EMPLOYMENT TRIBUNALS

Claimant: Mr C Edson

Respondent: Kammac Limited

Heard at: Nottingham **On:** Thursday 8 October 2020

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: In Person
Respondent: Mr A Jones of Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal **fails and is dismissed.**

2. The claimant's claim of breach of contract **succeeds in part.** The respondent shall pay the claimant compensation amounting to a sum equivalent to the net pay accruing between 20 September 2019 and 4 October 2019 inclusive. A remedy hearing will be listed, if quantum cannot be agreed.

3. The claimant's claim for a redundancy payment **fails and is dismissed**

REASONS

1. Introduction

1.1 On 4 October 2019, Colin Edson was dismissed with immediate effect following an investigation and hearing to determine allegations of misconduct. The allegation that was ultimately found was that the claimant knowingly and dishonestly received pay for a day that he was not at work. On the facts of this case, the claimant was potentially trapped between the idiomatic rock and a hard place. If in fact he was at work on the day in question, it meant he could not have attended an essential statutory training course to maintain his certificate of professional competence, a regulatory standard needed to lawfully drive large goods vehicles professionally. If, as was eventually accepted, he did attend the course, he knowingly received a day's pay to which he was not entitled.

2. Issues.

2.1 The issues identified in the claim are:-

a) Whether the respondent has established the reason for dismissal and whether that amounts to a potentially fair reason in law. The respondent relies on conduct.

b) Whether the respondent acted reasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant.

c) In order to succeed in the claim for a redundancy payment specifically, the claimant has an evidential, though not legal, burden to displace the respondent's case as the true reason, subject to the presumption in s.163(2) of the Employment Rights Act 1996.

d) Whether at the date of termination the claimant had a right to recover damages for breach of contract either arising or outstanding at the date of termination in accordance with common law and article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. Evidence

3.1 For the claimant I received a written statement from Mr Edson himself. For the respondent I received written statements from Leanne Liddel, dismissal decision maker and Jay Patel, who conducted the investigation interview and was also the decision maker in respect of an earlier disciplinary matter. I also received a statement from Lisa Jones who chaired the claimant's appeal but she was not in attendance. I was told that was due to personal reasons which were not expanded. I had read her statement before the hearing commenced. There was no application for her evidence to be adduced as hearsay evidence and I have not had further regard to it. However, the events of the appeal are well documented in the contemporaneous bundle. All witnesses in attendance gave evidence on oath or affirmation and were questioned.

3.2 I received a bundle of documents running to 209 pages. Both parties made brief oral closing submissions, Mr Jones briefly supplementing a detailed skeleton argument.

4. The Facts

4.1 It is not the Tribunal's function to resolve each and every last dispute of fact between the parties. My role is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

4.2 Mr Edson was employed as a large goods vehicle driver. He had been continuously employed since 20 September 2004 when his employment started with Securicor Omega Logistics Ltd. A TUPE transfer in or around 2008 meant he then became an employee of the respondent. He had been a professional HGV driver for many years and there is no reason to doubt his assertion that prior to 2019 he not only had an unblemished record, but had been

generally well regarded. It is, however, necessary to touch on events prior to 2019 to explain Mr Edson's case fully and put the subsequent events in context.

4.3 In the summer of 2017, the respondent lost a contract to an entity called XPO. This resulted in a TUPE transfer for part of the business to which the claimant was assigned. The respondent and Mr Edson agreed that he would not transfer and would instead remain employed by the respondent. The contractual arrangements they settled on appear confusing, contradictory and may not even achieve all the legal result they purport to, but that may be because the intention appears to have been to try to overcome what would otherwise have been the legal consequences of the TUPE transfer. In a letter dated Friday 23 June 2017, the claimant's apparent resignation was noted. It also conveys a decision of the employer to make *"an additional payment of £15,895.20 as a goodwill gesture. There is no contractual benefit to this payment, however, we believe that this will financially assist you until you secure future employment"*.

4.4 On Monday 26 June 2017, and notwithstanding the apparent termination of his employment with the respondent, Mr Edson was issued with a new statement of main terms and conditions in accordance with section 1 of the Employment Rights Act 1996 purporting to define the date of commencement of employment with the respondent as 26 June 2017.

4.5 Mr Edson also signed an agreement relating to the goodwill payment already referred to. This is described as an "ex gracia" (sic) payment. Despite the previous correspondence saying that the employment was coming to an end and the potentially significant statement that "there is no contractual benefit to this payment", this agreement now sought to impose a condition on that payment for a proportionate repayment should Mr Edson's employment terminate for any reason within the five-year period following the date of the agreement. Whatever the surrounding implications of these apparent contractual agreements, there is no dispute before me that Mr Edson's employment was governed by a contract with the same employer during both statutorily defined weeks either side of this purported termination and reengagement such that his continuous service continued unbroken back to 2004.

4.6 That, however, is not the only relevance of this episode to the present claim. The clawback agreement also stated that *"the company reserves the right to deduct the above monies from any monies due to the employee, at the time their employment is terminated"*.

4.7 Jumping forward 18 months, in a letter dated 7 January 2019 the claimant was put on notice of the fact that the company was implementing a redundancy programme as a result of a reorganisation of its business activities, namely the transport function based out of Worksop where the claimant was, essentially, the only HGV driver. It gave notice that the claimant's role was at risk of redundancy. In the consultation that followed, the question of his entitlement to a redundancy payment arose related to his length of service. The respondent's position was that the claimant did not have sufficient qualifying service to be entitled to any redundancy payment due to his current contract of employment dating only from 26 June 2017. Secondly, and in any event, any redundancy payment that the claimant would be entitled to would be offset by the clawback provision relating to the previous ex gratia payment. The claimant was under the impression that the clawback only applied if he was to

resign, not if he was dismissed. That may or may not be as a result of a representation by someone at the time, but it seems to me the written agreement alone does not limit it to that situation. The length of service issues was eventually resolved to the claimant's satisfaction. I cannot see that the clawback issue was similarly resolved.

