

# THE INDUSTRIAL TRIBUNALS

CASE REF: 11133/19

**CLAIMANT:** Vigantas Norvidas

**RESPONDENT:** Almac Pharma Services Limited

## JUDGEMENT

The unanimous decision of the tribunal is the claimant was fairly dismissed.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Bell

**Members:** Mr Carlin  
Mrs Gilmartin

### Appearances:

**The claimant was self-represented and was accompanied by Mr Kevin Doherty of ICTU who acted as a 'McKenzie friend'.**

**The respondent was represented by Mr Peter Bloch of EEF Northern Ireland.**

1. The claimant complained in his claim that he was unfairly dismissed on 22 March 2019 for leaving work early on 25 January 2019 after clearly being in distress and tears following criticism from his supervisor after which he made and was refused a request to take holiday leave to enable him to do so but later told it *'will be put as unpaid leave'* and that he had been *'moved to another shift from Monday'*, and despite the explanation given by him at a meeting on 29 January 2019 of what he had felt and his belief that the issue was then dealt with.
2. The respondent in its response resisted the claimant's claims and contended the claimant was fairly dismissed summarily for gross misconduct for leaving site without authorisation when a holiday request to enable him to leave early had been declined and there had been inconsistencies between accounts given by the claimant in the investigatory meeting and disciplinary hearing, in the former having indicated that he had left because he was annoyed, and despite being asked directly if he had an issue with his supervisor having said no.

## ISSUES

3. The following issues were before the tribunal for determination:-

(1) Was the dismissal unfair?

If so,

(2) What remedy is appropriate?

## EVIDENCE

4. The tribunal considered the claim, response, agreed bundles of documentation, additional documents produced at hearing and witness statements of Keith Turkington (Production Manager), Sara Currie (HR Manager), Phillip Lightowler (Head of Production) and Sue Bill (Global Vice President of HR) on behalf of the respondent, and that of the claimant and Kevin Doherty (Officer with the Irish Congress of Trade Unions [ICTU]) on behalf of the claimant, together with their sworn oral testimony.

## FINDINGS OF FACT RELEVANT TO LIABILITY

The following facts are found proven on a balance of probabilities:-

5. The claimant who is a foreign national first commenced with the respondent as a temporary agency worker through Diamond Recruitment on 1 April 2016, was promoted to a Senior Operator (Grade 2) on 1 July 2016 and was thereafter employed directly by the respondent from 9 October 2017 until his dismissal on 22 March 2019.

6. It is the respondent's standard practice to issue with all offers of employment a copy of the respondent's disciplinary procedure for employees to read before acceptance of their offer.

7. The disciplinary policy and procedures contained in the Employee Handbook provides:

*'Gross misconduct will normally render an employee liable to summary dismissal without notice. Examples of the type of offences considered to be gross misconduct are:*

...

- *Leaving the site without authorisation.*

...

*If the Company is satisfied, following investigation and a disciplinary hearing, that the employee has committed gross misconduct, the Company will normally dismiss the employee without notice or pay in lieu. However in exceptional circumstances the company may seek the employee's agreement to a transfer, demotion or suspension without pay as an*

*alternative to dismissal. Where it is deemed appropriate a final written warning may also be issued or an existing final written warning may remain in force or be extended for a further maximum of 12 months.'*

8. In July 2016 Aiden O'Callaghan became the claimant's Supervisor.
9. Mr Turkington commenced employment as Production Manager with the respondent in November 2018.
10. On 11 December 2018 the claimant received an annual assessment of his performance by his supervisor. The claimant had been hopeful his assessment would help him to gain promotion but felt disappointed by it, he considered that credit for processes learnt and mastered by him over the year had not been given, that it did not reflect his contribution and would hold back his career progression. The claimant sought a copy of his assessment and indicated that he wished to see Alec Iles, his supervisor's Manager. Mr O'Callaghan put to the claimant that he did not consider him ready yet for promotion to Grade 3.
11. On 17 January 2019 the claimant asked for a meeting with Mr Iles.
12. On Friday 18 January 2019 the claimant met with Mr Iles and raised concerns about his supervisor's assessment of him.
13. On Monday 21 January 2019 the claimant found that he had been moved by Mr Iles from the serialisation project supervised by Mr O'Callaghan to a different team supervised by Myles McAllinden. The claimant had greatly enjoyed working on serialisation and was very disappointed at being taken off it. The claimant continued to receive instructions thereafter also from Mr O'Callaghan.
14. On 24 January 2019 after successfully completing a work operation the claimant allowed staff members from room 26 out for a brief drink whilst he went to find out what operation they were next assigned to. Whilst on his way to look for Mr O'Callaghan the claimant was challenged in the corridor by Mr O'Callaghan as to where staff from room 26 were and then rebuked for allowing them out and told he was not allowed to let them out whenever he wanted and it would not be tolerated. The claimant felt belittled.
15. On 25 January 2019 the claimant at the beginning of his 2 PM to 10 PM shift went to see Mr Iles to talk about the events of the previous day. The claimant was reassured by Mr Iles that he could see no issue with the claimant having let people out when they were not busy. The claimant asked for guidance from Mr Iles as to how he might progress to being a supervisor. Mr Iles told the claimant that he could try different departments as they were not currently looking for supervisors in Pharma Services and that if he wanted to grow *'I have to start hearing about you for the right reasons'* from which the claimant considered that his work was being undermined by Mr O'Callaghan.
16. On route then to the production floor the claimant met Mr O'Callaghan and Mr McAllinden. Mr O'Callaghan queried whether the claimant had come in late and instructed the claimant to go to room 26 (where the serialisation task was performed). The claimant did so and because he had no access to the manual print station since his removal from the serialisation team he did the work of an operator.

