



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr Alan Henderson

**Respondent:** Persimmon Homes Limited

**Heard at:** Remotely, by CVP **On:** 22 and 23 June 2021

**Before:** Employment Judge Beever (sitting alone)

***Representation:***

**Claimant:** Mr Anderson, Counsel

**Respondent:** Ms Ayre, Solicitor

## **RESERVED JUDGMENT AND REASONS**

1. The claimant's claim for unfair dismissal is not well founded and is dismissed
2. The claimant's claim for accrued holiday pay is not well founded and is dismissed.

## **REASONS**

1. By an ET1 presented on 5 December 2020 the claimant claimed unfair dismissal and made other claims for unauthorised deductions of wages and holiday pay.

**The issues**

2. At the start of the hearing the tribunal discussed and agreed with the parties the issues in this case that the tribunal is required to determine arising in connection with (i) the unfair dismissal claim and (ii) the wages claim and the holiday claim.
3. The respondent admits that it dismissed the claimant and relies upon the potentially fair reason of misconduct. Counsel for the claimant, Mr Anderson, emphasised that a particular focus of the claimant's case was on the true reason

for dismissal and referred to the well-known cases of Brady v ASLEF and the decision of the Supreme Court in Jhuti.

4. The claimant in his claim form seeks holiday pay and other payments. His schedule of loss includes holiday pay within the heading of compensatory award. Mr Anderson clarified that there was a holiday pay claim and that any additional reference to wages claim was simply in respect of the holiday pay claim alone. He asserted that the sum claimed arises from the claimant having worked on Saturdays and/or accruing time off in lieu. He said that the sum claimed was in part a carryover of view unused entitlement from a previous year and in part an accrual of holiday during the final year of employment.
5. Ms Ayre contended that there was no evidence in the claimant's witness statement as to how the claim is calculated and she made reference to the case Management order in which the standard direction is given that statements should include everything relevant including remedy. In the event, the tribunal indicated that if the claimant provided supplementary oral evidence as to his holiday pay then Ms Ayre was at liberty to address the tribunal on matters such as the need for instructions or potentially the need for an adjournment.
6. The issues for the tribunal, as determined at the outset of the hearing, are:

Unfair Dismissal:

- (1) Has the respondent established the reason for dismissal of the claimant?
- (2) If so did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant?
- (3) Was the decision to dismiss within the band of reasonable responses?
- (4) Did the respondent follow a fair and reasonable procedure before moving to dismiss.
- (5) If there is procedural unfairness has such unfairness made any difference (Polkey rule).
- (6) Has the claimant engaged in blameworthy conduct contributing to his dismissal such that it is just to reduce any award of compensation?

Holiday Pay

- (7) Did the respondent failed to pay the claimant annual leave the claimant had accrued not taken when their employment ended?

The Evidence

7. The tribunal heard oral evidence from 2 witnesses for the respondent: Mr Archment and Mr Cook, both of whom were involved in the disciplinary process. The claimant gave oral evidence. All witnesses were cross examined. Each party made closing oral submissions. Mr Anderson provided a closing written submission which supplemented his oral submissions. There was a PDF bundle of documents of 372 pages placed before the tribunal.
8. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities. Findings of fact are limited to those that the tribunal considers necessary for the purpose of determining the issues in the case.

The Facts

9. The respondent is a large company engaged as a residential home builder and is part of a larger PLC employing more than 5000 employees. It has a dedicated HR function.
10. The claimant was employed by the respondent from 12 September 2016 until 26 August 2020 when he was dismissed following a disciplinary hearing that took place on 21 August 2020 after a finding of gross misconduct relating to 5 allegations, and summary dismissal was the outcome.
11. The claimant has had many years in the construction industry and was recruited by the respondent for his site manager experience. The responsibility of a site manager includes instructing and organising subcontractors on-site and making sure that they are performing as they should and carrying out all health and safety procedures. A site manager's responsibility includes inspecting the houses at varying stages of build and constantly having to check the site and new build. These are the core aspects of the job description.
12. The role of site manager is a position of trust and is regarded as a senior management role. On site, the site manager holds the most senior position. He has ultimate responsibility for safety on site and his oversight and responsibility includes ensuring the induction of staff and contractors particularly regarding health and safety and mandatory PPE requirements. It includes the implementation of a smoking policy on site which in turn requires the designation of a safe area for smoking on a site that might otherwise carry a risk of fire. The visibility and seniority of a site manager inevitably, as the claimant accepted, involved setting a good personal example to others.
13. In terms of line management chains, the claimant reported to Mr John Futter who in turn was accountable to Mr Don Anderson, the construction director of the respondent. He in turn reported to Mr Richard Cook (the Appeal Officer in this case), the MD of the respondent.
14. Separately, Mr Karl Duffield, was a senior manager in a different department, outside of the claimant's line management chain, but regarded within the

respondent as more senior than the claimant. He reported to Mr John Archment (the chair of the disciplinary hearing), commercial and technical director, and Mr Archment in turn reported to Mr Cook.