4.8 The claimant was convinced that because he had challenged HR and senior management, in particular Craig Olsen the operations director, he had become a target for retribution. He gives evidence of an exchange with Mr Olsen in February 2018 when he says he was told that if he pursued a redundancy payment, Kammac would pursue its right to reclaim the ex gratia payment, that he would not get two bites of the cherry and is also alleged to have told him he should have paid tax on the ex-gratia payment, all of which would cost the claimant a lot of money to pursue. I have not heard from Mr Olsen and, whilst I can accept Mr Edson's evidence that there was such a conversation, I am reluctant to find this was intended to be, or reasonably could be seen as, a threatening conversation as opposed to a blunt statement of position which, on the face of the other findings I have made, the respondent was entitled to set out to Mr Edson. In any event, this episode is said to be the foundation of a desire for the respondent to get rid of the claimant. Again, in the absence of contrary evidence, I accept Mr Edson recalls a conversation with his line manager, Mr John Moore, in which Mr Moore relayed a comment by another director, Mr Carabini, in which he was told to keep an eye on the claimant and let him know of any problems. I accept there was such a comment by Mr Moore, the truth of the content of that statement I am less able to accept. It is multiple hearsay, without context and any even if said could convey any other number of meanings alternative to the one suggested.

4.9 In short, I am not satisfied that the claimant properly standing his ground did in fact lead to any general or specific campaign to get him out of the business. I rely on the fact that Mr Edson's own statement describes the period after this episode in terms of "I resumed my work and everything was going well for 5 months". That period takes us to the first disciplinary matter which I deal with below. For present purposes, the fact that the decision maker in that matter accepted much of the claimant's case and stepped back from a decision to dismiss is a very strong factor pointing away from any campaign to dismiss him or any manipulation by senior management behind the scenes.

4.10 In any event, returning to the chronology, rather than dismiss him for redundancy at the time, the claimant was offered and accepted what that was described a *"suitable alternative employment as an alternative to redundancy"* although, again confusingly, the sentence continued with "*and accept that my role is no longer at risk of redundancy*". The claimant continued as before on the same terms and conditions although there seemed to be a slight change to the scope of the role *as it "would now include other duties on site as directed by the site management team, which may include, but is not exclusive to general warehouse and yard duties".*

4.11 On Thursday 5 September 2019, the events of what would become the warning occurred. The parties spent more time than was necessary on advancing and defending the reasonableness of this matter and the decision that followed. As it ultimately was not relied on in what would become the later dismissal decision, I do not need to go into the detail in the

context of reasonableness, nor decide whether it is open to me to revisit it at all (as in *Wincanton v Stone [2013] IRLR 178*). However, it is potentially relevant to the claimant's contention that there was a secret campaign to find fault with him and justify his removal from the business. To that extent it requires some findings of fact.

4.12 I find on the day in question, the claimant was collecting a trailer from Old Trafford in Manchester to make a delivery in Leeds before returning to base. He was running late. He noticed that one of the side supports which supports the roof bar was broken and one of the roof bars was on the trailer bed. Two things followed. First, the trailer was loaded despite the damage. Secondly, the claimant called the compliance team to report the damage. He did so not to get it repaired but in order to let it be known he had not caused the damage. He was told there might be an engineer in the vicinity and he would get a call back in 5 minutes. He did not wait. He set off to his next delivery as he was already late for a drop in the Leeds area. He did not receive a call back for some 20 minutes or so when he did get the call he was told the maintenance engineer was on their way to his last location. He explained he was already on his way to Leeds. There is a dispute as to whether the claimant had been told to wait at Old Trafford, whether he declared the vehicle off road ("VOR"), whether compliance declared it VOR or whether nobody did. When it became clear the vehicle was on its way to Leeds, this incurred costs to the respondent in respect of the maintenance engineer but the main issue was the concern that the vehicle had been driven on the public highway in a state that may have been dangerous.

4.13 The disciplinary investigation that followed included brief evidence from TIP Europe who were responsible for the trailer's maintenance. The evidence was that the trailer should have been declared VOR. The decision maker, Mr Patel was an experienced transport manager himself and held his own CPC card. He shared the view of the TIP engineer that this defect was dangerous. The claimant maintained at the time, and did so during the hearing, that it was not only not dangerous to drive on the road but that when he previously worked as a shunter he had been told to drive vehicles with similar levels of defects. There was also evidence that the claimant was prepared to refuse to drive vehicles where they or their load appeared dangerous.

4.14 Mr Edson was suspended on full pay during this investigation. So far as it is relevant to these proceedings a reasonably full investigation was conducted including obtaining witness statements of those involved in the calls, the nature of the damage and even the claimant's mobile phone call log showing the timing of the calls.

4.15 Mr Patel conducted a disciplinary hearing on 11 September 2019. Before then the claimant raised a grievance on 10 September. He refers to the dispute with HR over his length of service and the threatening meeting with Craig Olsen. He says he was so concerned he even spoke to Karen Rossington in HR at the time to ask if there would be any backlash after the risk of redundancy was removed and was assured there would not be. He attributed this allegation to the backlash starting. His grievance was investigated and ultimately rejected.