17. Around 3:20 PM Mr O'Callaghan had entered room 26 and when he was leaving again the claimant stopped him and said '*I cannot continue working for you, I am going home at 17:00 and will start looking for jobs in different departments*'. The claimant turned away from Mr O'Callaghan back to his task and Mr O'Callaghan left the room without further discussion.
18. The claimant thereafter left room 26 briefly and at approximately 3:40 PM on his way back he met Mr O'Callaghan and Mr McAllinden waiting outside the room. They asked the claimant for a chat (in room 30) and a conversation took place between the claimant and Mr O'Callaghan as follows:
- Mr O'Callaghan: *have you a holiday booked for 17:00 hours?*
- Claimant: *I do not have it booked but I need one.*
- Mr O'Callaghan: *I cannot give you a holiday as there are many people off already.*
- Claimant: *I will have no option but to go off sick.*
- Mr O'Callaghan: *What is wrong with you?*
- Claimant: *You stress me out, you are negative and you give people anxiety, if you are not letting me go off sick I'll go and see Alec, he will understand.*
- Mr O'Callaghan: *What makes you think that he will understand?*
- Claimant: *He has better education than you he is your boss for a reason.*
- Mr O'Callaghan: *Now you are insulting me, the conversation is over.*
- Claimant: *It is not an insult, I am telling the truth.*
- Mr McAllinden did not say anything. The claimant went straight to see Mr Iles.
19. At approximately 3:45 PM the claimant spoke with Mr Iles and put to him that he could '*not take this anymore*' and relayed what he had said to Mr O'Callaghan about him being negative and giving people anxiety which Mr Iles dismissed and proceeded to ask the claimant '*what is this nonsense that you're looking for a new job from Monday?*' The claimant replied that it was what Mr Iles had told him to do if he wanted to be a supervisor. Mr Iles reassured the claimant '*we need good workers like you, have a good think over the weekend about what can be improved and we will sit down and talk about it on Monday*'.
20. After leaving Mr Iles' office the claimant texted his partner to ask if she could pick him up at 5:00 PM. The claimant then returned to work.
21. At approximately 4:20 PM Mr McAllinden spoke with the claimant and asked that he remain to run an operation (in room 7). The claimant confirmed he had no problem and liked working with Mr McAllinden but stated '*I cannot take Aiden O'Callaghan's disrespect any more, and I'm going home and I already texted my partner*'.

22. The claimant left work at 5:01 PM before the end of his shift at 10 PM.
23. The claimant returned to work on Monday 28 January 2019 on the opposite shift, no longer working for Mr O'Callaghan.
24. Mr Turkington was informed on Monday 28 January 2019 that the claimant had left site without authorisation.
25. On Tuesday, 29 January 2019 the claimant was asked to attend a meeting with Mr Iles and Mr Turkington at which he was informed that leaving work was improper behaviour and the matter would proceed to a formal disciplinary investigation. The claimant agreed and apologised for what had happened. The claimant gave an explanation of how he had felt that day. Mr Turkington heard the claimant put forward that he had been annoyed and upset. The claimant confirmed he had no issue working with Mr O'Callaghan. Mr Iles advised that from Monday 11 February 2019 the claimant would go back onto Mr O'Callaghan's shift. The claimant asked why he had been taken off serialisation as it was something that he was good at. Mr Turkington asked him '*who told you this?*' the claimant replied '*Grade 3's that are involved in serialisation*'. Mr Iles confirmed the claimant would be put back on serialisation the following week, which he subsequently was. We find more probable the respondent's evidence that this was a short meeting of approximately five minutes conducted by Mr Ilse, rather than Mr Turkington who had attended to observe and ensure that the matter was progressed to a formal investigation.
26. On 13 February 2019 the claimant was asked to attend a formal investigation meeting held by Julie Quinn, HR manager and Mr Iles, at which the claimant explained his behaviour and confirmed that he had no issues with Mr O'Callaghan. The respondent's investigatory meeting notes record:

*JQ - ... Can you talk us through what happened?*

*VN - All started before that. December maybe, I wasn't happy with my assessment. Then the Thursday 24<sup>th</sup> we were all in room 26. My team very efficient, finished serialisation task. I let them out for a drink. I went asked my supervisor where to send them, but he wasn't there. Seeing him coming down the corridor and he said "where are the operators – been looking for them for 10 minutes" this wasn't true, I had only let them out two minutes before. He was saying to me "you are not allowed to let them out for a drink". He was still on phone talking – very disrespectful.*

*JQ - How does this tie in with you leaving site on 25<sup>th</sup>?*

*VN - Felt it still.*

*JQ - Felt what?*

*VN - Annoyed. Started to look at other departments. Told Aiden at 3 PM I would be leaving as I don't want to do him any favours or do the work. Not appreciated so planned to leave at 5.*

*JQ - Planned to leave – holiday booked?*

*VN – No, asked for one that same day but didn't get it.*

*JQ - So do you accept that you left site without authorisation?*

*VN - 100%*

*AI - Prior to leaving you came to see me, explained friction with Aiden. You said you have no issue with Aiden and he treats you with respect?*

