant's contract of employment.

3. The claims are dismissed.

REASONS

The Hearing

1. The hearing took place at Manchester Employment Tribunal on Friday 7 June 2019. The claimant was represented by Mr Menseh of Counsel and gave evidence on his own behalf. The respondent was represented by Mr McNerney of Counsel and witness evidence was provided by Jamie Gorner, an Area Manager of the respondent and the dismissing officer, and Andrew Millard, an Area Manager and the appeals officer. There was an agreed bundle of documents which ran to 386 pages.

2. The evidence and submissions were concluded on the afternoon of 7 June 2019 and judgment was reserved. Deliberations took place in chambers on the afternoon of 18 June 2019.

The Issues

3. The claim was for unfair dismissal. The issues were identified at the outset of the hearing as follows:

3.1 It was for the respondent to show that the dismissal was for a potentially fair reason under section 98 (1) and (2) Employment Rights Act 1996 ("ERA 1996"). The potentially fair reason relied upon by the respondent was conduct.

3.2 If the respondent could show that the dismissal was for a potentially fair reason, the tribunal would go on to assess whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

3.1.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

3.1.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

3.1.3 whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

3.3 If the dismissal was held to be unfair, then tribunal would be required to determine whether a Polkey reduction should apply and whether the claimant contributed to his dismissal.

4. The claimant also brought a wrongful dismissal claim. The tribunal would therefore be required to determine whether the respondent was in breach of contract by failing to pay the claimant his notice pay.

The Law

5. The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

a) the reason (or, if more than one, the principal reason) for the dismissal, and

b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

6. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

7. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

8. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

9. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations, see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

10. The tribunal must take in to account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair

procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

11. On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal stated: "*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*"

12. The tribunal were also referred to the case of Turner v East Midlands Trains [2012] IRLR 403, EAT as authority for the principle that where the effects of a dismissal are particularly grave there ought to be a heightened level of investigation and of care in reaching a decision upon the sanction.

13. The test for a breach of contract claim is quite different. The burden is on the respondent to show on a balance of probabilities, relying not only on matters known to it at the time but if necessary, on after acquired evidence, that the conduct of the claimant was such as to fundamentally repudiate the contract of employment.

Findings of Fact

The employment tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

14. The respondent is a mobile telephone network provider. The claimant commenced work for the respondent on 13 October 2016 as a store manager and initially worked from the respondent's Altrincham store where he performed well, albeit there were some reservations about his administrative skills which had led to a first stage warning. On 1 July 2018 the claimant was transferred to the respondent Oldham store. On relocating to that store, the claimant encountered some resistance to his management from some of the employees at the store who he considered to be ill-disciplined, for example they ate their lunch on the shop floor and some of them were found playing football within the store.

15. On 20 August 2018, the respondent received an anonymous "whistleblowing" report from an employee at the Oldham store relating to the conduct of the claimant and his assistant manager, Faisal Choudhry. It made various allegations which amounted to both mismanagement and misconduct on the part of the claimant and Mr Choudry (a copy of that report was reproduced at pages 89-94 of the agreed bundle of documents). These included allegations that the claimant would shout at members of staff, deny them breaks, sit in the back office and refuse to assist employees in the shop, and that he would leave the store early and "stealthily". There were also some allegations which might have amounted to mis-selling of the respondent's products, for example it was alleged that he had promised elderly customers they would receive a "free month" if they took out a new mobile telephone contract when no free month was in fact provided.

16. On 24 September 2018, the claimant and Mr Choudhury were suspended pending a disciplinary investigation. The investigation was initially conducted by Mr David Wilson, who was said to be a member of the respondent's "retail crime team". Mr Wilson interviewed five employees based at the Oldham store, and viewed CCTV footage to assess whether claimant and Mr Choudhury had left the store early as alleged. The respondent interviewed only five of the seven employees at the store, and this was a point which was raised during the course of the hearing as contributing to a failure to conduct a reasonable investigation. However, the tribunal were of the view that the decision to interview five employees was not unreasonable given that the two remaining employees were part-time staff who worked mainly weekends and therefore had limited contact with the claimant.