4.16 In the meantime, the disciplinary hearing continued on 11 September 2019 chaired by Mr Patel. I accept Mr Patel investigated the points raised by the claimant with the individuals concerned about the allegation that on other occasions vehicles had been driven. His enquiries did not support the contention the employer expected unsafe vehicles to be driven. Further written statements were obtained albeit at a later stage when his disciplinary sanction was appealed.

4.17 Mr Patel gave his decision in writing in a letter dated 19 September 2019. The allegations had been: -

a) failure to follow reasonable request from the compliance team.

b) potentially taking an unroadworthy trailer on the road

c) contributing to an additional cost to the company having to arrange the party to repair the trailer.

4.18 Mr Patel did not find the first allegation proven as a fact. He accepted that there was ambiguity over what instructions were given as between the claimant and compliance team. He concluded that the vehicle was dangerous to drive on the road and that Mr Edson should have appreciated that and should have declared it VOR and waited for the engineer in Manchester and that by continuing to drive it not only did he put his and the respondent's licences at risk if an accident had occurred, but he incurred unnecessary cost to the respondent. Mr Patel concluded that there was gross misconduct established in the safety risk of driving the vehicle but that the ambiguity over what Mr Edson had been told to do or not and when should mean the benefit of the doubt should be given to the claimant in terms of the sanction imposed. He decided to reduce the sanction from dismissal to a final written warning. The claimant appealed. The appeal was subsequently dismissed.

4.19 Whilst this disciplinary process was taking place, events occurred on a totally unrelated matter but which would ultimately lead to the claimant's dismissal. I accept that Mr Patel was not aware of this until after he had reached his decision on this first disciplinary matter.

4.20 On a date between 6 September and 13 September 2019, the respondent received an undated anonymous letter. A Ms Woods opened it whilst covering the post duties at some point between those dates and passed it to Lisa Jones. Ms Liddell, in turn was tasked with dealing with this issue and she would ultimately become the disciplinary decision maker. She recalls becoming aware of it a few days before writing to the claimant about it on 19 September 2019. Both she and the claimant accept they had a telephone conversation about it a few days before that letter. I find it likely that Ms Liddell would have contacted the claimant very soon after receiving this letter. On balance, therefore, I find the date of receipt to be at the end of the period Ms Woods recalled, that is on or around 13 September. The letter is central to the respondent's case and I therefore set it out in full.

> ***to the managing director of Kammac***
>
> ***I don't know if you are aware that there [has] been a serious incident involving fraudulent CPC qualifications.***

Mr Peter Allsop has been arrested and is facing serious charges for taking money from lorry drivers and fraudulently giving them the qualification with out them ever attending the courses required. Obviously the lorry drivers involved are also getting investigated as a new legal getting this by deception.

The reason for my letter is that a number of people within Wilkinson's have been dismissed from [their] job for paying this man and getting their CPC.

You have a driver Colin Edson who works for you who I know is one of these drivers.

Obviously you can check this as he would have not attended the courses and more than likely been driving for your company on the days the courses were fraudulently claimed to have happened.

Therefore he has been driving for your company illegally for the past 5 years and I am sure as a company you would not and will not condone this.

I am also sending the same letter to all authorities that deal with the qualification i.e. Joupt as I am disgusted that this has gone on for so long. I know of a number of drivers who have paid this man and feel that this is something that needs addressing with every company that [has] employed these drivers.

Whilst I know that this classed as whistleblowing I want to remain anonymous as I have to live in the area where the drivers I am reporting live.

Thank you for taking the time to read this and hopefully you will deal with this serious allegation immediately.

4.21 I need to explain CPC to put the issue in context. To drive a large goods vehicle (sometimes still called a heavy goods vehicle) on the public highway a certain class of driving licence is required. To drive one professionally has, since around 2014, also required a certificate of professional competence card, or CPC. To maintain a certificate of professional competence, professional drivers are now required to undergo 35 hours of training in each 5 year period. In Mr Edson's case, and I think this may be merely coincidental, his 5 year driving licence and his CPC period coincide such that the first period of renewal of CPC covers the period September 2014 to September 2019. Those 35 hours are typically undertaken by attending 5 day long training courses, each of 7 hours duration. Upon the new rules coming into force, I accept it was initially Mr Edson's intention to undertake one a year. He did not maintain that intention after the first year.

4.22 Each approved course successfully attended by a driver would result in a certificate being issued. This was little more than a record for the attendee as proof of attendance rather than having any particular regulatory status. The actual regulatory process was for the course organiser to report the attendance to the Driver and Vehicle Standards Agency ("DVSA") which would update that particular driver's licence record. As long as the necessary 35 hours CPC training had been undertaken by the 5 year anniversary, a CPC card would also be issued entitling the driver to drive professionally for the next 5 year period.

4.23 I find that there was strong resentment amongst drivers about having to do this training. I suspect that was felt even more sharply by those like Mr Edson who had been driving professionally for many years. In fact Mr Edson described it as *"the same old garbage, teaching people to suck eggs*". That resentment was made all the more acute by the fact that this employer, like a number of others in the industry, not only did not get involved in arranging or booking the necessary training courses, but neither paid for the course nor for the drivers' time of attending it, although it did permit unpaid leave. A driver

had to book and pay for the course themselves and therefore either took a day's annual leave or lost a day's pay. In the case of this respondent, that position has since changed slightly, in that it now takes an active role in booking its drivers on CPC courses and paying for the course. The time off for attendance remains unpaid.