*VN - Oh yes, no grudge against him at all.*

*JQ - Still need to address the fact you left site without authorisation.*

*VN - OK.*

*JQ - Any particular reason you needed to be home for 5 PM?*

*VN - Nope, just didn't want to be here.*

*JQ - Anything further to add?*

*VN - Don't think it went the way I wanted it to.*

*AI - When holiday wasn't granted, you said you would go sick as you were "sick of you" to Aiden. Any issues with Aiden?*

*VN - No, nothing personal.*

*JQ - Ok, next step will be to review and potentially pass to disciplinary panel. Leaving site without authorisation classed as gross misconduct. Anything further to add?*

*VN - No.*

27. By letter dated 7 March 2019 the claimant was invited to attend a disciplinary meeting on 14 March 2019 with Mr Turkington and Mrs Currie, HR manager, to discuss the allegation that:

- *On 25<sup>th</sup> of January 2019 you requested a holiday to enable you to leave early but the holiday was declined. Despite holiday not being approved you clocked out at 5:01 PM and left site without authorisation.*

The claimant was advised a potential outcome was summary dismissal for gross misconduct, advised of his right to be accompanied and provided with a copy of the respondent's disciplinary policy and the evidence of the case against him.

28. The claimant attended the disciplinary hearing at the outset of which the respondent ensured that the claimant had received the disciplinary notification with relevant evidence, had a reasonable opportunity to consider same, understood the purpose

of the meeting and his right to be accompanied but had declined same. The claimant was advised a potential outcome was summary dismissal for gross misconduct. Disciplinary meeting notes in particular record:

*Q1 – From the investigation notes you advise that you had requested a holiday on 25<sup>th</sup> of January 2019 but the holiday was declined. Please can you confirm who you requested the holiday from what was the reason given for the request being declined?*

*VN – Room 30 Myles + Aiden present. Asked why I was leaving at 5 PM as no holiday slot available as book full. This occurred @3 PM in day and wanted to leave at 5 PM as I was distressed. Obvious I was distressed, not myself, stress.*

*KT - What was reason for distress?*

*VN – It is my leader, Aidan O'Callaghan. I am a people person, like hard workers. Not like to see people being treated unfairly or not appreciated I find this distressing.*

*KT - You admit AO'C treated you fairly up to this point in the investigation meeting so what changed?*

*VN – Yes up to this point. At time on 25 Jan I told AO' C I felt unappreciated and said I would be looking work from tomorrow. AO' C turned back on me so I did the same.*

*SC – Work outside Almac or Aidan's team?*

*VN - In Almac...*

*KT - This incident was when AO'C came into room + no-one there as you have sent them for a drink...*

*VN - When I came in on Friday talked about situation.*

*KT - Thurs @5 pm AO'C spoke people not in room. On Fri Alec Iles spoke to you about situation in room.*

*VN - No, unrelated Alec about progressing in the company. Need to hear positive comments about your work – my leader mustn't be telling Alec about the good work I do.*

*SC - So on 25/1 Myles + Aiden call you in @3 PM to discuss incident in room 30. Was Myles present whole time.*

*VN - No, just a short conversation. Spoke to AO'C later@4 PM + Myles not present.*

*KT - So conversation 3 PM where made clear you were not granted holiday and then again at 4 PM but went anyway?*

*VN - Yes, unfortunate not given opportunity to rest + meet again on Monday. Not sure why not allowed to leave on sickness.*

*SC - Hol. book there for a reason, resources to ensure rooms sufficiently manned. Can't see events being sickness so understand why not granted. As a senior operator you must realise impact of walking off site without authorisation.*

*VN - Yes I do, not planned.*

*SC - Other avenues to raise concerns regarding AO'C and frustrations about recognition. Why choose to leave site without authorisation rather than other avenue?*

*VN - [D]on't know never been in situation before.*

*KT - Not best decision, busy period, needed you here.*

The claimant responded that it was not that busy, there were other senior operators who could run rooms and that he would have let a good worker leave if distressed. Mrs Currie replied that they need to be careful as others will have a 'bad' day but they could not have everyone just leaving site and important that the claimant understood the seriousness. The claimant acknowledged that he understood. Mrs Currie then proceeded to ask:

*SC - I am not grasping what was so serious on 25 Jan that led you to have no choice but to leave site.*

*VN - Other person had [irritated] me earlier in the day not thought about that but maybe also contributed to it. Only coming to me now.*

*SC - There will be occasions where people irritate you but still doesn't warrant leaving site. I am simply not understanding what happened on 25<sup>th</sup> January that led you not being able to remain on site to finish shift.*

*KT - I can't understand how throughout investigation you have stated no issues with AO'C, treats you well so why after 1 conversation can this change*

*VN - I felt what I wanted to say what I thought about AO'C for while felt I would be leaving Almac. Felt better after telling AO'C that day. I stand up for my people.*

*KT - So to summarise:*

- *AO'C treatment of you and other people- mannerism, stature, stresses people out, panics, poor people skills.*

Mrs Currie read out the section of the investigation meeting minutes where Mr Iles had asked the claimant directly if he had any issues with Mr O'Callaghan to which the claimant had replied 'no nothing personal'. Mrs Currie queried why the issues the claimant had now raised were not raised in the investigation meeting when he



was asked directly about it. The claimant responded that he was not sure, maybe he should have, he did not like 'telling bad about people' but as it was his last chance he had now raised it. Mr Turkington asked if there was anything further the claimant would like to raise, the claimant confirmed no. The claimant was advised the meeting would reconvene the following week to advise him of an outcome. At the close of the meeting the claimant remarked if he were to lose his job 'it would not be the end of the world, there were other jobs in good companies, Almac would just be losing a good worker.'