15. One of the responsibilities of directors of the business was to inspect sites from time to time where completions are due to take place (“a director’s inspection”). A director’s inspection produces a score which is a mark out of 10 assessed by the director and is a reflection of the quality of the finished unit.
16. On 7 February 2020, the claimant had an appraisal with his line manager, Mr Anderson. At that appraisal, Mr Anderson raised a number of matters relating to the claimant’s performance and in respect of which the claimant felt both “ambushed” and “shellshocked”. The claimant began a period of sickness absence shortly after which was followed by a lengthy grievance [125] which he says that he posted to the respondent on 14 March (but which is otherwise not dated). The gist of that grievance might be fairly summarised from the terms of the claimant’s later document [153] when he said that he was, “called in for an appraisal with Don Anderson.... but it was far too negative with various accusations being thrown at him”.
17. In March 2020, the respondent had identified allegations of misconduct against the claimant which would form the subject of a disciplinary investigation. The respondent wrote a letter dated 10 March 2020 in which it identified two allegations, namely, excessive use of annual leave and non-compliance with health and safety regarding an accident on site on 14 August 2019. The claimant says he did not receive that letter. He was not contacted by the respondent, who proceeded to complete an investigation report [122] dated 17 March 2020 by Mr Anderson. The report identified the above two allegations and Mr Anderson concluded that these displayed “disregard to company procedures which can be classified as Gross Misconduct” as a result of which Mr Anderson said, “I would recommend consideration of termination of employment”.
18. The claimant was unaware of the disciplinary process until he received a letter on 15 April 2020. However in the meantime Mr Charles, HR officer of the respondent, was dealing with both the grievance and the disciplinary matter. He proposed that the disciplinary matter should be deferred pending the ability (ref-COVID) to hold a face to face meeting.
19. A grievance meeting took place on 18 June 2020. Prior to any outcome of the meeting, an incident took place on 26 June 2020 on-site, i.e., the construction site at which the claimant was the site manager.
20. The claimant was on site on 26 June 2020. He was met on site by Karl Duffield. Mr Duffield was deputising for Mr Archment for the purpose of carrying out a director’s inspection of two finished units. The claimant was not expecting Mr Duffield’s visit. Mr Duffield noticed that there were two scaffolders on site who were not wearing hard hats. He also noticed that the claimant was not wearing a hard hat or (as he thought) safety boots. The claimant was in fact wearing safety shoes but it is common ground that he was not wearing a hard hat.

21. What took place on site was recounted by Mr Duffield in an email written by Mr Duffield on 29 June 2020 [162]. The email recounts that Mr Duffield had spoken to Mr Anderson on the afternoon of the director's inspection that he had undertaken on Friday, 26 June 2020. There is no evidence as to what was discussed between Mr Duffield and Mr Anderson although the tribunal infers that Mr Anderson requested that Mr Duffield provided a written account of the inspection. Mr Anderson was Mr Duffield's line manager. Mr Anderson was also the claimant's line manager.
22. Mr Duffield wrote that he saw the scaffolders and asked them to put their hats on. He noticed that the claimant did not "have the relevant PPE on". The claimant and Mr Duffield then went on to the inspection. Mr Duffield awarded a score of 8 in respect of plot number 9, and the claimant responded by saying, "F\*\*\* off". Mr Duffield then awarded a score of 9 in respect of plot 6, which drew the reaction from the claimant, "you're having an F\*\*\*ing laugh".
23. When Mr Duffield had completed the inspection and was in the process of finalising the paperwork, he went to find the claimant to sign as site manager. The claimant was found at the front of the development between two blocks smoking a cigarette.
24. These were the events that were relayed to Mr Anderson verbally later on the Friday afternoon.
25. On 30 June 2020, the claimant was suspended pending a disciplinary investigation. Mr Archment was identified as the decision maker. The respondent might ordinarily have identified Mr Anderson as the line manager but he had been implicated in the claimant's grievance. There has been no suggestion from the claimant that Mr Archment was an inappropriate person to deal with the disciplinary. He was plainly senior enough to do so.
26. On 30 June 2020, the claimant was invited to a disciplinary hearing on 7 July 2020, to respond to 5 allegations. He was informed that a potential outcome of the hearing could include dismissal and was informed of his entitlement to be accompanied. The letter attached Mr Duffield's email, and documentation relating to holiday entitlement. The 5 allegations, are set out in in the letter, but in summary are:
  - (1) not wearing safety boots or a hard hat and in addition 2 scaffolders were also not wearing appropriate PPE, and as Site Manager, the claimant is the designated person in charge on-site responsible for health and safety compliance
  - (2) following Mr Duffield's inspection of plot number 9, the claimant replied with "F\*\*\* off"
  - (3) following Mr Duffield's inspection of plot number 6, the claimant replied "you're having an F\*\*\*ing laugh"
  - (4) smoking within the building development and not within a designated smoking area
  - (5) taking excessive holiday and/or attempting to carry over excessive holiday entitlement