4.24 Driving professionally without a valid CPC is an offence and may have implications for the driver's licence, the insurance of any vehicle being driven and depending on the circumstances may also jeopardise the employer's transport operating licence. I find operators are under a duty to investigate issues relating to their drivers' licencing and to report concerns to the DVSA. In short, it is a serious matter for both the driver and the operator. The allegation that CPC hours were being obtained fraudulently, in essence they were being bought without the driver actually needing to attend the course, is a very serious matter.

4.25 Returning to the chronology, on becoming aware of the anonymous allegation Ms Liddell spoke to the claimant shortly after 13 September to ask him to give consent for the respondent to contact DVSA. I find the respondent, as a licenced operator, had some access to DVSA and its records held for drivers employed by it. That information it could see was limited. All Ms Liddell could discern was the number of CPC hours recorded in any 5 year renewal period. In fact, it was access to this information that, in February 2019, had led her to arrange 4 more CPC courses for the claimant to attend which he had completed over July and August of 2019 in time for what would have been the renewal of his CPC card in September. I find she could not tell the further details of his training from his record. In the light of the anonymous letter, it was the detail of the course and, in particular the course provider, that the respondent wanted to know about at this stage and so she had asked for Mr Edson's certificates for each course attended.

4.26 Mr Edson refused the request. As a result of that refusal, Ms Liddell was forced to deal with the matter as a disciplinary investigation. By letter dated 19 September 2019, she wrote to the claimant. Whilst his suspension would have been lifted as a result of the first disciplinary matter now being decided, she decided that his suspension, of sorts, would have to continue whilst the CPC issue was investigated. She wrote: -

> ***…it is a legal requirement for all drivers to carry a valid CPC licence. In addition, Kammac requires you to provide the Company with 5 CPC Certificate and your CPC card.***
>
> ***Prior to your suspension these documents and your consent to contact DVSA was refused. As Kammac do not hold or have access to your 5 CPC certificates and your CPC Card, you will not be permitted to return to work until these have been produced.***
>
> ***I must make you aware that we have reason to believe that some or all of your CPC certificates may have been obtained fraudulently, a matter which is being investigated by the Police. As such we are very concerned that we do not have the correct legal documentation for you to be able to carry out your job role.***
>
> ***As such, and so that you may return to work legally, please provide to me by no later than 17.00pm Monday 23rd September 2019 all 5 CPC certificates and your CPC Card. Failure or refusal to provide these documents could be considered as failure to follow a reasonable management request. And in further failing to provide these documents it could be considered that you are unable to fulfil your contract of employment and therefore have frustrated your contract.***

Please be aware, following the lift of your suspension until you are able to provide the above requested documentation, you as you are unable to demonstrate your legality to work, you will not be paid for any days where you ordinarily would have been scheduled.

4.27 I say suspension "of sorts" because it is clear she was not purporting to continue the contractual right to suspend on full pay. What had happened was that there was a view taken that until he provided the documents, he would not be able to drive and was therefore removed from all work without pay. There was no consideration of giving him other work short of driving, nor of suspending him under the disciplinary process. The result was that the claimant was suspended without pay between 20 September, when he would otherwise have returned to paid duties and what would become his last day of employment, namely 4 October 2019.

4.28 I also find that the claimant did, at that time, have the necessary documentation demonstrating he was legally entitled to drive. He had a valid and current licence with the correct class and he had a CPC card from DVSA which demonstrated he could drive commercially. The real issue was a concern that that one of the five CPC courses had not in fact been attended and that he had conspired with the said Peter Allsop to obtain a credit for a course he had not in fact undertaken. That is clearly a potentially serious conduct issue. It would clearly have been appropriate to investigate as a disciplinary matter including suspending him from driving duties and this would be the case in any event and only becomes more obvious a step to take in the face of an apparent refusal to cooperate. However, I have not been taken to any contractual authority that entitled this employer of a professional driver to suspend without pay in these circumstances nor any general legal provisions which entitled the same. I suspect that such contractual provisions may well exist somewhere in the industry as a whole but there is nothing before me to establish the contractual power to do so within this employment relationship.

4.29 Ms Liddell continued her investigations. The claimant continued to be obstructive to the investigation. He did not produce all the certificates, even in respect of the 4 CPC course arranged by the respondent. He eventually did. I find his explanation for not producing the first, 2014 course, changed over time although I accept the difference between "I cant find it" and "I was not issued with one" could be explained by the process of speculating why he could not find one. However, the force of that explanation diminished somewhat against the ease with which he would later be able to obtain a replacement certificate, yet he still did not immediately disclose it to the employer. He continued to argue that the certificates were his personal property as the employer had not paid for the courses and that they had no right to see them. He did produce a screen shot of his own access to his online DVSA account which showed slightly more information about the CPC record than the employer could see in its own access. This still did not give the employer what it had reasonably asked for. Mr Edson contacted DVSA and received an email confirming his driving record was up to date and he was legal to drive. Again, this missed the point of the employer's investigation.

4.30 One piece of information the employer did have was the date of the course in 2014, that was 17 September 2014. It knew it had never paid drivers for the time of attendance on these professional licencing courses and as part of its own investigation turned to its own

payroll records. If Mr Edson had attended a course, he would be shown as being on annual leave or on unpaid leave for that day. Unfortunately for Mr Edson, he was shown to have been at work all week and was certainly paid for each of the five working days including the day of the course.

4.31 I find all of this was seen as, and indeed was, obstructive and diversionary. In his evidence, Mr Edson explained what he said was the confusion that the employer was asking for certificates for the period before 2014. Not only do I not accept there is evidence of that, but the piecemeal disclosure of information in the 5 year period after 2014 demonstrates Mr Edson was fully aware of what was being asked for at the time.