29. Mr Turkington met with Mr Iles on 20 March 2019, Mrs Currie participated by telephone and put to Mr Iles questions regarding his meeting with the claimant before he had left site. The respondent recorded notes of the questions put and responses as follows:

*SC - Conversation with VN ... - how did he appear?*

*AI - [A]gitated over letting people out for water but was calm throughout. He was polite but just talked about respect and handshakes.*

*SC - [H]ow would you describe his demeanour? Was he upset, distressed?*

*AI - Agitated but not upset or distressed. If he had been I would have told him to go and get some water and tried to [defuse] the situation.*

*SC - Did you have any concerns that VN was distressed/unfit to remain at work?*

*AI - No, I asked him during the investigation if any issues with Aiden due to issue over letting people go for a drink but he said there was no issue and Aiden always treated him fairly.*

30. Mr Turkington met with Mr O'Callaghan on 20 March 2019, Mrs Currie participated by telephone and put questions to Mr O'Callaghan about his interactions with claimant. The respondent's notes in particular record:

*SC - Just have a question in relation to interaction you had with VN on 24 and 25 Jan 2019 which led to him leaving site early on 25<sup>th</sup>. How would you describe his demeanour during exchange?*

*AO'C: A bit arrogant, I did [sic] this type of behaviour. Didn't feel he gave me my place as a supervisor. Dismissive almost.*

*SC – Any evidence of distress, upset, concern re-: fitness to remain in work.*

*AO'C – On Friday 25<sup>th</sup> when he told me he wanted a holiday, didn't know he had already spoken to Alec Iles. VN almost that it didn't matter what I said he was going home anyway and was going to get another job. Brought Myles as witness to try to reason with VN but came across as hell bent on going home + didn't matter what I said. Glad Myles was there with me as wouldn't have felt safe one on one. Again came across as arrogant and can be volatile.*

*SC - Did you consider reaction normal to conversation you had had with*

him?

*AO'C – No but VN not open up, last year split up with girlfriend + was volatile afterwards. Annual PMP give him FME but not happy with some comments + went round floor comparing his score with others – could be disruptive.*

31. The claimant was invited to attend the re-convened disciplinary meeting on 22 March 2019 at which he was informed of the decision to dismiss him for gross misconduct. Mr Turkington set out by letter dated 25 March 2019 considerations taken into account and the panel's conclusions as follows:

- *You advised the panel that you had requested a holiday on 25 January 2019 to enable you to leave work early, but the holiday was declined by your supervisor Aidan O'Callaghan. You advised that you wanted to leave work early at 5 PM as you were stressed following a conversation with Aiden O'Callaghan on 24 January 2019 regarding you letting the operators out of room 26 for a drink. You stated that you are a people person, you like hard workers and do not like to see people treated unfairly or not appreciated.*

*The disciplinary panel reviewed the notes from the investigation meeting dated 13 February 2019, where you reply that you left site on 25 January 2019 because you were 'annoyed ... Told Aidan at 3 PM I would be leaving as I don't want to do him any favours or do the work. Not appreciated so planned to leave at 5'. At no time during the investigation meeting do you mention that you were distressed.*

*During the investigation meeting Alec Iles stated that prior to leaving on 25 January 2019 you came to see him and explained friction with Aiden. Alec says that you told him that you have no issue with Aiden and he treats you with respect, to which you replied 'oh yes, no grudge against him at all'. Alec later in the investigation meeting asked you if you had any issues with Aiden to which you replied 'no, nothing personal'.*

*Based on the above the disciplinary panel do not accept that you left site without authorisation on 25 January 2019, as you were distressed and were unable to remain on site. Despite being asked directly at the investigation meeting if you had any issue with Aiden you replied that you did not and therefore this is inconsistent with the evidence that you provided at the disciplinary hearing.*

*The disciplinary panel do not find evidence to support that Aiden O'Callaghan acted unreasonably by asking you about events on 24 January 2019, regarding letting operators out of the production room outside a scheduled break time. The panel conclude that your account of events on 24/25 January 2019 would not explain why you felt you had to leave site early without authorisation.*

*The panel conclude, that as per the investigation meeting notes that you were annoyed and had decided at 3 PM on 25 January 2019 that you were leaving site early regardless of whether this had been authorised. The panel*

*therefore determined that this amounts to an act of gross misconduct and the decision was taken that you would be summarily dismissed without notice or payment in lieu of notice, effective from Friday, 22 March 2019.'*

