



EMPLOYMENT TRIBUNALS

Claimant: Mr Robert McMinn

Respondent: A&F Haulage Limited

HELD AT: Manchester

ON: 22, 23 February, 15
March & 10, 13 June
2022 (in chambers)

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: Mrs Emma Di-Nardo

Respondent: Mr M Huggett (Solicitor)

JUDGMENT

The JUDGMENT of the Tribunal is:

1. The claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded.
2. The claimant was not wrongfully dismissed, he was in repudiatory breach of contract and his claim for notice pay is dismissed.

REASONS

Preamble

1. In a claim form received on 18 April 2020 following ACAS Early Conciliation that took place on 19 March 2020 the claimant, who was employed has brought complaints of unfair dismissal, and wrongful dismissal.

Evidence

2. I heard evidence from the claimant on his own behalf. I also heard from Mrs Emma Di-Nardo, the claimant's daughter who accompanied him to the disciplinary meeting on 20 January 2020 and who also presented the claimant's case in this Tribunal. The claimant also relied on the written and oral evidence of Mr Stephen Creighton, a former Managing Director of A&F Haulage Ltd.

3. The claimant relied on witness statements from former employees of the respondent who claimed to have driven without a tachograph card in various circumstances but were not dismissed. These examples did not play a significant part in this judgment.

4. For the respondent I heard from Mr Masood Raza, currently the Managing Director; Mr Paul Southwell, Senior Transport Manager; Mr Hammad Majeed, Transport Manager; Ms Nitu Patel, a Human Resources consultant; and Mrs Beverly Bell, former Senior Traffic Commissioner for Great Britain and the Traffic Commissioner for the Northwest until 2017, who had also done consultancy for the respondent since leaving office.

5. In the bundle there were copies of notes and documentation from the claimant's disciplinary process and termination, and copies of the respondent's disciplinary and driver policies.

Agreed issues

6. The issues were agreed between the parties, as follows:

6.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("the ERA")? I.e:

- a. Did the Respondent genuinely believe that the Claimant had committed misconduct?
- b. Did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the claimant? In particular:
 - i. Was that belief reasonably held?
 - ii. Was there a reasonable investigation?
 - iii. Was dismissal a fair sanction?
 - iv. Was a fair procedure followed?
- c. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? Would it be just and equitable to reduce the basic and compensatory award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

1.1.1 What was the claimant's notice period?

1.1.2 Was the claimant paid for that notice period?

1.1.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

7. The Tribunal was referred to an agreed bundle of documents totalling 234 pages, with additional witness statements. On the second day of the hearing, the respondents provided typed notes from Nitu Patel's interviews with both Mohammed Taha and Gary Maddock on 24 February 2020, as part of the claimant's appeal process. Having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of

the relevant facts having resolved conflicts in the evidence on the balance of probabilities.

Facts

8. The respondent is in the business of road haulage, mainly carrying asphalt and aggregates (small rocks) in Large Goods Vehicles (LGVs) aka Heavy Goods Vehicles (HGVs). The respondent employed approximately 125 employees running about 100 vehicles. At the time the claimant was dismissed in January 2020, Mr Masood Raza was the Managing Director.

9. The claimant's employment commenced on 1 June 2009. He was dismissed in a letter dated 21 January 2020. The claimant had been an LGV driver for more than 40 years, and spent 17 years training other drivers.

10. The claimant appended medical evidence to his witness statement from his GP surgery that he had an acute illness in 2011 affected his short-term memory and ability to express himself when stressed and that he suffers from Post-Traumatic Stress Disorder (PTSD) and this also affects how he handles stress. I accept this and took it into account in the hearing, and in how I considered his evidence.

Policies & Procedures

11. The respondent's "Driver's Manual 2013" and Handbook, are in the bundle, Part 8 of the respondent's Health and Safety Guide in the Handbook refers to any driving hours infringement as resulting in "possibly dismissal".

12. The gross misconduct rules as set out in the disciplinary policy include "deliberate recording of incorrect working hours", "falsification of records or company documents" and "serious breach of health and safety policies and procedures". Notices were periodically sent to all drivers, reinforcing the rules relating to driving without the tachograph card inserted.

13. The date is not clear but there is a signed confirmation that the claimant was aware of the tachograph rules. Beverly Bell, whose evidence was not specific to this case, stressed the importance of the tachograph cards for safety and regulatory compliance. Stephen Creighton agreed that in any circumstances, driving without a card was serious and required an investigation.

14. In any event the claimant does not dispute the rules or his knowledge of them. His case is based on the argument that the circumstances in which he removed the tachograph card and drove without it were exceptional and not related to the desire to avoid the required break. I find that, in accordance with the respondent's policies and witness evidence, driving without a tachograph card is not gross misconduct *per se*, but it is dependent on the circumstances.