4.32 In the absence of all of the certificates, in reality it was the critical first certificate in 2014 that was required, Mr Patel was now tasked with investigating the situation at a disciplinary investigation meeting. By letter dated 25 September 2019, Mr Patel wrote to the claimant inviting him to an investigatory interview. The letter set out three reasons for the investigation. At this stage they were not explicitly framed as disciplinary allegations. They were: -

- ***You have failed to follow a reasonable management request to prduce all 5 CPC certificates issued to you (you have only produced 4), which are issued to you in order for you to obtain your driver CPC Card.***
- ***The company needs to investigate the reason for your refusual to do this, including whether it is as a result of you not attending the CPOC course and obtaining the certificate by way of false declaration.***
- ***Whether there is evidence to indicate that you have obtained your CPC licence unlawfully.***

4.33 The letter indicated he could be represented. It also restated the continued suspension without pay until such a time as he could satisfy the company he was lawfully entitled to carry out his work.

4.34 As part of the wider investigation, statements were obtained from Ms Woods on the original receipt of the anonymous letter and Lisa Jones on the systems in place within the company related to CPC courses and licencing.

4.35 The investigation meeting took place on 27 September 2019. Mr Edson declined representation. He was asked if he would be willing to log into the DVSA online site in the presence of Mr Patel and allow him to see his driving record in full. Mr Edson refused saying it was personal data, he was entitled to withhold it and it was nothing to do with Kammac. He said he might have lost the certificate or he might not have been given one. He accepted he had the ones for the 4 courses undertaken in 2019. He produced them because the employer had paid for the course, which it did not in 2014. He then said he had tried to contact the training provider but thought it had gone bankrupt. He asserted it was not reasonable for the employer to ask for this personal data and relied on the fact that his DVSA record showed he satisfied the CPC and licence requirements. He mistakenly asserted the request related to an old CPC period and was out of date as a reason for not disclosing the information.

4.36 Mr Patel then put to the claimant that he had been paid for working on all 5 days of the working week in which the course was alleged to have taken place. Mr Edson conceded that if Kammac knew he was going on the course he wouldn't have got paid. He then said his boss, John Moore, had said to go on the course and he would cover his work on that day. He accepted that he knew he would not get paid to attend the training. He alleged that John Moore had suggested the idea. In evidence before me, this was expanded to say he asked for a day's leave as he knew he would not get paid and was told just to go on the course and John would cover his work. He suggested this was a regular occurrence. He accepted knowing Peter Allsop but only through attending the course. As far as I can see, that is the first time there was a link established between the 2014 CPC course and the allegations in the anonymous letter. He denied the allegations in that letter and raised again that this was the backlash he feared for challenging when he was placed on redundancy.

4.37 I have to say that, by this time, the claimant's manner of responding to the enquiries would lead any reasonable employer to become increasingly concerned that there was some force in the allegation made in the anonymous letter.

4.38 The wider investigation now included interviewing John Moore. He denied the suggestion he had allowed the claimant to undertake the course on the pretence of being at work so he would get paid. He explained the reason why that not only did not happen, but explained why it would have been impossible to do.

4.39 Faced with this evidence, Ms Liddell decided that the claimant should face a disciplinary hearing. In a letter dated 30 September 2019 she wrote to him setting out the three disciplinary allegations as they were now framed. They were : -

- ***You have failed to follow a reasonable management request to produce all 5 certificates issued to you (you have only produced 4) , which are issued to you in order for you to obtain your driver CPC card. In addition, you have further refused a temporary password to validate your DVSA CPC Screen***
- ***Following the being alerted to an anonymous letter that you had allegedly obtained a certificate unlawfully (and therefore your CPC Licence unlawfully), you have failed to rebut the allegation by your failure to produce the certificate in question;***
- ***By your own admission at the investigation meeting, as your evidence to demonstrate that you attended the CPC training course, you admitted conspiring with a member of the management team to deceive the company in order to obtain a day's wage which you knowingly were not entitled to. You added that similar actions had occurred on other occasions when you had actually not been working but had been paid.***

4.40 The letter provided copies of all the evidence to be relied on including the investigation notes and statements and the anonymous letter. The clamant had a right to be accompanied which he declined.

4.41 The disciplinary hearing took place on 3 October chaired by Ms Liddell who was supported by Karren Rossington from HR. Mr Edson was asked to offer any reason why he had refused to provide the first certificate. Whilst maintaining the personal data argument, he nevertheless provided a copy of the missing certificate on the day of the hearing. It showed the course was delivered by Peter Allsop, the person named in the anonymous letter, as had

been alluded to by Mr Edson in his investigatory interview. He explained how he had contacted the company. When reminded he had previously said the company had gone out of business he now described it as a "side company". He now explained the delay on the basis that "the guy issuing it had been away" albeit that later changed to difficulties in printing it. It is not surprising that the employer was rightly concerned about these explanations.

4.42 Ms Liddell moved onto the second allegation, that of obtaining the certificate unlawfully. His answers thereafter are, essentially, "no comment" or to that effect. He produced a statement explaining how odd it was that the anonymous letter arrived after 5 years when he was just suspended and that he had investigated the allegation with a manager at Wilkinsons. Interestingly, the information he obtained did not show the anonymous letter to be without some truth as it was confirmed that three people had indeed been dismissed over CPC fraud, albeit he told the employer that this had nothing to do with a Peter Allsopp. Ms Liddel attempted to explore aspects further only to be met with a response that he "didn't wish to comment any further". He did, however, suggest another reason for the delay in providing the certificate was that he struggled to print it and wanted to check it. He accepted he had previously denied any knowledge of Mr Allsop but then had accepted he was aware of him.