32. The claimant with the assistance of Mr Kevin Doherty prepared and submitted a letter of appeal on 1 April 2019 requesting notes of the disciplinary meeting and copies of any other documentation which the disciplinary panel considered in making their decision and setting out in the absence thereof, the grounds of appeal to include: –
- That the disciplinary panel failed to take into account the seriousness of the impact upon the claimant of his supervisor.
  - That the level of sanction was overly excessive.
33. Notes of the disciplinary meeting were provided by the respondent to the claimant prior to the appeal meeting but the claimant did not share them with Mr Doherty prior to their attendance at the appeal meeting.
34. The claimant accompanied by Mr Doherty attended the appeal meeting on 16 April 2019 conducted by Mr Lightowler and Tracey Blacker, Group Head of HR. We accept on balance that the appeal meeting took place as recorded in the respondent's notes, in summary as follows:
- 34.1 Mr Doherty put that the claimant had good English but a limited vocabulary, using different words e.g. annoyed, and was not his natural tongue to express what was in his head. The claimant referred to his conversation with Mr Iles on 25 January 2019 at 2 PM which made him feel that he was not being taken seriously and that he was then sent to room 26. The claimant explained he was a bit emotional about the conversation and felt the work done by him was not appreciated; he then stopped Mr O'Callaghan when leaving the room and said to him that Mr O'Callaghan did not recognise his input, he would look for a job elsewhere and would be leaving site at 5 PM. The claimant put forward that he did not know why he said it and was not proud that he did, it was not in his character. The claimant then asked if he could go for a drink, he had tears in his eyes; he met Mr O'Callaghan and Mr McAllinden, Mr O'Callaghan asked why he was leaving at 5 PM, did he have a holiday booked, the claimant replied '*no*' and that he did not want to go off sick. The claimant said that Mr O'Callaghan was the wrong person to speak to. The appeal meeting was briefly adjourned at that point to allow for notes of the disciplinary meeting to be copied. Mr Doherty then asked the claimant how he felt; to describe the crisis he felt at the time; and why it led to him leaving work. Ms Blacker stated that the notes were not verbatim but if there was anything missing to let them know. The claimant explained that he did not want to back down; he did not want to see Mr O'Callaghan; it was only a few minutes; he was not allowed holiday and said he would take sick; that Mr O'Callaghan asked him '*why sick*'; the claimant told Mr O'Callaghan he '*stresses me out and gives me anxiety*'; Mr O'Callaghan said the conversation was over and the claimant went to see Mr Iles. Mr Doherty put forward that the claimant did not think Mr O'Callaghan was assisting him in his development and had '*– stated work problem with him*'. The claimant explained that Mr Iles called Mr O'Callaghan negative and told him not to worry about it and asked '*what was this nonsense about looking for a job*' to which he had confirmed '*not outside of Almac*', but another department, and Mr Isles had

offered to help him apply. The claimant told Mr Ilse he '*could not continue*' and was told '*take a rest*' and to '*have a good think*', they could not lose a good senior operators. The claimant confirmed this took place at 3:55 PM and after returning to the floor Mr McAllinden had asked to speak to him; said to him that he looked stressed and Mr McAllinden knew the claimant did not want to do work even for him; the claimant replied that he had no issue with Mr McAllinden; Mr McAllinden told the claimant that Mr Iles was asking the claimant to stay [to run] a room; he replied that he was going to go home at 5:00 PM and had sent a text to his partner; Mr McAllinden told him '*this will be unpaid leave*' and '*on Monday you will come in to a different shift*'. The claimant put that he had tears in his eyes, freshened himself up, set up and left at 4:59PM.

34.2 The appeal notes then record:

*PL: did Myles authorise you [to] leave*

*VN: did not say allowed to go? But unpaid leave + new shift on Monday.*

...

*PL: Myles, said when leaving on 25 to come back at different shift Monday*

*VN: yes. Meeting was scheduled at 3:30 PM. Left room for meeting Alec + Myles – gross misconduct to leave site without permission. Not sure if said at risk  
asked if any issues with Aiden. No – told sorry back on to normal shifts .Told me I made a mistake and no issues with supervisor*

*PL: 4 PM with Myles Room 7, pulled in to room 4 what said?*

*VN: said something like know stressed/look stressed  
Don't want to run room for me or Aidan  
Said no problems with Myles.  
Left at 5 PM + cannot concentrate  
Will be put onto other shift Monday*

34.3 Clarification was then sought over confusion in the timeline of discussions. The claimant confirmed he had told Mr O'Callaghan at 3:20 PM that he did not want to work with him. Mr Doherty referred to '*tears in eyes*' at 3:25 PM and claimant at 3:40 PM being told he was not allowed to take holidays. The claimant confirmed he went to see Mr Iles at 3:45 PM, was on the production floor at 3.55 PM and spoke to Mr McAllinden at 4:15 PM.

34.4 Mr Doherty confirmed that between the Friday and the Monday the claimant '*had had time to reflect, didn't have time with Aiden, the crisis had just built up and claimant accepts he reacted wrongly*'. Mr Doherty appealed for the claimant to be given his job back, that one incident had destroyed everything.

34.5 The claimant on being asked if he had anything to add responded that he thought he should have been given another chance and could not explain why he '*said those things but at time it was how I felt*'.

- 34.6 Mr Doherty acknowledged leaving site was listed under gross misconduct in the company handbook, but as had been picked up, there was an issue whether this was with authorisation, or not, arising from the conversation with Mr McAllinden.
- 34.7 Mr Doherty stated the claimant wanted his job back and stressed that the respondent could take an alternative sanction without moving to dismissal putting forward that the claimant was going through a crisis and knew he had made a mistake that he did not stress the point about Mr McAllinden; he had been off for three weeks which had been a difficult period and the claimant reflected a lot on things; the claimant had thought he had a future in his job; language issue was an issue, as could be seen from the appeal hearing it was difficult for the claimant to express his emotions, but the claimant had opened up to Mr Doherty and that he did not think it was [a matter] for a disciplinary and queried mental health provision, such as Care Call. Ms Blacker confirmed provisions made by the respondent. Mr Doherty stated that he understood the company's position and asked that they consider the mitigating circumstances; that the claimant wanted to be a supervisor; felt that he had been unfairly impeded; and that this had been 'a learning experience in life, a costly one'.
35. On 17 April 2019 Mr Lightowler and Ms Blacker met with Mr McAllinden and put questions to him in relation to his conversation with the claimant at 4:15/4:20 PM on 25 January 2019, which the respondent kept notes of as follows:

*PL ... Explain where conversation took place, who instigated what + who left.*

*MMcA V running room 7, approached me in corridor outside room 7, about leaving work early.*

*Room 4, need to leave early, well running room 7, can't let you go. I need to go. I said can't let you go – short notice – need you ...*

*V said 'I am going to go home to girlfriend'*

*M said will be unauthorised absence. Can't authorise holiday*

*adamant he was leaving*

*said would get himself into trouble*

*I spoke to Aidan to say what is happening*

*...*

*PL Say unpaid leave[?]*

*MMcA No, unauthorised absence, said he would get himself into trouble. Said I wasn't authorising holiday*

*room will stop if you go – can't let him leave*

36. By letter dated 19 April 2019 Mr Lightowler confirmed the appeal panel's findings:-

1. *You said at the appeal hearing that you told your supervisor that you felt he did not recognise your input and got upset with regard to this. While it is appreciated that an incident on 24 January 2019 may have made you feel this way, this did not in itself permit you to leave site without permission.*
2. *... You stated that Myles had said "if you leave at 5 PM, this would be viewed as unpaid leave" but also stated that he did not say that you were allowed to go. I have checked your account of meeting with Myles and note that the wording used is stated as being "if you leave at 5 PM, this would be viewed as unauthorised leave" and furthermore it is noted that you said that you had informed your girlfriend that you would be leaving site at 5 PM.*
3. *At the appeal hearing you acknowledge that you had left site without permission. Your accompanying person noted that this action amounted to gross misconduct under the company's disciplinary policy but felt that the sanction was overly excessive and stressed the wording 'normally' used within the disciplinary policy.*
4. *Both Myles and you acknowledge that you were involved in the serialisation process, which is an extremely important process for the company. You were not permitted annual leave as this process required you to be present so as to provide appropriate staffing levels for the process to be covered.'*

Mr Lightowler in conclusion confirmed they had found no reason or further mitigating circumstances to disagree with the original findings; that it had been found the claimant was not given permission to leave site yet he knowingly did so without permission; and they believed the decision to dismiss was fair and reasonable and so upheld the decision to dismiss the claimant due to leaving site without permission.

37. The accuracy of the respondent's investigation meeting notes or disciplinary meeting notes were not challenged by the claimant during the disciplinary process.
38. The claimant presented his claim to the Office of the Industrial Tribunals on 21 June 2019.

## **RELEVANT LEGISLATION**

### **Unfair dismissal**

39. Under Article 126 of the Employment Rights (Northern Ireland) Order 1996 [ERO] an employee has the right not to be unfairly dismissed by his employer.

Article 130(1) ERO provides that 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

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- (a) the reason (or, if more than one, the principle reason) for the dismissal, and
- (b) that it is either a reason falling within Paragraph (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.

Reasons falling within Paragraph (2) include at Article 130(b) if it relates to the conduct of the employee.

40. Under Article 130(4) ERO where the employer has fulfilled the requirements of Paragraph (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.

41. The task for the tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

*“What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case”.*

42. The Northern Ireland Court of Appeal decision in the case of ***Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the ***Burchell*** approach and outlines the task for the tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.
43. The case of ***Connolly v Western Health and Social Care Trust [2017]*** NICA confirms that the task of the tribunal is not to substitute its view for the employer's. The tribunal must decide in a gross misconduct case whether dismissal was an appropriate sanction particularly where an employee is summarily dismissed for a

first offence. The tribunal must look at whether the actions of the employer with regard to process and penalty were within the band of reasonable responses for a reasonable employer in the circumstances. The tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the tribunal must look at whether a lesser sanction was appropriate in the circumstances.

44. Where an industrial tribunal finds that the grounds of a complaint of unfair dismissal are well-founded the Orders it may make by way of remedy are set out at Article 146 ERO and include reinstatement, or re-engagement, and otherwise compensation. How compensation is to be calculated is set out at Articles 152 to 161.
45. Article 156(2) ERO provides: *“Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”*
46. The starting point for the calculation of the compensatory award is Article 157(1) ERO: *‘(1) Subject to the provisions of this Article and Articles 158, 160 and 161, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer’.* The compensatory award should not be increased out of sympathy for the claimant or to express disapproval of the respondent. The onus is on the respondent to show the claimant as unreasonable in the steps taken or not taken to mitigate his loss. Reduction may be made to reflect the extent of a claimant’s contributory fault where considered just and equitable to do so under Article 157(6) ERO.
47. The case of ***Polkey v Dayton Services LTD 1987 3 All ER 974 HL*** makes it clear that, if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if following the procedures correctly would have made no difference to the outcome.

