EMPLOYMENT TRIBUNALS
BETWEEN

Claimant	**AND**	**Respondent**
Mr Andrew Thomas		Real Alloy UK Limited

HELD AT: Swansea **ON:** 17 March 2020

EMPLOYMENT JUDGE N W Beard (Sitting Alone)
Representation:

For the claimant: No Appearance
For the respondent: Mr Henry (Counsel)

JUDGMENT

The judgment of the tribunal is: The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

The Preliminaries

1. The claimant claims unfair dismissal. The respondent admits that it dismissed the claimant but denies the dismissal was unfair. The claimant did not attend the hearing. This case was listed for hearing and the parties informed in writing in November 2019. On Friday 13 March 2020 the tribunal wrote to the parties indicating that the case might have to be pulled from the list due to a lack of judges, that letter made it clear that no final decision on the case would be made until Monday 16 March 2020. On 16 March the parties were informed that there was a Judge available but that the case had been transferred to Cardiff. The claimant wrote seeking a postponement, in an initial email he indicated that he was working on the day in question, he later cited difficulties attending Cardiff because of childcare and asked for a postponement. The claimant was written to asking if a later start would assist, he did not respond. In any event in the afternoon of 16 March 2020 the case was transferred back to Swansea. The claimant wrote on the morning of the 17 March 2020 that he would not be attending because of childcare and asked for a postponement. The claimant's reasons related to the letter of Friday and the changes on Monday.

2. The respondent objected to a postponement. They indicated that the claimant had failed to co-operate towards the preparation for hearing by responding to

communications from them. Nothing indicated that the claimant had complied with the orders made by the tribunal for preparation towards a hearing. The respondent indicated that they had prepared, that they had brought a key witness, Barbara James, who no longer worked for the respondent and that it might be difficult to arrange her further attendance to give evidence. The respondent asked me to either dismiss the claim or proceed to hear it on the evidence.

3. Rule 2 of the Employment Tribunal Rules of Procedure deals with the overriding objective and provides:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> *(e) saving expense.*
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

Rule 47 of the Employment Tribunal Rules of Procedure deals with the absence of a party and provides as follows:

> *If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*

4. I considered that it would be not be in accordance with the overriding objective to grant a postponement. Here the date of hearing had been set for a considerable time, the claimant had failed to indicate that there were any difficulties in attending at Swansea until the morning of the hearing, two different reasons were given for unavailability the first of which should have been known for some time. I have doubts as to which is the genuine reason for non-attendance but approach matters on the basis it is because the claimant arranged childcare because he received the Friday letter from the tribunal. That letter made it clear that no final decision would be made until Monday. The claimant did not indicate problems until he had been told the hearing was in Cardiff. The claimant did not wait to hear from the tribunal as to his application to postpone or monitor his email before making arrangements for childcare. The respondent attended with a witness prepared for a hearing, where that key witness might have difficulty in attending in future. The parties would not be on an equal footing in all the circumstances if I were to permit the claimant to choose not to attend; the tribunal communications were to put the claimant on alert, nothing more, as the letter made clear. In addition, this would lead to an unacceptable delay

in proceedings. Further other parties with cases have an entitlement to use the tribunal, allocating a further day to this case interferes with that.

5. Having decided that the postponement should not be granted I then considered whether I should dismiss the claim. The respondent had attended with a prepared bundle of documents and with the key witness in attendance to give evidence. The claimant's claim is for unfair dismissal, that is a claim which requires the respondent to prove the reason for dismissal and that the reason falls within one of the potentially fair reasons for which a respondent is entitled to dismiss. On that basis I considered that simply to dismiss the claimant's claim would not be appropriate and that I should hear evidence and decide the case on the evidence available to me.