17. The respondent conducted some fairly detailed investigation meetings with the five employees concerned, which were carried out by Mike Hall, a manager from a different store (copies of the notes from the meetings were reproduced at pages 123 to 148 the bundle). The claimant was then required to attend an investigation meeting which was conducted by Kelly Dower, a lead store manager, on 2 November 2018 (pages 151-158). Following that meeting the respondent concluded that there was sufficient evidence to proceed to the disciplinary stage and a letter of invitation to a disciplinary hearing was sent to the claimant on 9 November 2018 (pages 161-162). The allegations of misconduct which were to be considered were summarised in that letter as follows:

- *"Failure to follow correct company procedure and lack of management control in terms of Operational Compliance which could impact the customer experience, impact the Three brand* [the respondent's brand name]*, may bring the company into disrepute and result in a potential loss in revenue specifically:*

    - *25 suspected instances of churn.*

    - *Providing customers an xsell discount even if the other existing customer is not in-store to verify the account.*

    - *incorrectly advising customers that Three rescue comes with the sale and it is their responsibility to cancel.*

- *Your general conduct and attitude towards your team including several instances of swearing and one particular instance of shouting at a member of your team when they refused to follow your instruction to follow incorrect processes. This is a breach of our Non-negotiable Charter specifically 'bullying harassment and intimidation use of inappropriate, discriminatory abusive or offensive language (verbal or written) or behaviours and/or treating anyone with a lack of respect are all behaviours we will not accept.'*

- *Misuse of company time and alleged unauthorised absence specifically:*

    - *Generally leaving the store unattended or leaving prior to the end of your shift without permission and specifically on 27, 28, 29, 30 August - 4, 5, 17, 21 September you left the store prior to the end of your scheduled shift leaving the store without management.*

- *Poor levels of shop floor management and fulfilling the responsibilities of your role as Store Manager by supporting and engaging with your team."*

The letter warned that these allegations were considered to be gross misconduct and therefore "*a disciplinary sanction may be issued against you, which could be up to and including dismissal (with or without notice)*".

18. Some of the matters of which the claimant was accused were not later relied upon as reasons for the dismissal. The only matters which were relied upon, and therefore the matters which concerned the tribunal, were the allegations that the claimant left the store early without permission on eight occasions in August and September 2018; and the 25 suspected instances of "churn", of which only six were later said to have been confirmed. This latter allegation requires some further explanation. "Churn" is a name given by the respondent to a process whereby an existing customer who is contracted to use a mobile telephone with the respondent and whose contract is due for renewal, or a customer of the respondent who wishes to upgrade their existing contract, cancels their existing contract and takes out a new contract with a new telephone number. The customer effectively leaves the respondent and comes back as a new customer, the intention being to take advantage of promotional offers which are provided only to new customers. The respondent's position was that this was malpractice since it was to the detriment of the business and potentially of financial benefit to the claimant since it may result in additional bonus been paid to him.

19. The disciplinary hearing was scheduled to take place on 12 November 2018 but the claimant, having only received the relevant paperwork very shortly before the hearing, requested more time to prepare. There were some further delays due to the non-availability of the claimant's trade union representative and a reconvened hearing on 27 November 2018 was adjourned when the disciplinary hearing of the claimant's assistant manager, who was accused of very similar offences, overran. As a result, the claimant's hearing did not take place until 12 December 2018 (the notes from that hearing were reproduced at pages 181-187). The claimant denied many of the allegations put to him at the hearing. In respect of churn he said, at both the investigation and disciplinary stages, that he did not promote the practice but that it was "*occasionally done to retain a customer*". His view in essence was that the respondent should be "*transparent*" and offer all customers the same deal. He also said that he believed that the rates of churn at his store were comparable to those at other stores. In respect of the early departures from the stores, the claimant did not necessarily accept the times that were put to him but admitted that, on occasions, he did leave early. This was, he said, because he had time owed to him where he had worked additional hours for various reasons including, for example, attending work early for conference calls, working through his lunch and carrying out stock takes. The claimant said that he was having difficulties with an online roster system operated by the respondent which meant he was unable to record any additional time he had worked and he was unable to claim the time off in lieu using that system.