27. The disciplinary hearing was in the event adjourned at the claimant's request and took place on 21 August 2020. The hearing was chaired by Mr Archment. He was asked in evidence at the tribunal whether he had seen the 17 March 2020 investigation report. He said that "it may been available but I took no notice of it once I had started my process...whatever Mr Anderson may have done, I threw it out of the window". That was challenged by the claimant but there was no evidence to contradict it.
28. There was no investigatory meeting. The process moved straight to a disciplinary hearing. The information available to the claimant was collated and set out in the letter dated 13 June 2020. It did not include the 17 March 2020 report because Mr Archment had disregarded it.
29. Mr Archment understood that the claimant had raised a grievance. He took the view that the grievance was "not relevant". He told the claimant at the disciplinary hearing that the grievance would not be any part of the disciplinary process. In evidence to the tribunal, Mr Archment said, "I tried to be fair to the claimant. My investigations were totally separate to his grievance with Don and I side-lined it and it was not considered in any part by me".
30. Mr Charles was present at the disciplinary hearing on 21 August 2020 in his capacity as HR adviser. The claimant has taken issue with the nature and frequency of Mr Charles' interventions during the course of the meeting. The notes of the meeting are contained at [185] which the tribunal has considered.
31. As to PPE on site, the claimant said that when he had been on sick leave the site cabins had been moved and his PPE was also removed such that he had to reorder some. By the time of his return to work on 28 May 2020, it had not arrived such that the claimant accepted in evidence that he worked from 1 June 2020 for the period up to 26 June 2020 without a hat. He said that "we were working in the building" (emphasis added) such that there was no requirement to wear a hat due to the particular tasks being undertaken.
32. The claimant confirmed at the disciplinary hearing that the site was an active site but that the claimant was not in an area that required a hat. The claimant confirmed at the disciplinary hearing that as site manager he would have avoided dangerous areas if he did not have PPE.
33. Mr Archment said in evidence to the tribunal that it was the site manager's responsibility, "to wear PPE – full stop". When the claimant was cross-examined on the question of whether the site manager had ultimate responsibility for health and safety, he demurred. Instead he said, "not total responsibility" and that "everybody on site had responsibility". When cross-examined on whether the site manager had to "set a good example", the claimant said, "yes, but I reported it: I was not told to go home or to buy it". When the claimant was cross-examined about whether he was not able to visit all areas on site, again he demurred, saying "technically not, but actually yes because the site was so small". He was asked whether he agreed with the proposition that: "if someone was on site without a hard hat that they should be sent home?". The claimant agreed but said

that, “nobody sent me home”. He said in cross-examination: “at the end of the day, it’s the employer’s responsibility to provide PPE, and my line manager didn’t send me home”.