The claimant's act of misconduct

15. On 6 November 2019 the claimant was returning to the depot in an LGV. The claimant says that he was in a state of mental turmoil due to recent events as well as situations that were developing on that day. He says that his younger sister and his older brother, and his best friend of 50 years, had recently passed away. The claimant says that on that day, he had been informed that his son was having problems and

needed to be medically sedated. The claimant's son lives in sheltered accommodation and is autistic. He suffers from hydrocephalus and learning and behavioural difficulties. His housing providers suggested to the claimant that they may call the police due to the behaviour. There has been no challenge to this and I take into account a letter from an organisation called Creative Support that provides the claimant's son housing that confirms his son's conditions and states that he was in a prolonged mental health crisis at that time.

16. The claimant's daughter also contacted him that day and said that she was going to hospital due to a suspected (later confirmed) miscarriage. The claimant says that he found all of this extremely overwhelming. I accept the claimant's evidence, and that of Mrs Di-Nardo, that he had been told these distressing things and was stressed by these events.

17. At the same time, the tachograph machine was flashing a warning that the claimant had been driving for almost 4 hours and 30 minutes, at which time the claimant was required to take a break for 30 minutes.

18. At a distance from the depot that has been in dispute but which I accept to be about 3.5km, the claimant ejected the tachograph card from the machine in the cab of the LGV. The details of this process will be considered elsewhere in the judgment, but it required following a multi-key process on the tachograph machine. The claimant had been driving for 4 hours and 28 minutes, two minutes short of the requirement to take a break.

19. It is agreed that a tachograph card cannot be removed or re-inserted into a machine while the vehicle is moving. The claimant says that the traffic was stop-start; he says the stretch of road had cars parked on both sides for the afternoon school run, and that there was considerable traffic and pedestrians that made stopping the LGV to re-insert the tachograph card dangerous.

20. There was a dispute about whether the claimant intended to eject the card to avoid the statutory break, as the Respondent contends, or whether he merely intended to produce a print-out of the daily record so that he could minimise time at the depot and get home to address the other situations. On the claimant's case, he had not intended to eject the card; in his distressed state, he had not applied his mind to the correct procedure on the machine and had simply pushed the buttons in the most familiar sequence. He was on, he claimed, 'auto-pilot'.

21. I accept the claimant's evidence that at the point that he ejected the card, he was in 'stop-start' traffic in a built-up area. I accept his evidence that, at that moment, he was in an area that was near a school, which is shown on the map, and there were cars parked on both sides of the road. I also accept his evidence that it would not have been reasonable in the circumstances to turn down a side road, because they were similarly busy and the LGV was over 2 metres wide.

22. But this is not the case for the entire journey back to the depot. I have been shown a map of the point where the incident took place and at a minimum there were

3-3.5 kilometres to go. I do not accept that there was literally no safe opportunity to come to a brief stop to re-insert the card over that distance.

23. The claimant eventually arrived back at the depot. The claimant says that he informed Stephen Creighton, Hammad Majeed, and Muhammed Taha, who is another Transport Manager that he had ejected his card prematurely. The claimant had a meeting about a minor disciplinary matter which was coincidentally also related to tachograph cards, but the facts of which are not relevant here. The claimant understandably attaches weight to the claim that he told the managers that he had removed the tachograph card at that point.

24. Stephen Creighton recalled the claimant saying that he had ejected his card to him in the presence of Mohammed Taha. Mr Creighton recalled saying something to the effect that it would be dealt with later, as it wasn't his role to deal with it directly. That was a Transport Manager's job. He said that it was for Mr Taha to take further, but that in any event the process would pick it up down the line. He said that the claimant raised it a second time in the unrelated infringement meeting that took place immediately thereafter.

25. Hammad Majeed gave evidence to the tribunal that he did not recall the claimant raising the incident, and that their only conversation was about the previous incident. Muhammed Taha, who I accept was at the time a Transport Manager and someone that drivers would speak to about relevant issues, said later in response to the disciplinary investigation that he did not recall the claimant speaking to him about it.

26. Mohammad Taha did not give evidence to the tribunal or provide a witness statement. The respondent's witnesses says that Mr Taha said he "had no specific memory" of the claimant telling him that he had driven without his card on 6 November 2019. The claimant says that when he rang Mr Taha on 10 January 2020 after the infringement meeting, Mr Taha said that he did vaguely remember the claimant saying that.

27. I prefer the evidence that the claimant did not raise the issue of the ejected card, meaning the incident on that day 6 November 2019 and not the previous incident, at this point. This is because it is clear from the evidence that the kind of issue that involves a tachograph card is serious enough to warrant immediate recording. Mr Majeed and Mr Taha were active Transport Managers at the time, with Mr Taha's demotion coming later, in February 2020. Stephen Creighton was also well-versed in the rules and must have known immediately that a record needed to be made if he was told this.