20. Having considered all the evidence, and taken account of the claimant's representations, Mr Gorner formed the view that the claimant had left work early on eight occasions in August and September 2018. He took account of the fact that all five employees interviewed during the investigation said that the claimant left early

and that there was CCTV footage which appeared to show the claimant leaving the store on the occasions alleged. Even if the online roster system was not operating correctly, there was no documented record of the claimant having worked additional hours to show that he was taking time off in lieu and he had not requested that time off from his line manager. Mr Gorner believed that the claimant left early without permission and he concluded that the claimant had been paid money for time when he should have been at work.

21. Mr Gorner also concluded that the claimant had "*churned*" against company policy and therefore that he was "*a serious risk to [the] business*". The respondent's case was that there was a cost to the business if a customer left and returned as a new customer, and also that it would affect a store's key performance indicators (KPI's) by showing the acquisition of a new customer which in turn, Mr Gorner said, would benefit the store financially and might affect the claimant's bonus. It was on this basis that he found against the claimant on this allegation. In respect of the remaining allegations, he stated that "*I did not feel that I had the weight of evidence to warrant a sanction on these allegations*", which is not quite the same as saying that the allegations were not upheld but nonetheless these matters were not relied upon in support of the decision to dismiss.

22. Mr Gorner wrote to the claimant on 20 December 2018 to advise him of the outcome of the disciplinary process (pages 203-205). The allegations of churn and unauthorised absence were upheld and he concluded that the following justified a summary dismissal:

- *Failure to follow correct company procedure and lack of management control in terms of operational compliance which could impact the customers experience, impact the Three brand, may bring the company into disrepute and result in a potential loss in revenue specifically: 25 suspected instances of churn.*

It is my reasonable belief that the malpractice of churn occurred in your store and this was encouraged by you to the wider team. Whilst I believe this action was not purely for financial gain, it did however indirectly result in this. This act was a serious breach and failure to comply with the company's policies, procedures, rules or guidelines in circumstances where you are reasonably expected or required to do so.

- *Misuse of company time and alleged unauthorised absence specifically: on 27, 29, 31 August 2018 and 1, 4, 5, 17 and 21 September 2018 you left the store prior to the end of your schedule shift leaving the store without management cover.*

During the hearing despite being an experienced store manager, you are unable to provide me with justification for this repeated unauthorised absence. You chose to leave your store unattended, without authorisation when you should have been leading and completing tasks and duties associated with your role. Furthermore, based on information available to me, I reasonably believe that you knowingly left work early without authorisation and were therefore paid for hours that you did nor were entitled to receive. This repeated act was unauthorised and a breach of trust and confidence in your position of trust as Store Manager."

23. The claimant submitted a letter of appeal on 23 December 2018 (page 206). The letter outlined the basis of the appeal and stated:

"*With regards to the churn, and the 'suspected instances', I explained at length that I did not encourage the malpractice under any terms, the company as a whole are aware of churn, other stores have churn, there is the expectation that churn will take place, and I will reiterate that if churn did take place then it is down to the customer and their request. You have stated that it wasn't for financial gain so what possible reason would I encourage churn for?*

With regards the misuse of company time, I explained at length that I have not misused company time, I have taken time back owed to me, had the rota tool been up and running then this would have been logged. I did provide justification, just not to your satisfaction. I have attended work early, stayed late for stock takes, taken back time or from breaks etc."

24. The appeal hearing took place on 9 January 2019, it was conducted by Andrew Millard, an area manager, and the notes from that meeting were reproduced at pages 210 to 213. During the appeal the claimant's position was that churn may have occurred but he received no financial gain from it. He said that other stores had churn and there was an expectation that it would take place. He denied that he had taken any time off to which he was not entitled, and said that he had kept a diary of time that was owed to him and that it had been kept in the store. This was different to his position earlier in the disciplinary process when he had not made any mention of such a diary.

25. Mr Millard adjourned to carry out some further investigation, including trying to find the diary to which the claimant had referred, which could not be located at the store. He attempted to obtain data relating to churn from other stores but was informed that that the data was not available. One of the claimant's objections to the disciplinary process was that he did not have an opportunity to cross-examine witnesses and Mr Millard sought to deal with this by allowing the claimant to put together a list of questions (pages 227-228) which Mr Millard then put to the witnesses during telephone interviews following the appeal hearing (pages 229-256). He also spoke with with Shannon Beattie, the claimant's area manager, and Mr Gorner.