34. As to the allegations of swearing, at the disciplinary hearing, the claimant did not recall telling Mr Duffield to “F\*\*\* off” but did agree that he was angry at the school awarded in the inspection by Mr Duffield. Nor did he recall saying, “you’re having a F\*\*\*ing laugh”. He accepted that he said words to the effect of, “you are a clown”. The claimant asked Mr Archment why he had not obtained a statement from Daniel Duffield, a trainee and the son of Karl Duffield, who was present at the inspection. This evidence was later obtained and Mr Daniel Duffield confirmed that he heard foul language from the claimant but could not recall exactly what was said. In evidence to the tribunal, the claimant did accept that he said “F\*\*\* off” and explained that he did so because he was “upset” but that seen in the correct context it was, “like saying unbelievable”. The claimant said in cross examination, “I did say it, but it was directed at “the score” and not at him”; he also said, “I agree I said “F\*\*\* off in annoyance” and when asked whether that was acceptable he said that Mr Duffield had in the past previously called him an “angry elf” (as corroborated in a text message seen by the tribunal).
35. As to smoking, the claimant admitted at the disciplinary hearing that he had been smoking saying that he deemed that smoking outdoors was acceptable and that in effect all outdoor areas were designated smoking areas. He allowed all operators to smoke in the outdoor and without designated areas. At the disciplinary hearing, in response to a suggestion by Mr Charles that smoking in a workplace was illegal, the claimant stated that Mr Charles was “naïve” because, “if we stop smoking on site the country would come to a halt”. In evidence the tribunal, the claimant did not think that fire was a high risk on a building site but acknowledged that the risk assessment [46] identified it as a high risk. He acknowledged that a site manager was required to designate safe areas. In evidence to the tribunal he said that he was allowed (i.e., not illegal) to smoke on site and that the designated smoking area was any part of the external areas on site.
36. As to the claimant’s use of holiday entitlements, at the disciplinary hearing, the claimant was asked about the authorisation procedure. There was a difference of opinion about the relevant procedure when managers’ holiday leave had to be authorised. The claimant acknowledged that part of the year he did not follow procedure. The exchange is at [194] and is an example of the degree of interaction of Mr Charles in the disciplinary hearing, who did for example assert that the claimant did not get proper authorisation and it was, “not up to you to determine protocols”. The holiday matter was concluded at the disciplinary hearing with some confusion as to what was in fact due with the claimant offering to “do the maths”. No further information was provided by the claimant. In cross examination the claimant was challenged about the fact that he could only carry over entitlements with the authorisation of managers whereas at best he had obtained the verbal authorisation of Mr Futter and did not obtain the authorisation of Mr Anderson. The claimant had not at any point, including in the disciplinary process, mentioned that any entitlement to Saturday time off in lieu was based on a calculation of 1.25. The claimant accepted that there is no reference in his

contract to overtime at such a rate. The tribunal was informed that the claimant had taken three days holiday in January 2020 (2, 3 and 6 January 2020). The claimant accepted that and asserted that it was part of his enforced Christmas entitlement.

37. Archment compiled a written note of his conclusions on 25 and 26 August 2020. In his notes, Mr Archment deals with each of the 5 allegations. By reference to the allegations, he wrote that (1) was serious misconduct, (2) was discourteous and unacceptable, (3) was discourteous and unacceptable, (4) was serious misconduct, (5) was unacceptable.
38. Mr Archment sent to the claimant a detailed outcome letter dated 26 August 2020 [207]. In it, each of the five allegations was set out together with a summary of what the claimant had said in the course of the disciplinary hearing. In the letter, Mr Archment outlined his concerns in respect of each of the allegations and outlines his findings. He concluded that the claimant's explanations were not acceptable and accordingly upheld each of the 5 allegations. The letter informed the claimant that his employment was terminated due to acts of gross misconduct.
39. In cross-examination, Mr Archment accepted that the claimant had no prior relevant disciplinary record. He was challenged as to why he did not provide the claimant with a, "warning or a chance to improve". In response he said it was not appropriate because of the health and safety matter. When pressed, Mr Archment conceded that, "out of the five allegations, if each was an individual allegation, then dismissal might not have been the outcome, apart from the health and safety matter. That, on its own, did deserve dismissal". As to the other matters, Mr Archment fairly acknowledged that he might have simply warned the claimant and in effect told him not to do it again. Not so, in relation to the health and safety matter as Mr Archment explained: "I couldn't ignore the health and safety – scaffolders, bricklayers; this was a dangerous situation and we cannot ignore the lack of PPE, as people die".
40. The outcome letter outlined an intention that the claimant would receive his pay including any accrued but untaken holiday pay to the date of termination.
41. The claimant did not assert at the disciplinary hearing that he believed that the dismissal had taken place because he had raised a complaint against Mr Anderson. He had raised a grievance against Mr Anderson of course. He referred to the grievance within his dismissal appeal letter [213]. The tribunal has taken careful note of that appeal letter dated 3 September 2020 in which he refers to the issue that the claimant had been targeted by Mr Anderson. The appeal letter asserts that the claimant was not happy with the decision and set out a number of reasons why the allegations were not well founded. It is not a natural inference to draw that the appeal letter should be read that his grievance against Mr Anderson was the reason for his disciplinary investigation and/or the decision to dismiss.
42. The appeal hearing took place on 9 October 2020 and was chaired by Mr Cook, the MD. Mr Cook addressed each of the five allegations. At no stage during the