4.43 Ms Liddell then moved to the third allegation and received a repeated response to the effect of "no comment".

4.44 Later that day the claimant attended two further formal hearings. The first was his grievance. The second, the appeal against the final written warning issued by Mr Patel. Both were refused.

4.45 By letter dated 4 October 2019, Ms Liddell set out her decision on the disciplinary hearing. That was to terminate his employment with immediate effect. The letter is said to have been delivered by email as well as registered post and there is no issue of the effective date of termination. Of the three disciplinary allegations, Ms Liddell found the first made out. As to the second, she found that Mr Edson had remained evasive and obstructive throughout notwithstanding that he had now produced the first certificate. She found he had been inconsistent in his explanations of why the certificate was not produced. Despite a number of serious reservations in his account, she does not positively express a conclusion one way or the other as to whether this allegation was found proved or not. In evidence, she accepted it that at the time she found this was not and this follows from the overall alternative conclusion she did reach on allegation three.

4.46 In respect of allegation three, she found gross misconduct was established within the essence of the allegation. She records how the evidence before her established that he knew that he had deliberately set out to deceive the company by obtaining those wages. She classed this as a breach of trust and confidence as an act of dishonesty. As that amounted to a fundamental breach of his duties as an employee it constituted gross misconduct.

4.47 Mr Edson was given the right of appeal. He exercised that right. His grounds were that he provided everything asked for but the anonymous letter was believed and he was still

dismissed. He relied again on a conspiracy between all senior management to dispense with his employment which expressed strangely as continuing even up to the anonymous letter. In respect of his pay, he stated that *"all I did was to ask for a day off and John Moore choose to pay me. How can I be to blame I do not issue wages and payments as I am not a manager*"

4.48 The appeal hearing took place on 10 October 2019 chaired by Lisa Jones. She also conducted his appeal against the grievance outcome and his earlier warning. Mr Edson again attended alone. In respect of the appeal against dismissal, Mr Edson stated that it was John Moore who had arranged the payment of wages and as such it was Mr Moore that defrauded the company, not him. He said he didn't know until he got his wage slip, but accepted that at that point he did not notify anyone about the over payment about which he was obviously aware and he couldn't explain why he did not inform anyone. He agreed it was dishonest to take a day's wages for a day that he didn't work. He said how John used to bully people regarding picking up fishing tackle and if you refused he would make your life hell. He gave details of leaving work for a few hours in John's car to run errands for him during working hours which happened on 2 or 3 occasions. He accepted he had not raised this with anyone before.

4.49 He explained his no comment response in the disciplinary hearing simply that he did not wish to comment at that time as he thought he was being tricked into saying things.

4.50 In a letter dated 16 October 2019, Ms Jones set out her decision on the various appeals in total. She decided to reject the appeal and confirm his summary dismissal for gross misconduct. She set out her reasons. She recorded how Mr Edson had accepted that taking a day's wages when he had not worked was dishonest, a position he would confirm in evidence before me. She also rejected the allegation that John Moore had bullied the claimant. She explained the illogic of him bullying the claimant to take a day off for training (that he was entitled to take, albeit unpaid) and not only forcing him to receive pay for that day but then to have to carry out the claimant's work. She found the decision to dismiss well founded.

4.51 However, in respect of the failure to follow a reasonable management instructions, she overturned this conclusion on the basis that he did eventually provide what was required on the day of his disciplinary hearing, albeit he had acted unreasonably in delaying

5. Law

5.1 Section 98 of the Employment Rights Act 1996 ("the 1996 Act") states, so far as relevant:

> ***"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(b) relates to the conduct of the employee,***

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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."

5.2 In interpreting the tests within this statutory provision, I have had regard to the guidance in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** on the correct approach to adopt in answering the question posed by section 98(4) of the 1996 Act; to **Post Office v Foley [2000] IRLR 827** on that approach; to **Siraj-Eldin v Campbell, Middleton Burness and Dickson [1989] IRLR 208** that the hypothetical reasonable employer must be engaged in the same field as the employer (see Siraj-Eldin v Campbell, Middleton Burness and Dickson [1989] IRLR 208; to **Sarkar v West London Mental Health NHS Trust [2010] EWCA Civ 289** on substitution ; to **British Home Stores Ltd v Burchell [1978] IRLR 314** on the seminal test in cases of conduct dismissal; to **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA** on the application of the range of reasonable responses to the steps taken to reach a decision as much as the decision itself.

5.3 Mr Jones also relies on **Williams v Leeds United Football Club [2015] EWHC 376 (QB)** for the proposition at paragraph 83 that: -

Similarly if, viewed objectively, the conduct does amount to a repudiatory breach by the employee, then the employer is entitled to rely upon that repudiatory breach as justifying the dismissal irrespective of the employer's motives or reasons for wishing to do so. Consequently, the fact that the Club were motivated by consideration of their own financial and commercial interests, and wished to find a reason, and indeed were actively looking for evidence, to justify the Claimant's dismissal, does not prevent the Club from relying upon conduct amounting to a repudiatory breach as justifying the dismissal on 30 July 2013. Nor does the fact that the Club were unprepared until recently to accept that the notice period was 12 months, rather than three, prevent them from relying upon conduct amounting to a repudiatory breach as justifying termination of the contract without notice.