## SUBMISSIONS

48. The claimant’s main contentions were:
  - A) ***The respondent failed to fully investigate and the sanction was disproportionate***
49. The claimant put forward that his distress had been apparent on 25 January 2019. That after speaking to Mr O’Callaghan at 3:20 PM he had left room 26 to clean himself up as he had *‘tears in his eyes’*; that during the conversation with Mr O’Callaghan at 3:25/45 PM (with Mr McAllinden present), he *‘could not stop crying’* and had left the room with *‘tears in his eyes’*; that at 4:20 PM when Mr McAllinden had spoken with him, he had *‘tears running’* and was in *‘total meltdown’* and at that meeting Mr McAllinden had said to him *‘I understand you Vigantas. When you leave at 17:00 Alec said this will be put as unpaid leave and*



*from Monday you are on the opposite shift. Alec will have a chat with you when you come in.*' He contended that Mr Turkington was notified of his upset at the meeting on 29 January 2019 and so it was not credible for Mr Turkington to have relied upon '*inconsistencies*' in accounts given by the claimant between the investigatory and disciplinary meetings, nor was Mr Turkington's involvement in the disciplinary process appropriate.

50. The claimant further contended that the disciplinary panel had been put on notice that there had been something wrong between the claimant and his supervisor by the following, but which it chose to ignore:
  - 51.1 He had left work unauthorised after advising his supervisors and management that he was going to, a situation confirmed by Mr Turkington and Mrs Currie in cross examination as *not normal*.
  - 51.2 Mr Ilse had decided to move him to another shift away from Mr O'Callaghan on 25 January 2019.
  - 51.3 The disciplinary panel had noted that he was '*agitated*', '*hell bent on leaving work*' and Mr O'Callaghan '*did not feel safe one to one*' with him from meetings with Mr Iles and Mr O'Callaghan, but did not enquire fully as to the claimant's condition and why he had come to be in it.
  - 51.4 On appeal Mr McAllinden had been interviewed on one specific of the case only and the disciplinary panel's findings were simply accepted.
  - 51.5 His actions being deemed so serious was inconsistent with his treatment thereafter in that he was not suspended and the disciplinary process was not commenced until one month afterwards. The fact he was a good and valued employee with an unblemished disciplinary record was not taken into account, Mrs Currie had not even checked his record and the respondent chose to ignore alternative options to dismissal.

#### **The respondent submitted:**

52. The question for the tribunal is whether the disciplinary panel having the benefit of a properly conducted investigation came to a decision to dismiss which was within the band of reasonable responses. The fact that another employer or indeed the tribunal might consider a different approach is not relevant.
53. Whether or not the claimant was stressed multiple times or treated badly in the workplace was not brought before the investigatory panel or before the disciplinary panel. The respondent first became aware of background matters prior to the disciplinary investigation in the claim form.
54. The investigation panel met on 13 February 2019 and nothing was contained in the investigation notes to indicate to the disciplinary panel who considered them to suggest the stress now alleged by the claimant, but rather the contrary. The claimant indicated *annoyance* and *no problem* with the alleged perpetrator or matters which caused him stress. No mention was made by the claimant of the meeting on 29 January 2019 and which was held simply to advise that the matter would be investigated formally.

55. The claimant despite being given unfettered opportunity to do so repeatedly failed to explain why he chose to leave work and showed no remorse, illustrated by his remark at the close of the disciplinary hearing that if he *'were to lose his job it would not be the end of the world, there were other jobs in good companys, Almac would just be losing a good worker'*.
56. Neither the claimant nor Mr Doherty raised any matters regarding the veracity of the respondents' meeting notes until the substantive hearing before the tribunal. At no stage up to his dismissal did the claimant put forward that he had been told by Mr McAllinden that he could have unpaid leave. Both the disciplinary panel and appeal panel interviewed all those the claimant said could shed light on the matter. Regrettably from the claimant's point of view they did not agree with him. Similarly the claimant failed to mention the meeting on 29 January 2019 at the investigatory or the disciplinary meetings, which corroborates the evidence of Mr Turkington that the meeting was nothing more than to advise the claimant that the formal process would be undertaken. If there was an issue regarding the 29 January 2019 meeting it should have been raised but this was never put to the investigation or disciplinary panel. It is clear that Mr Turkington was not involved in any way in the claimant leaving site on 25 January 2019. Mr Turkington was made aware of the claimant leaving which was quite proper, he had no other prior involvement other than to advise that a formal investigation would take place.
57. A shift change was a perfectly normal thing as per Mr Lightowler's evidence. Mrs Currie repeatedly put to the claimant that she did not understand why he had left, that he needed to help her and had asked him this on at least on two or three occasions.
58. The respondent did not ignore alternatives to dismissal and the evidence of Mr Lightowler was that the claimant was a good employee with an unblemished record.
59. The claimant criticized Mrs Currie as unable to identify circumstances where the duty of care was triggered for an employee in distress but she had in her evidence pointed to provision made by the respondent for pastoral care, occupational health etc.
60. Delay in the disciplinary proceedings was not excessive and it was explained by Mrs Currie as being due to prior diary commitments.
61. Mr Lightowler went to Mr McAllinden to ask him about the matter raised by the claimant, it would have been negligent for him not to have done so and there was a clear and unequivocal response which the respondent had to take into account.

**B) The claimant was unaware of the potential for dismissal**

62. The claimant put that he was not advised by the respondent despite awareness of his intention to leave work early that he would be dismissed as a result. No training was received by him on his initial placement by Diamond Recruitment with the respondent as a temporary worker, or from the respondent on him becoming their employee.

**The respondent submitted:**

63. There is clear and uncontroverted evidence that the claimant like every other employee had a copy of the respondent's disciplinary policy of which it is their duty to make themselves aware. It was abundantly clear that leaving site without authorisation falls within gross misconduct. It is not a question of proper construction, it is set out clearly and expressly.