hearing did the claimant make reference to Mr Anderson (save in respect indirectly in relation to holiday authorisation). The claimant did not have any representation but he was offered the opportunity and (as he did at the disciplinary hearing) was happy to continue alone.

43. The appeal upheld the dismissal and the claimant was informed of the outcome on 18 December 2020.

### The Law

44. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to conduct.
45. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, the tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.
46. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states “termination of the question whether dismissal is fair or unfair.... (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”.
47. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. Mixed motives such as malice and misconduct leave open the possibility that either may be the principal reason and for example it could be malice even if the misconduct would have justified the dismissal had it been the principal reason. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576. The case
48. The case of Royal Mail Group Limited v Jhuti [2020] IRLR 129 reminds tribunals to ensure that the reason for dismissal is sufficiently examined and identified. The examination may in turn reveal that the real decision maker lay in the shadows or that the decision once made was in fact “the fruits of a poisoned tree”. This may be relevant in the present case as the claimant has placed emphasis on what he contended was the antagonism of Mr Anderson and also the fact that the claimant had raised a grievance against Mr Anderson. The tribunal has considered Jhuti in detail.

49. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.
50. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.
51. Secondly, section 122(2) ERA provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal must make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some extent at least by the claimant's culpable or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.
52. Finally, in terms of holiday pay, the claimant is entitled to be paid in respect of accrued but untaken holiday entitlement at the date of termination. The burden of proof is on the claimant to establish that he is owed the sums that he is claiming.

### Discussion and Conclusion

#### Unfair Dismissal:

53. Has the respondent established the reason for dismissal? Mr Archment was the decision maker and it is the facts (or beliefs) known to him at the time of the dismissal that will be central to the issue. At the same time, it is clear that there was a background of grievance from the claimant about Mr Anderson. The

claimant explained this in writing both in his grievance and in his dismissal appeal letter. In the latter, he described how he had raised his grievance and then shortly after that, the letter dated 10 March 2020 [120] was sent, which raised two allegations. Following on from that, Mr Anderson produced an investigation report which recommended the termination of the claimant's employment. Nothing overtly progressed as a result of that report. Instead, as a result of the incident on Friday 26 June 2020 and a verbal conversation between Mr Duffield and Mr Anderson, Mr Duffield produced a written statement of events on Monday 29 June 2020 which triggered disciplinary process leading to the claimant's dismissal.

54. In those circumstances, the claimant raises the issue that the reason for his dismissal was the antagonism of Mr Anderson or the fact that the claimant had raised a grievance against Mr Anderson. The tribunal notes that the burden of proof rests with the respondent to establish the reason for dismissal. If, having regard to the facts the tribunal is in doubt, the respondent may not have discharged the burden of proof.
55. The trigger for the disciplinary process came from the disclosure by Mr Duffield relating to the conduct of the claimant. The fact that Mr Duffield had brought that to Mr Anderson's attention on Friday 26 June 2020 is unsurprising because Mr Anderson was the appropriate director to receive that information and in any event was in the claimant's line management chain. There is no factual basis for determining what was said on that Friday afternoon, but the subsequent process the following week in which the claimant was suspended and a disciplinary process initiated does not give the tribunal sufficient information to be able to draw any adverse inference about the way in which the process was initiated.
56. To all intents and purposes it was an appropriate way to respond to allegations of a potentially serious nature that had been disclosed by Mr Duffield. Mr Anderson was involved in the subsequent process but only to the extent that Mr Archment had raised queries around the claimant's holiday entitlements. It is understandable that the claimant might query why Mr Anderson had to be involved at all, but the tribunal notes that Mr Anderson's involvement does not suggest a desire to exert any influence over the process. In fact, see [144] in which Mr Anderson in fact suggests that the holiday issue might be "overlooked" and in which Mr Anderson reflects that he should not have any involvement in the process due to his awareness that the claimant has been critical of him. The involvement of Mr Anderson in Mr Archment's investigations might possibly have been "naïve" as Mr Archment acknowledged, but it is insufficient to base any finding that Mr Anderson is influential in any meaningful way in the reason for dismissal.
57. Mr Archment was an impressive witness who gave measured and reflective evidence. He made concessions where appropriate (see, e.g., being "naïve" above) and in particular expressed in very clear terms that of the 5 allegations there was only 1 on its own that was deserving of dismissal. The tribunal accepted his evidence that in regard to the investigation report of Mr Anderson