6. At the outset of the hearing I discussed with the respondent the issues that I am required to resolve. I took account of the very limited information in the claimant's ET1 and noted that the claimant had not provided any further information to the tribunal or the respondent. I identified the issues as follows:
   6.1. Was the real reason for the claimant's dismissal conduct or was the claimant's absence due to an injury the reason?
   6.2. Did the respondent conduct a reasonable investigation into the conduct matters for which the claimant was dismissed?
   6.3. Did the respondent provide the claimant, in sufficient time, with necessary materials to allow him to participate in the disciplinary hearing held?
   6.4. Was the evidence gathered in the investigation and disciplinary hearing sufficient for a reasonable employer to consider that the claimant was guilty of the alleged conduct?
   6.5. Was the conduct found by the respondent sufficient misconduct for a reasonable employer to dismiss the claimant?
   6.6. The respondent argues that the reason for dismissal was the claimant's dishonest conduct in exaggerating the extent of is injuries and deceiving the respondent as to his ability to work in order to claim sick pay whilst absent.

7. I was provided with a bundle of documents running to 139 pages I heard oral evidence from Barbara James, at the material time the respondent's Human Resources Manager, who made the decision to dismiss the claimant.

The Facts

8. The respondent is a metal recycling plant. The claimant was employed as a production floor operator. He commenced employment on 31 July 2017 and was dismissed by a letter on 23 September 2019.

9. On 11 July 2019 the claimant submitted a fitness to work form which indicated that he had an injury to his finger and would be unfit to work until 30 July 2019. Mrs James spoke to the claimant to ask after his health, his response was that he was unable to drive and was dissatisfied with his treatment and had approached a plastic surgeon. He was asked if it was the result of a work accident and responded that he was not sure but that nothing specific had happened to cause it. The claimant was reminded to follow procedure which included an occupational health assessment.

10. The claimant attended an occupational health assessment on 2 August 2019. The claimant gave this account to the practitioner: at work, he had "knocked his left hand on a shovel" this was painful but he continued to work, the following day his finger

and hand were swollen and he attended A&E there was no bony injury but there was soft tissue damage, a further visit to A&E because of an absence of recovery led to a diagnosis that his fingers were out of alignment, the claimant said he was unable to drive.

11. Later the same day the claimant met with the respondent's production manager and health and safety officer. At this meeting he accepted that he had told the production manager that he had felt a bit of pain but carried on working and didn't know how he had hurt his hand. He later in the same meeting said "well, I think I may have hit my hand against the shovel.

12. The respondent had received information that the claimant had been seen driving. This, along with the difference in accounts given, raised suspicions about the claimant's honesty. Because of these suspicions the respondent arranged for an enquiry agent to investigate. This observation took place on the 6 August 2019. During the observation the claimant was seen to drive and to shop at a supermarket. There was no indication of any difficulty driving or using his hand at any stage of the observation. A report was prepared, with photographs, demonstrating this.

13. On 14 August 2019 the claimant attended a further occupational health appointment. Again, at this appointment the claimant contended that he was unable to drive, had a compromised grip and was unable to lift. The claimant complained of swelling and tenderness in the finger. On examination the practitioner could find no evidence of swelling.

14. Later that day the respondent held an investigation meeting with the claimant. At this meeting the claimant was questioned about the difference in accounts to the respondent and to the occupational health practitioner as to how the accident occurred. The claimant's position was that the occupational health practitioner had misunderstood. The claimant maintained at this meeting that he was unable to drive and carry out work with his hand. The claimant was confronted with the photographs which showed him driving and the claimant said that "he was trying" because he "had to try to do things". The claimant's responses remained in the same vein throughout the investigation meeting.

15. The respondent also became concerned about the fit certificates provided by the claimant. One of the certificates provided by the claimant in August was not signed by his GP but by the claimant.

16. The claimant was sent a letter on 5 September 2019 inviting him to attend a disciplinary hearing on 9 September 2019. The letter set out that it was alleged that the claimant was falsely claiming sick pay and had breached trust and confidence. The letter also set out an allegation that the claimant had failed to report an accident at work.

17. The claimant attended the meeting on 9 September 2019. The letter inviting him had the usual indication that the claimant could be represented by a trade union or a work colleague. The claimant attended the meeting accompanied by his father. The claimant was not a member of a trade union and at the start of the meeting said could not obtain union representation. When the respondent explained that it recognises a trade union and the claimant could be represented because of that, he declined on the basis the representatives weren't very good. When the claimant was

pressed on the question of a work colleague, he said that there was no-one at the plant that he trusted. The respondent permitted the claimant to be accompanied by his father but indicated that he should not contribute until the end when he would be permitted to ask questions.