5.4 I struggled to see that this case takes the respondent very far, in respect of the unfair dismissal claim for which it is relied although it does of course apply in respect of the wrongful dismissal element of the breach of contract claim where the principal established in **Boston Deep Sea Fishing and Ice Company v Ansell (1888) 39 Ch.D. 339** would apply although the "later" discovery of misconduct in this case is four years after the event, it is still before the decision to dismiss. In respect of the claim of unfair dismissal, the principles applying to breach of contract have very limited, if any, relevance. The better authority on this point arises from **ASLEF v Brady [2006] IRLR 576** which deals with search and discovery of misconduct and an employer's reliance on that. The respondent has the burden of proving the factual reason and that it is a potentially fair reason. It is a matter for the tribunal to accept or reject that as the true reason for dismissal. If it is accepted as the true reason, and

amounts to a potentially fair reason in law, it does not matter that the employer's state of mind is such that it is pleased to have discovered a reason to dismiss and welcomes the opportunity to be rid of the employee.

5.5 I have also had regard to the ACAS code No 1 which applies in the case of conduct related dismissals as required by section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992.

5.6 Section 139 of the Employment Rights Act 1996 defines redundancy. There is no dispute the claimant was dismissed and he is claiming a redundancy payment. The law provides a rebuttable presumption that redundancy is the reason in section 163(2). In the context of this case, it will be resolved as a matter of fact as part of the analysis of the reason for dismissal.

5.7 I have had to consider the principal in Ansell and Williams in the context of the failure to pay the claimant at all during the final stages of the disciplinary suspension. The respondent's case is that he had not established he could legally drive a large goods vehicle in a commercial setting and, as such, could not work. The claimant's case is that, at its highest, there was a conduct allegation being investigated and it was no different in principal to the earlier suspension with pay. The question is whether if the claimant is correct, the respondent can nonetheless rely on Ansell to deny that claim of breach of contract. I am clear that Ansell, and for that matter Williams, both deal with an after the fact justification for termination without notice in a defence to a claim for wrongful dismissal. They are specific to that situation and do not advance a proposition of general application that a party to a contract can avoid liability for breach giving rise to a monetary debt if it is able to find some prior repudiatory breach by the other party of which it was not aware at the time and where such repudiation had not been accepted. The Court of appeal in Cavenagh v Williams Evans Ltd [2012] EWCA Civ 697 supports this conclusion. Secondly, the point in time at which the matter could be said to have been discovered is such that in this case it was known to the employer and it was investigated. It did not summarily dismiss until it actually did summarily dismiss sometime later for a different reason. Whilst both parties were fully aware of the facts that may justify dismissal for that reason, until that time they conducted themselves on the basis of the continuation of the contract. Consequently, the terms of the contract must prevail to govern their relationship until it is terminated. The issue is simply whether there was a breach or not.

6. Discussion and Conclusion

6.1 The first issue is the reason for dismissal. The respondent carries the legal burden of satisfying me that the reason or principal reason was the claimant's actions in respect of his pay for the day he attended the unpaid training course. The claimant carries no legal burden but does have an evidential burden to advance his claim that conduct was not the true reason and that this was part of an effort to dismiss him due to his challenges to the earlier redundancy plans. Similarly, so far as he is also claiming a redundancy payment, this issue overlaps with the rebuttable presumption in law.

6.2 I am satisfied that the reason for dismissal was Ms Liddel's belief that the claimant had dishonestly obtained wages for a day he had not worked. That is a matter related to conduct and as such is a potentially fair reason. I am not satisfied that the evidence before me reasonably establishes a desire to dismiss the claimant due to his challenges in respect of the earlier consultation process. I am reinforced in that conclusion by Mr Patel's opportunity to potentially reach that outcome in the first disciplinary hearing yet he stepped back from that outcome. I have further considered the anonymous letter. Whenever there is said to be an anonymous complaint there must always be some concern about where this has originated from, any malicious motive for it and whether it supports a contention of some conspiracy. I have concluded no such concerns are present here even though the fact that it happened when it did does raise some legitimate suspicion. However, Mr Edson's own enquiries established that there had in fact been a problem with drivers at Wilkinsons as the author of the letter suggested. If the letter was planted or staged by someone at the employer, they would have had to know already that the claimant had attended a training course organised by Mr Allsop. The idea that this was part of a plan to establish a reason for dismissal could not have known the basis on which Mr Edson would actually be dismissed and raises a question as to why would someone in authority go to such lengths to construct a disciplinary scenario when, if they had the basis of such a belief to start with, they could simply engage with the potential disciplinary issue that gave rise to. I therefore find no basis for concluding otherwise that the anonymous letter was a genuine whistleblower.

6.3 Having reached a conclusion on the reason for dismissal, it follows that I am further satisfied that the presumption of redundancy has therefore been rebutted. There is nothing before me to support a conclusion that the reason for dismissal was any of the circumstances set out in the definition of redundancy at s.139 of the 1996 Act.

6.4 The second part of the test is to consider on all the evidence whether the respondent has acted reasonably in relying on that conduct as sufficient to dismiss. Although the claimant had by the time of his dismissal been made subject to a final written warning, the circumstances of this alleged misconduct occurred before and could not reasonably be relied on as a means of totting up a dismissal. The purpose of a warning is to improve conduct. It is impossible to improve conduct in respect of events that have already occurred before the warning was issued. In this case, however, the respondent does not rely on the earlier warning. It says that the conduct it found amounted to gross misconduct on its own.

6.5 The procedure adopted was itself one that fell within the range of reasonable responses and consistent with the ACAS code. I am satisfied that the claimant understood the allegations, they were set out in writing, the information on which they were based was provided before a hearing at which he had the right to be accompanied and his responses were considered. The decision was communicated in writing with reasons and gave an opportunity to appeal which was exercised.