and also in regard to the grievance about Mr Anderson those were both matters that he put out of his mind because they were not relevant to his decision. That is supported by the substance of the allegations which (save with the potential partial exception of the holiday entitlement) did not rely on Mr Anderson at all. The allegations relied on factual evidence from another source.

58. The tribunal was satisfied that Mr Archment was not influenced by Mr Anderson in his decision making and further the tribunal is satisfied that the evidence relied on in his decision was not evidence that was influenced by or investigated by or reported by Mr Anderson (save again to an immaterial extent in connection with the claimant's holiday entitlement).
59. In the light of Mr Duffield's disclosure of potentially serious matters, it is entirely foreseeable that the respondent would investigate further. The reasons for the dismissal are explained to the claimant in careful and detailed terms by Mr Archment in the outcome letter; and in turn these are amply corroborated in Mr Archment's contemporaneous decision making notes.
60. The actions of Mr Archment are wholly inconsistent with the actions of a decision maker who was simply determined to "get rid of" the claimant or influenced by another to make such a decision. Nor is the evidence the product of any material involvement of Mr Anderson. The holiday pay issue albeit investigated previously by Mr Anderson had no material influence on Mr Archment, a fact which he confirmed (and the tribunal accepted) in evidence.
61. The tribunal finds that the respondent's letter of dismissal set out the facts and matters genuinely in the mind of Mr Archment when he made his decision to dismiss. He did so because of his belief as to the misconduct of the claimant. Mr Archment was the decision maker. The tribunal is satisfied that the respondent has established that the reason for the claimant's dismissal was the potentially fair reason of conduct.
62. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal approached this question having regard to the principles set out in Birchell but always bearing in mind that it remains necessary to return to the central question which is posed by s.98(4).
63. What is the nature of the misconduct relied on by the respondent? The outcome letter refers to 5 matters. That said, Mr Archment expressed in clear terms that the single incident that on its own merited a dismissal was the health and safety issue. This is reference to the claimant's failure to wear PPE, in this instance, a hard hat. Mr Archment descriptively explained that the claimant's role as site manager meant that he had ultimate responsibility for site and that it was his responsibility not only to set a good example but also undertake site inspections. Mr Archment at the time of the decision took into account that the "facts" were admitted, i.e., that the claimant had not worn a hard hat, but that the claimant

was not accepting responsibility: “he admitted each case, but in a way that he believed that his actions were correct”.

64. Mr Archment had a genuine belief as to the misconduct of the claimant in relation to the health and safety matter and that belief was held on reasonable grounds because the claimant had admitted the facts and Mr Archment was fully aware of the responsibilities of the site manager. The claimant had been without a hard hat from 1 June 2020 to 26 June 2020 which inevitably impacted on his ability to take responsibility for his role as site manager. This was in the mind of Mr Archment at the time and it plainly establishes reasonable grounds for Mr Archment’s belief.
65. Mr Archment had a genuine belief as to the misconduct of the claimant in relation to the other allegations relating to the interaction between Mr Duffield and the claimant on 26 June 2020. Again, the claimant admitted the facts, namely, that he had sworn at Mr Duffield and that he was angry in response to Mr Duffield’s assessment of the build quality of the completed units. Mr Archment had reasonable grounds for his belief because he had had regard to the statement of Mr Duffield, as well as that of Mr Daniel Duffield, and had taken into account the claimant’s explanation in the disciplinary hearing. Mr Archment also had a genuine belief on reasonable grounds that the claimant was smoking on site when not in a designated area. In reality, the claimant’s response to that was simply to assert that there was no need to designate an area as it was permissible to smoke in any external area. Mr Archment quite reasonably rejected that not least because the site risk assessment (with which the claimant did not in fact agree) concluded that there was a material risk of fire. The claimant’s response at the disciplinary hearing that everyone in the industry ignores the policy was considered but rejected by Mr Archment.
66. Finally, the tribunal finds that Mr Archment had a genuine belief in the claimant’s misconduct in failing to follow the correct procedure or instruction in obtaining authorisation for taking holiday in lieu as a result of Saturday working. His contemporaneous decision making process is evidenced in his notes at [205] and the tribunal is satisfied that it is both a genuine belief and one founded on reasonable grounds.
67. Was there a reasonable investigation? The claimant had a reasonable opportunity to present his case at the disciplinary hearing which had been adjourned on the first occasion for a significant period at the claimant’s request. The claimant clearly understood the allegations that were being made. Save in respect of the holiday allegation, the other 4 allegations flowed from the events of 26 June 2020. The information relied on by the respondent was contained in Mr Duffield’s statement. No more was needed. The claimant was asked to explain his position and there was never any sense of or suggestion that either he did not understand or that there was more information in relation to those allegations that needed to be investigated. The claimant did not complain of the inadequacy of the investigation. In one respect, he suggested that Mr Daniel Duffield should be asked for a statement. Mr Archment did that.