***C) The respondent failed in its duty of care towards him***

64. The claimant put that the respondent's management had failed in its duty of care towards him despite the condition they saw him to be in on 25 January 2019. Mrs Currie was unable to identify in what circumstances the company's duty of care to employees experiencing distress would trigger.

**The respondent submitted:**

65. This is not a matter for the tribunal to adjudicate upon, or which was put to the panel, it is a matter for a civil case to be decided upon in another forum.

***D) Refusal by respondent to call Witnesses***

66. The claimant contended that the respondent had refused to call at the substantive hearing before the tribunal those who had witnessed the circumstances of the incident thus limiting the claimant's ability to prove the level of stress that he was experiencing on 25 January 2019.

**The respondent submitted:**

67. It was open to claimant to call whoever he wished.

***E) Failure to take witness statements***

68. The claimant contended that the respondent had failed to take witness statements in the disciplinary process but had relied upon at hearing strictly limited questions and witness responses recorded by it in unverified, unsigned, handwritten meeting notes.

**The respondent submitted:**

69. There is no requirement for the respondent to do so, notes were adequate and are used day in day out in tribunal proceedings.

**APPLYING THE LAW TO FACTS FOUND AND CONCLUSIONS**

70. On balance the tribunal prefer the contentions, as set out above, made for the respondent. The tribunal's determination does not depend upon the claimant proving his level of stress on the day on question; it is not for the tribunal to 're-try' the case or substitute what it would have done, but rather is required to judge the reasonableness of the respondents actions in treating the claimant's conduct as a sufficient reason for dismissing him at the stage that it did.

71. The tribunal accept that whilst the claimant may genuinely have felt distressed and unable to remain at work on 25 January 2019 due to recent interactions with his supervisor, it is apparent however that he presented to Mr O'Callaghan and Mr McAllinden at the time as *arrogant* and *dismissive* of his supervisors rather than as upset and or distressed.
72. When the matter was formally investigated and the claimant given unfettered opportunity to explain how he had felt so as to have left without authorization, it seems he chose, due to embarrassment, rather than any misunderstanding by him of language, not to disclose to the respondent any underlying distress but rather gave an account of annoyance at his supervisor and his not wanting to co-operate with him.
73. When the claimant then subsequently at disciplinary hearing presented a differing account of having been distressed the respondent sought to verify whether this had been so by making enquiry of the claimant's supervisors but their responses supported the claimant's prior explanation of annoyance provided at the formal investigatory meeting.
74. During the disciplinary process the claimant accepted that he had wrongly left site; he did not suggest at any point that he had been unaware of the potential consequences; he did not put forward that he had understood he had Mr McAllinden's assurance that if he left work early that it would be treated as unpaid leave. The claimant furthermore made comments at the close of the disciplinary meeting which displayed an apparent lack of remorse.
75. When the claimant first raised on appeal the alleged assurance given to him by Mr McAllinden just prior to leaving (that it would be treated as unpaid leave) Mr Lightowler made appropriate enquiry of Mr McAllinden seeking to verify this, but instead Mr McAllinden's account supported a deliberate decision made by the claimant to leave without authorisation due to annoyance, despite warning given to him by Mr McAllinden that the claimant would get into trouble, rather than vouching the claimant as having been obviously distressed.
76. We are not persuaded that there were clear pointers such that the respondent unreasonably then failed to delve deeper in enquiries that it made so as to have established distress as the claimant's true reason for leaving.
77. We consider Mr Turkington and Mrs Currie at the disciplinary stage and ultimately Mr Lightowler and Ms Blacker in upholding the dismissal decision on appeal all genuinely held the belief that the claimant had deliberately left site without authorisation due to annoyance rather than upset or distress and that they had at the time reasonable grounds upon which to sustain that belief. We furthermore accept that Mrs Currie considered the claimant to have displayed a lack of remorse at the disciplinary hearing and no exceptional circumstances to have been established to give the respondent reason to pull back from their normal sanction of summary dismissal. We accept that by the stage of the appeal outcome when Mr Lightowler confirmed the dismissal decision that the respondent had made all investigations as were reasonable in the circumstances of the case, including by that stage appropriate enquiry of Mr McAllinden regarding the point raised on appeal as to assurance given by him to the claimant, and that Mr Lightowler also gave consideration to whether the sanction was too severe, raised by the claimant

as an appeal point, mindful that the claimant was a good and valued worker, but in fact considered the claimant to have left despite not being permitted annual leave and aware his presence was required and to then have latterly presented an exaggerated account of distress motivated by a realisation of the seriousness of the matter and concluded that no grounds had been established to overturn the original dismissal decision.

78. We are satisfied on balance that the respondent held a genuine belief in the claimant's misconduct, that it had reasonable grounds upon which to sustain that belief, that at the final stage it had carried out as much investigation as was reasonable, and that the sanction adopted was not disproportionate in the circumstances.

## **CONCLUSION**

79. The tribunal finds that the claimant was fairly dismissed by the respondent. The respondent has established the claimant's conduct as the reason for dismissal. We find in the circumstances (including the size and administrative resources of the employer's undertaking) the respondents acted reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant, determined in accordance with equity and the substantial merits of the case.

**Employment Judge:**

**Date and place of hearing: 27 and 28 January 2020, Belfast.**

**Date judgement recorded in register and issued to parties:**