18. The meeting began with the claimant asking whether the meeting was to be recorded, the respondent assured him it was not. The respondent raised with the claimant the issue of the fit note and the signature. The claimant contended he had sent the document by post and said he would obtain another from his GP. The claimant contended that the GP had given him an unsigned fit certificate, the respondent challenged him on this, but he maintained his position. The claimant was challenged about saying that he could not drive, the claimant argued that he had not said this to the occupational health practitioner. The claimant was asked for his account of the accident and a gave a further and different account. The claimant was defensive throughout the meeting attacking the respondent for taking the surveillance photographs and insisting they were in breach of the law. The claimant was asked if he would provide the respondent access to his medical notes, the claimant did not provide such access. Mrs James carried out further investigations following the disciplinary meeting checking the accuracy of the information she had received, she was unable to obtain the claimant's medical records.

19. The respondent dismissed the claimant by letter dated 23 September 2019. The allegation that he had failed to report an accident was not upheld. However, the respondent set out it believed the claimant had been dishonest about his medical condition and the extent to which it affected his driving and ability to work. The respondent was also concerned about the unsigned medical certificate from the GP and this added to their concern that the claimant had been dishonest. The respondent on that basis concluded that he had been obtaining contractual sick pay dishonestly and that he had been dishonest in his explanations as to the way in which injury occurred and the symptoms resulting from the injury. The letter set out the right to appeal the decision, but the claimant did not appeal the decision to dismiss him.

The Law

20. Section 98 of the Employment Rights Act 1996 provides:

> *(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, the Tribunal shall have regard to—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is ---- a reason falling within subsection (2)".*
>
> *(2) A reason falls within this subsection if it-*
> *(b) relates to the conduct of an employee*
>
> *(4) where the employer has fulfilled the requirements of subsection (1) the determination of the question of*

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".

21. ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT 0032/09*** and ***Wilson v Racher [1974] ICR 428*** demonstrate that gross misconduct must be either deliberate wrong doing or gross negligence. It is a question of mixed fact and law upon which the Tribunal must draw its own conclusions.

22. I now outline the general approach to be taken unfair dismissal, particularly related to conduct. I remind myself that in ***Mitchell v St Joseph's School*** in the Employment Appeal Tribunal, a decision made after the change to a situation where unfair dismissal cases are dealt with generally by an Employment Judge alone His Honour Judge McMullen QC made it clear that the law remains as it was. It is not the subjective view of the Employment Judge that is important, what is important and what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition was set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107***. The Judge in Turner said:

"For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with the equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the Wednesbury mast".

23. Guidance has been given to Tribunals in dealing with conduct cases, beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379***. This requires me to consider the following: firstly, whether the respondent has a genuine belief in the misconduct; then whether that belief is sustainable on the basis of the evidence that was before the respondent at the time; thereafter, whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case; finally, I must consider whether the punishment fits the crime, in other words, whether dismissal was a reasonable decision to take given the conduct itself and the evidence upon which it was based. ***Sainsbury's Supermarket v Hitt [2003] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also one of applying the band of reasonable responses.

24. Therefore, the process I must engage in is to look at the evidence as it was before the respondent at the time of the decision. Decide whether that evidence is

sufficient for a reasonable employer to hold the belief in this claimant's misconduct. Then to ask whether the investigation was reasonable in a ***Sainsbury*** sense. To ask myself whether or not that decision was reasonable in all the circumstances at that point in time and on that evidence. I am warned, in particular, to avoid what was referred to by Lord Justice Mummery in ***London Ambulance Service NHS Trust v Small [2009] IRLR 563*** as the substitution mindset, where he held:

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charge made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- which is whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal".*

That of course all the circumstances must include reasonableness as is set out in ***A v B*** and ***Crawford*** as I have already indicated. Lord Justice Mummery said in ***Post Office v Foley [2000] ICR 1283*** that:

> *"The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J in Iceland Frozen Foods Ltd v Jones [1983] ICR 17 and as approved and applied by this court (see Gilham v Kent County Council (No 2) [1985] ICR 233; Neale v Hereford & Worcester County Council [1986] ICR 471; Campion v Hamworthy Engineering Ltd [1987] ICR 966; and Morgan v Electrolux [1991] ICR 369), remains binding on this court, as well as on the Employment Tribunals and the Employment Appeal Tribunal. The disapproval of that approach in Haddon (see p.1160E-F) on the basis that (a) the expression was a "mantra" which led Employment Tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of Employment Tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done had they been the employers, is an unwarranted departure from binding authority".*

Making it clear therefore that the position is that substitution is not ever appropriate

25. However, I am also to consider the limits that are set out by Lord Justice Longmore in ***Bowater v Northwest London Hospital NHS Trust [2011] IRLR 331***, he said:

> *"I agree with Stanley Burnton LJ that the dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for an ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer. The ET made it more than plain that that was the test which they were applying".*

That case in my judgment makes it clear that the decision as to the answer to the question of whether it is an objectively reasonable decision on the part of the employer remains mine to make. Thus I am required to assess whether this respondent's decision to dismiss this claimant for this reason falls within the range of decisions that an employer acting reasonably could have made.

Analysis

26. What was the real reason for the claimant's dismissal? In my judgment the respondent genuinely believed that the claimant was being dishonest in the description of the cause and extent his injury. I do not believe that his absence due to the injury was the cause of the respondent's approach. Rather it was the fact that the claimant had given differing accounts of how his condition came about ansd there was significant evidence that the claimant was overplaying the extent of his injuries.

27. Was the investigation into the claimant's conduct one which a reasonable employer could have undertaken in the circumstances? In my judgment the respondent carried out an investigation that was within the band of reasonable investigations. The respondent had information that the claimant had not been truthful about the effects of his injury. Further the respondent had seen differing accounts from the claimant as to how the injury occurred. It did not rely on that evidence but used an enquiry agent to satisfy itself that the information it received about the effects of the injury was accurate. It approached the claimant with that evidence and asked the claimant to provide an explanation for both the difference in the account of how the injury occurred and the effects.

28. Did the respondent provide the claimant, in sufficient time, with necessary materials to allow him to participate in the disciplinary hearing? The respondent provided the claimant with all the evidence that it relied upon and warned the claimant that it was concerned about his fit certificate. The claimant was told what was alleged against him and warned that it might be considered gross misconduct and lead to dismissal if established. The respondent acted reasonably in the amount of information it provided to the claimant. The claimant had four days in which to consider matters before attending the hearing. The claimant was allowed to attend with his father in

support despite this not being usual. In my judgment the respondent acted reasonably throughout in its approach to the evidence provided and the time given to the claimant in preparation for the disciplinary hearing.

29. Was the evidence gathered sufficient for a reasonable employer to conclude that the claimant was guilty of the alleged conduct? In my judgment there was more than enough evidence gathered for the respondent to reasonably conclude that the claimant was acting dishonestly. The respondent had the variety of accounts as to the cause of the accident; the respondent had photographic evidence that the claimant had driven and was using his hand freely. The respondent had evidence which it was entitled to accept that the claimant had told the occupational health practitioner that he was unable to drive and was not properly able to use his hand. The respondent was entitled to consider the claimant's account that he had been given an unsigned GP certificate to be improbable. The respondent was entitled to consider that the claimant's explanation for being able to use his hand and to drive as unconvincing when he said he was trying to drive given the absolute nature of the explanation given to the occupational health practitioner. The respondent was entitled to take account of the claimant's defensive approach to answering questions when drawing conclusions after the disciplinary hearing.

30. Was the conduct found by the respondent sufficient misconduct for a reasonable employer to dismiss the claimant? The respondent found that the claimant's conduct in exaggerating the extent of is injuries and deceiving the respondent as to his ability to work in order to claim sick pay whilst absent was deliberately dishonest. Such conduct is in my judgment clearly within the range of conduct that it would be reasonable to consider as gross misconduct. The respondent reasonably reached the conclusion that it was gross misconduct. The decision to dismiss the claimant for this reason in these circumstances was, in my judgment, within the range of responses a reasonable employer could follow.

31. The claimant's claim of unfair dismissal is not well founded and is dismissed.

EMPLOYMENT JUDGE N W BEARD

Dated: 20 March 2020

Judgment posted to the parties on 25 March 2020

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For Secretary of the Tribunals