68. On the other hand, the respondent did not undertake an investigation phase involving an independent investigatory witness. Nor was there an initial investigatory interview. The tribunal reflected on this. The ACAS Code states that in some cases an investigation can take the form of the collation of evidence by the employer for use at any disciplinary hearing.
69. An employer is entitled to the “range of reasonable responses” test not only in relation to the decision itself but also the process. The lack of an investigatory meeting or prior investigatory report in the circumstances of this case is not unreasonable. Nor has its absence in itself produced any unfairness in particular for the reasons set out above. There was no need for any further, or indeed any, investigation into the role or actions or involvement of Mr Anderson including in relation to his March investigation process as (the tribunal has found) it played no part at all in Mr Archment’s decision.
70. The tribunal is not to stand in the shoes of the employer and ask whether it would have dismissed the claimant in the same circumstances. Mr Archment found that the claimant had been without PPE (hat) since 1 June 2020 and that the claimant admitted that but did not accept responsibility for that situation. Having to avoid areas of activity was a serious dereliction of his duty and responsibility as site manager. Mr Archment considered that this allegation on its own merited dismissal. Mr Archment reflected that the claimant despite being site manager had a disregard of PPE procedures and had ignored health and safety policy. This was nothing to do with general standards within the company but an essential safety requirement that can properly be expected of a site manager. The sanction of dismissal of the claimant in respect of this allegation alone fell within the range of reasonable responses.
71. Further, and in any event, when having regard to totality of the allegations, at least in relation to the events of 26 June 2020, Mr Archment’s sanction of dismissal fell well within the range of responses available to a reasonable employer.
72. Mr Archment had regard to the claimant’s service and his clean disciplinary record. Mr Archment did not need to have regard to the nature of the relationship between the claimant and Mr Anderson nor the grievance relating to it because it had no relevance to the decision. The nature of the claimant’s appraisal and the claimant’s reaction to it had no bearing on what the claimant did on 26 June 2020 and whether he was prepared to accept true responsibility for it.
73. For completeness, the tribunal notes that Counsel for the claimant contended that the decision may be affected by bias or apparent bias and that this is a separate consideration for the purposes of section 98(4) ERA. The tribunal has already concluded that the limited involvement of Mr Anderson in the process has been explained and is an insufficient basis for undermining Mr Archment’s decision making. The tribunal concludes the Mr Archment’s decision was neither

biased nor appeared to be biased as a result of Mr Anderson's role either in the process or arising from the claimant's appraisal and subsequent grievance. Counsel referred also to the involvement of Mr Charles during the disciplinary hearing. His interventions at times went beyond merely providing technical advice and assistance to the decision maker. This created the risk that he thereby became involved in the decision whereas the claimant was entitled to a decision from the appointed independent decision maker without illegitimate interference. It is alleged that it also points to pre-judgment. It is a valid criticism in the circumstances of the case having regard to the nature and frequency of the interventions of Mr Charles. That said, the tribunal has concluded that Mr Archment was plainly capable and did reach his decision independently and fairly and on the evidence available to him both in the disciplinary pack and orally from the claimant at the disciplinary hearing. Mr Charles' role at the disciplinary hearing did not impact on the fairness of the process nor did it create bias or apparent bias or prejudice.