26. Having taken those steps, Mr Millard concluded that churn was manager led within the Oldham store. This conclusion was based principally upon the evidence obtained from the employees in which they alleged that the claimant encouraged churn. Mr Millard's view was that the 25 suspected instances of churn within the claimant store was very excessive since, from his personal experience, he had only one instance of churn across his managerial area of 16 stores during the same period. Mr Miller was of the view that there was a potential financial gain to the practice of churn since if the customer was going to leave the business rather than upgrade or renew their existing contract then a financial gain resulted from retaining that customer within the business. He considered churn to be malpractice and believed that the claimant had instructed his team to follow that malpractice.

27. In respect of the alleged unauthorised absence, having looked in to the matter he did not believe that the diary existed since it could not be found and there had been no mention of it at the disciplinary or investigation meetings. The respondent appeared to accept that the claimant had issues with the online roster system but Mr Millard's

position was that there should have at least been a telephone call or email to the claimant's line manager to request time off and some other documentary record of the time which the claimant said he was "taking back" in lieu. In the absence of that, and having reviewed the CCTV footage of the claimant leaving the store, he concluded that the claimant was taking unauthorised absence. For those reasons the decision to dismiss was upheld.

28. Mr Millard wrote to the claimant on 25 January 2019 in a lengthy letter addressing the main points raised by the claimant at the appeal hearing (pages 257-260). In brief, none of the points were upheld and the decision to dismiss was upheld, apart from in one minor respect which had no bearing upon the outcome.

29. Mr Gorner and Mr Millard both presented as genuine and credible witnesses. The tribunal found that they genuinely believed that there were eight occasions when the claimant had left the store early, and without authorisation, in the period between 27 August and 21 September 2018. The tribunal were of the view that a reasonable investigation was conducted, which included interviewing the five employees and reviewing the relevant CCTV footage, and based upon that investigation, this was a reasonable conclusion to reach. The claimant was having difficulty accessing the online roster tool and so was unable to record any additional time worked using that system but he had no other evidence of any additional time worked and that he only raised the alleged existence of a diary at the appeal stage. The diary could not be found and, in the circumstances, it was not unreasonable for the respondent to believe that it had never existed.

30. The claimant did not, on any of the occasions that he left the store, have the authorisation of his line manager to leave. There was an assertion in his evidence that he may have been working back at the Altrincham Store on some of those occasions, but he was not able to give any specific times or dates when he was working at Altrincham to substantiate that assertion. In the circumstances, the respondent had reasonable grounds upon which to sustain its belief that the claimant's absence was unauthorised.

31. The tribunal found the position in respect of churn more problematic. The tribunal was satisfied that there was sufficient evidence from the investigation, in particular the interviews with the claimant's team, from which the respondent had reasonably concluded that the claimant encouraged the practice of "churn" within his team. Further, in reaching their conclusions, Mr Gorner and Mr Millard were entitled to rely upon their own knowledge of the rarity of churn within other stores, which in Mr Millard's case had occurred only once across 16 stores during the period when the claimant was at the Oldham store. However, the tribunal were not convinced that the respondent had any reasonable grounds upon which to conclude that the claimant had derived some financial benefit from the practice. The KPIs referred to by the respondent were not produced, nor was the bonus scheme which was said to be applicable to the store and to the claimant. There was no evidence that these documents were considered during the investigation stage and no documentary evidence before the tribunal at all to substantiate the respondent's view that churn might benefit the claimant financially. Nor did the respondent provide any evidence in its witness statements as to why churn might cause any detriment to the customer. In response to a question from the tribunal, Mr Gorner said that there might be some

inconvenience to a customer since he would need to change his number and if he did not immediately cancel his existing deal, he may end up paying for two contracts at the same time. However, it seemed to the tribunal that it would be for the customer to ensure his existing number was properly cancelled and to weigh up the inconvenience of a new number against the benefit of having a better deal as a 'new' customer.