6.6 As to the substantive test of fairness, there are essentially two aspects to the test of reasonableness in conduct cases. Was it reasonable for the employer to hold the belief and was that belief based on a reasonable investigation.

6.7 The belief that led to dismissal was that the claimant had knowingly and dishonestly obtained a day's pay to which he was not entitled. The investigation established as a fact he had received that pay. The context of that investigation meant this allegation of misconduct potentially became the "hard place" alternative to the "rock" of the fraudulent training course. The issue in this case that has caused me to undertake some closer analysis is the basis on which Mr Edson came to receive the day's pay. There are two issues going to the reasonableness of the employer's actions. First, whether in some exculpatory way he was invited to take it by an informal invitation from his manager, Mr Moore, indicating that he would cover his work. Secondly, whether what happened can reasonably be said to amount to knowingly and dishonestly.

6.8 The employer acted as a reasonable employer would by putting to Mr Moore the allegations implicating him and investigating his position on that. He not only denied them but denied them with explanations as to how he could not have "covered" the claimants driving duties. The investigation into this matter is not the most thorough one could imagine. It could not be said that "no stone was left unturned". But that does not mean it was not within the range of reasonable responses. If things were left there, I have to say I would retain some nagging concerns about the extent of the investigation into how the claimant came to be paid for this day. I might expect some explanation as to how this state of affairs could come about if Mr Moore did not sanction it yet the claimant's work for that day could not be covered. Against that, the difficulty Mr Edson faces in seeking to challenge the fairness of the belief held is that that both before the employer and again before me, Mr Edson has accepted that he knew he was not entitled to be paid for that day and, more particularly, that his actions were accepted as being dishonest. When an employer is faced with that sort of admission, I do not think it the place of the tribunal to say acting on that admission falls outside the range of reasonable responses.

6.9 The reason for that conclusion is that the investigation into any disciplinary allegation includes any interview or hearing with the accused employee when their account is taken into consideration. The standard of reasonableness of an investigation depends on the circumstances of each case. Where there are denials and the case is based on inference, the standard of investigation necessary to found a reasonable belief will sit at one end of the continuum. Where there are admissions or an employee is "caught red handed", the standard of investigation necessary will sit towards the other end. So as the nature of the case moves from the former to the latter, less in the way of investigation may be needed to satisfy the test of reasonableness.

6.10 I have therefore come to the conclusion that the employer was reasonably entitled to hold a belief that Mr Edson had acted dishonestly and it had a reasonable basis for that belief. I include in that the contemporaneous evidence of the appeal stage at which it seems to me Ms Jones was reasonably entitled to reject the basis of the bullying allegation against Mr Moore raised as part of the claimant's defence. Having established dishonesty, it must be open to an employer to reach a conclusion that dismissal is a sanction reasonably open to it. That sanction was therefore within the range of reasonable responses.

6.11 The test in respect of the breach of contract claim, so far as it alleges wrongful dismissal, is different. It is not for me to evaluate the respondent's belief, but to consider the evidence and come to my own conclusions. There is no further evidence adduced in this case than was the case before the employer at the time of the dismissal. I am faced with the same evidential picture. The nagging concerns I have about the unfair dismissal claim are repeated in respect of the notice claim. I am, however, faced with the same crucial concession in evidence that Mr Edson accepted he acted dishonestly. It seems to me that I cannot ignore that concession. It is fundamental to the relationship and I would be wrong to conclude that there was not evidence before me of conduct which entitled an employer to dismiss without notice. For that reason alone, I must dismiss this much of the breach of contract claim

6.12 However, there is one small part of the claimant's complaint against his employer which does appear to me to be well founded. That is in respect of his suspension without pay. As a litigant in person, he has not articulated it in terms of its legal cause of action but it is clear to me it arises as part of the claim of breach of contract insofar as it was a breach outstanding at the date of termination. There is nothing in the contract which I have been taken to which permits suspension without pay. The claimant was entitled under the contract of employment to be paid his normal pay during the second suspension, just as he was under the first suspension. That continued until such a time as the employer either terminated the contract or reinstated him to normal paid duties. There is nothing about the nature of the allegations in the second episode which altered the underlying basis of his contractual entitlement. At the time the employer formed its suspicion, the DVSA records confirmed that the claimant held a valid driving licence and a valid CPC card. So far as DVSA were concerned, he was entitled to drive an LGV/HGV professionally. The fact that there was a suspicion, and even that that suspicion was reasonably held, is no more a basis for suspending without pay than any other disciplinary matter that an employer suspects. Until there is a basis for reaching a conclusion, at which point the contract may well then be terminated, the contract subsists. If an employer wants to make provision for certain disciplinary matters to lead to a period of suspension without pay, it must contract for that state of affairs with the employee. If it does not, it cannot unilaterally impose a period of nil pay. For those reasons, the claimant is entitled to compensation amounting to the sum lost in normal pay during the period starting on 20 September, when he would otherwise have returned to paid duties, and ending on his last day of employment, 4 October 2019. I calculated that to be 15 days. I do not have details of wages before me and am not in a position to express that in monetary terms. That regrettably means that a remedy hearing will have to be held unless the parties are able to reach agreement on the arithmetic. In that regard, I do not envisage there should be any difficulty. The applicable normal wages were known to both. I have set out the period of time to be paid. This ought to be simple and capable of agreement so much so that if a remedy hearing is required, I will have to explore why that was felt to be proportionate and may have to engage with consequential orders.

EMPLOYMENT JUDGE R Clark

DATE 13 November 2020
JUDGMENT SENT TO THE PARTIES ON

……...……

AND ENTERED IN THE REGISTER

……...……

FOR SECRETARY OF THE TRIBUNALS