74. The tribunal is satisfied that there is no material procedural unfairness.
75. The tribunal asked itself the question posed by s.98 (4) namely: did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal concluded that the answer was yes.
76. The unfair dismissal claim therefore fails and is dismissed.
77. The tribunal did not consider it appropriate to deal with any hypothetical *Polkey* arguments in the circumstances. However, it did go on in any event to consider the respondent's submission that any award should be reduced by reason of contributory fault. The conduct relied upon by the respondent reflected the allegations that were the subject of the disciplinary process and ultimately the dismissal.
78. The tribunal finds that the claimant had decided to work in his role as site manager between 1 June 2020 and 26 June 2020 without appropriate PPE (hat) and in circumstances where he accepted no responsibility for that state of affairs when confronted with it by Mr Archment. These features when taken in combination can properly be described as culpable or blameworthy as envisaged by Nelson no.2 and by s. 122(2) and s.123 (6) ERA. The tribunal finds that it would have determined that any award that the claimant would otherwise should be reduced by reason of the claimant's contributory conduct. If the claimant had succeeded in his unfair dismissal claim, the tribunal would have reduced the award by 100%. The claimant's dismissal was of his own making in circumstances made plain at the disciplinary hearing, and which were corroborated by his evidence to the tribunal, where he was frankly unable to accept responsibility for what was a plainly unacceptable state of affairs. It does not reflect well on the claimant that despite having responsibility for the site, he felt able to reject taking responsibility for attending site without PPE on the grounds that no-one more senior to him had sent him home. He could not perform the safety aspects of his job fully and yet did not recognise his responsibility for that situation.

Holiday Pay

79. Turning separately to the claimant's holiday pay claim, the burden of proof rests with the claimant. The claimant has provided no documentary evidence nor adduced before the tribunal reliable records of his holidays taken or Saturdays worked whereby he may have become entitled to holiday in lieu. The evidence before the tribunal is that three different senior managers, all of whom were familiar with the holiday pay system at the respondent had considered the claimant's use of the holiday process. The claimant himself acknowledged that he had not followed the correct authorisation procedures in some respects at least. The conclusion of Mr Archment was that there was no sufficient evidence that the claimant did in fact work weekends so as to become entitled to the additional holiday that he then claimed. It was certainly sufficient for Mr Archment to hold a reasonable belief that the claimant had over claimed for holiday to which he was not entitled.
80. The claimant's claim was that he was paid 14 days holiday pay on termination of employment. He claims that this was insufficient because (i) he had in fact accrued 16 days in the final year of employment (2 days shortfall), (ii) he had carried over 9.5 days ( $\times 1 \frac{1}{4}$ ) for holiday in lieu of working on Saturdays, which was normal practice (12 days shortfall) and (iii) he had bank holiday entitlements which accrued in 2020 (5 days shortfall). The claimant claims shortfall of 18 days.
81. As to (i) above, having regard to all of the circumstances and the evidence before the tribunal in the bundle and taking into account the fact that at no stage in the proceedings has the claimant provided any evidence or explanation of his holiday pay claim until he answered supplementary oral questions in examination in chief where he provided an outline of the calculation, the tribunal concludes that there is insufficient evidence to be satisfied that the claimant did in fact work the days that he alleged and that he obtained due authorisation so that he would thereby be entitled to additional holiday leave and that he was entitled for it to be carried over. In any event no evidence was adduced to the tribunal which supported the claimant's suggestion that a factor of 1.25 should be applied to any accrued leave in those circumstances. The tribunal finds that the claimant has failed to establish his entitlement to any accrued holiday leave in respect of (i) above.
82. As to 2020, the claimant accepted that he had taken holiday on or 2, 3 and 6 January 2020. The tribunal was referred to the claimant's contract of employment at [41]. The contract restricted payment to the claimant of any unused accrued holiday pay to the statutory minimum allowed by the Working Time Regulations in circumstances where termination is due to gross misconduct. That is a relevant consideration for the tribunal because, as Ms Ayre submits, the Working Time Regulations provides, at regulation 14, that the payment due to a departing employee can include, "such sum as may be provided the purposes of this regulation and the relevant agreement". The result is that the claimant, at the date of termination of his employment (26 August 2020) he had accrued 7 complete months' service. Allowing for 2.3 days per month (pro rata of 28 days),



entitled the claimant to 16.33 days. He had taken 3 days in January 2020. The resulting payment to him of 14 days was sufficient to discharge the respondent's liability to him in respect of accrued holiday entitlement.

83. The claimant's holiday pay claim is not well founded and is dismissed.

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**EMPLOYMENT JUDGE BEEVER**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

**9 July 2021**

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