32. The respondent confirmed that there was no written policy in place to prohibit churn, nor indeed any memorandum or other documentary evidence which set out any restriction upon the practice. Mr Gorner said that there were regular sales meetings at which he, and other senior managers, impressed upon employees that they should not sell new contracts to existing customers. It was, it seemed to the tribunal, unusual that no documentary evidence existed at all within the respondent's organisation to place any restriction upon selling to existing customers offers which were designed for new customers. One of the claimant's arguments was that there was a lack of transparency and that all customers should have been equally informed and aware of the deals which were available. This it seems to the tribunal was a reasonable position to take, although one of the difficulties for the claimant was the ambiguity of his own position during the disciplinary process. On the one hand he sought to deny that he was encouraging the practice of churning but on the other he sought to defend it as been in the interests of the customers.

Conclusions

33. The tribunal was satisfied that the respondent had a genuine belief in the claimant's misconduct and therefore the dismissal was for the potentially fair reason of conduct under section 98(1) and (2) ERA 1996. There was a suggestion in the evidence that the claimant's move to the Oldham store and his subsequent dismissal was orchestrated by ill feeling from his area manager, Shannon Beattie but there was no significant evidence to support that contention and it was not pursued with any vigour.

34. The tribunal was satisfied that the respondent followed a fair procedure having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. This was a lengthy process in which the five full-time employees at the store, as well as the claimant and his assistant manager, were interviewed and in which CCTV footage was produced and reviewed. The allegations against the claimant were put to him with sufficient clarity and he had a full opportunity to respond to them at four separate meetings. It was correct, as submitted on behalf of the claimant, that the specific dates and details of alleged instances of churn were not put to the claimant but he did have a full the opportunity to respond in general terms to the allegation that he had encouraged churn within the store; that allegation did not require specific dates and instances. In respect of the unauthorised absence, he was given an opportunity to review the CCTV footage which showed the occasions of him leaving the store early. The tribunal were not of the view that the claimant should have had an opportunity to cross examine witnesses, the questions which the claimant had of them were put to them at the appeal stage and the 'cross examination' point was not in pursued in submissions. Having regard to the principles enunciated in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA the tribunal was satisfied that a fair procedure was followed.

35. There was, in fact, little attack upon the process in purely procedural terms; the focus of the claimant's case and of Counsel's submissions was upon whether the respondent had reasonable grounds to sustain a belief in the misconduct alleged. The tribunal was satisfied, in respect of the unauthorised absence allegations, that there were reasonable grounds to sustain a belief in misconduct. The respondent was entitled to conclude that the CCTV footage clearly showed the claimant leaving the store early and this corresponded with the statements from employees to that effect. The tribunal did not accept the submission that the respondent was required to further investigate whether and when the claimant had made early starts, conducted conference calls outside of his normal hours, or covered other stores and had thereby accrued time off as he claimed. The claimant had ample opportunity to put those specifics to the respondent himself during the disciplinary process and he did not to do so. The claimant did not assist himself since he initially said, at the investigation meeting, that he did not keep a log of his time and only later, at the appeal stage, said that he had kept a record of accrued time in a diary at the Store. The diary could not be found and, given the claimant's inconsistency on the point, Mr Millard was entitled to form the view that it did not exist. The claimant had not sought permission from his area manager to leave early, even a quick telephone call or brief email along the lines that he was intending to leave early because he had, for example, commenced work early that day may have saved him. In the absence of any such record, the respondent was entitled to conclude that the claimant's absence was both unauthorised and that it was not covered by accrued time.

36. There were some further points relied upon by the claimant but they did not assist him: there was no CCTV evidence for one of the dates of unauthorised absence, but there was for seven of the eight dates; a date was incorrect in some of the correspondence in relation to the unauthorised absence, but the tribunal accepted this was a genuine error on the part of the respondent. The motive of the whistle blower was also in question but the tribunal held that this was taken in to account by the respondent and it was entitled to rely upon all of the evidence that followed from that initial disclosure.

37. Turning to the sanction and whether the decision to dismiss fell within the band of reasonable responses. In respect of the unauthorised absence, and applying Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT, the tribunal was satisfied that the decision to dismiss was within the band of reasonable responses. This was a store manager who was leaving the store early along with his assistant manager, thereby leaving no managerial cover in the store, he had no authorisation for doing so and the respondent reasonably concluded that he had not accrued the time off. The case of Turner v East Midlands Trains [2012] IRLR 403, EAT, relied upon in submissions, did not assist the claimant here either in terms of the investigation, which was reasonably comprehensive, or the appropriateness of the sanction.

38. In respect of churn, the tribunal held that the respondent genuinely believed that churn had occurred and, based upon the evidence of the employees, found that the respondent had reasonable grounds upon which to sustain its belief that this was encouraged or led by the claimant. The tribunal did not find however that there was any reasonable basis for the respondent to conclude that there was some element of 'fraud' involved in the practice, or indeed that there was any financial benefit to the claimant in "churning". There was no examination of any documentation relating to

KPI's or bonuses upon which to sustain such a view, and Mr Millard himself concluded at the appeal stage that "*there may not have been a direct financial benefit to the management team*". Mr Millard relied instead upon this being a serious breach of a company "*policy, procedure, rule or guideline.*" However, there was no evidence of any written policy or procedure anywhere across the respondent's organisation to prohibit the practice of churning, nor even a memorandum to indicate any restriction upon it.

39. The respondent's evidence was that the prohibition on churn was communicated to employees verbally at management meetings but it was not said that it was impressed upon employees that "churning" was a gross misconduct offence. If the respondent had a clear policy that churning was regarded as a disciplinary offence then it ought to have been communicated to its employees in writing, even more so if it was intended to rely upon it as an offence justifying a summary dismissal. There are some offences which are sufficiently serious that they do not require such a communication, and this might include breaches of certain company policies and procedures where, for example, it amounts to fraud or has adverse consequences for staff or customers. The tribunal was not persuaded that the respondent had any reasonable grounds to regard this as such a policy. Churning was a process which allowed existing customers to take advantage of offers which were available only to new customers. The claimant's point that there should be transparency upon the offers available to all customers was a valid one. On the evidence before the tribunal, there was no reasonable grounds for the respondent to sustain a belief that a customer was disadvantaged by cancelling an existing contract to take out a new one or that the claimant derived any personal benefit.

40. When considering the appropriateness of the sanction the tribunal are required to have particular regard to Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT and to take care not to fall in to a substitution mind set. The respondent had a reasonable belief on reasonable grounds that churn was encouraged by the claimant and that it was commercially to its disadvantage to have existing customers taking on promotional offers intended for new customers. However, having regard to the complete lack of any written policy or documented prohibition on the practice, and the finding that the respondent did not have any reasonable basis to conclude that there was any financial gain to the claimant nor any detriment to any customer, the tribunal held that the decision to dismiss for churning did not satisfy the reasonable responses test. If the dismissal had been for that reason alone the tribunal would have held it to be unfair.

41. In this particular case, this finding does not assist the claimant since the respondent has satisfied all of the necessary tests in respect of the unauthorised absence. Both the dismissing officer and appeals officer reasonably concluded that the unauthorised absence in itself warranted a summary dismissal. The tribunal further find on the balance of probabilities that, even if the churning allegation had not existed, the claimant would have been dismissed in any event for unauthorised absence.

42. We turn now to the wrongful dismissal or breach of contract claim. The legal test here is different: an employee may be summarily dismissed if he is guilty of a repudiatory breach of the contract of employment. This is where the misconduct is sufficiently serious to amount to a fundamental breach of contract, commonly referred to as "gross misconduct". In respect of the churn "offence", the tribunal did not find

that the claimant's actions amounted to fundamental breach of contract. This was an unwritten policy, a breach of which was not said to amount to an offence justifying a summary dismissal and there was no evidence of any financial benefit to claimant or detriment to the customer. In respect of the absences, the tribunal held that the respondent did show, on the balance of probabilities, that the absence was unauthorised. The claimant did not have permission to leave and had not accrued any time off in lieu to cover the periods of absence and his absence was unauthorised on eight occasions during a period of little over a month. This amounted to a fundamental breach of the contract of employment. Accordingly, the claimant was not wrongfully dismissed and there was no breach of contract on the part of the respondent.

43. The claims are dismissed.

Employment Judge Humble

Date 22 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

2 August 2019

FOR THE TRIBUNAL OFFICE