28. I find that if the claimant had communicated what had happened to those three managers, there would be some record of it, or some memory of it. I understand the claimant's assertion that Mr Taha told him he remembered it over the telephone, but there is no record of that conversation to compare to the investigation records. Mr Taha twice denied recalling that the claimant told him about the incident on the day it happened. It would be better if Mr Taha had attended to answer questions, but in the absence of that evidence I find ultimately that the claimant did not say it.

29. I understand the claimant's case to be that there was a conspiracy to dismiss him and it suited Mr Majeed and the other managers to pretend that the claimant had not told them about the incident on the day. But if there was such a conspiracy, it is even more likely that action would have been taken on that day, 6 November 2019. Even if the claimant insisted on leaving to deal with his situations at home, there would have been some record or memory that it needed to be dealt with as soon as possible. This is particularly the case since I heard that the respondent company had a poor record of regulatory compliance and had been recently sanctioned for various failures, apparently related to tachograph card records.

30. While I prefer the evidence that he was not told, I reject assertions put to Stephen Creighton that he was a disgruntled employee who sought revenge on the respondent. Mr Creighton's evidence, substantiated by text messages and not disputed by the respondent's witnesses, was that he left the company in amicable circumstances. He had joined and left the company three times over several years. Mr Creighton did not dispute that removing a tachograph card was serious and merited an investigation and potentially disciplinary action. He agreed that intentionally removing a tachograph card to avoid a break merited dismissal.

31. There is a document titled "Missing Mileage" in the bundle dated 10 January 2020 and signed by Mr Majeed and the claimant that states that the claimant's reason given was "Ejected card by mistake-was trying to a printout (sic)". This document has the words "Notified on that day to Taff" (ie Mohammad Taha) handwritten in the margin. I was not directed to any evidence clarifying this.

The disciplinary process

32. Stephen Creighton said that he was in the office when Majeed, Taha, Raza and Maddock said effectively that the claimant had to be sacked. He also said that he was told by Masood Raza not to get involved with this disciplinary matter. Creighton's evidence was not that Mr Raza told him not to get involved because he (Creighton) might be needed to preside over a later stage as a manager, but because the decision was pre-determined.

33. Masood Raza confirmed in his evidence that while it was possible for Mr Creighton to be involved in disciplinary matters, this was normally a Transport Manager's job. This is consistent with Stephen Creighton's evidence that he said the same when the claimant informed him of the event on 6 November 2019. I accept that it may be a reasonable policy not to allow a very senior manager to assist employees in disciplinaries because they may exert undue influence.

34. It is clear that the respondent's witnesses did not consider there to be any explanation for removing the tachograph card other than to avoid the statutory break. Paul Southwell gave evidence about other employees who were disciplined or dismissed for driving without tachograph cards, depending on the circumstances. Mr Southwell gave evidence of two employees he had dismissed for removing tachograph cards, and others who received lesser penalties due to circumstances. He was clear that the only explanation was avoiding a break.

35. Masood Raza's oral evidence was equally clear that in his view, ejecting the card so close to a required break could only be for the reason of avoiding that break.

Hammad Majeed's evidence on this point was the same; driving without a tachograph card was not *per se* gross misconduct, but there was no other explanation for it in this case.

36. I find that the reason for the claimant's dismissal was the respondent's genuine belief in his misconduct. As set out below, the investigation was flawed, but these flaws were reasonably ameliorated by Nitu Patel's investigation.

37. I find that overall a fair procedure was followed and the investigation into the claimant's misconduct was reasonable.

38. The respondent's witnesses accept that there were some aspects of the disciplinary procedure that were not ideal and that I would describe as sloppy. For example, Hammad Majeed accepted in oral evidence that it may have been appropriate to advise the claimant about the investigation meeting on 10 January 2020 in advance, due to the seriousness of the situation. He clearly should have; lying to employees about the reasons for an investigation meeting makes no sense. Majeed also should have been excluded from the process when it became clear that he was a potential witness. In particular, he should not have interviewed Mr Taha.

Investigation Meeting

39. On 10 January 2020, Gary Maddock invited the claimant by text to an 'infringement' meeting, which turned out to be the investigation meeting and which is more serious. Hammad Majeed also texted the claimant an outright lie on the same day, asking him to attend the office for a 'licence check'. Mr Majeed accepted this to be a ruse to get the claimant to attend the investigation meeting. Mr Majeed said in oral evidence that he would "never" inform a driver that there was going to be an infringement meeting "because its serious". He later accepted that due to the seriousness, "maybe" the claimant should have been notified of the true nature of the meeting in advance. He made no attempt to justify the fact that the claimant was not told the true nature of the meeting on 10 January 2020.

40. In oral evidence Mr Majeed said that he thought it was appropriate for two Transport Managers to be present in the investigation meeting because it was serious. He said that he thought someone else needed to take notes as there was a lot of information. I observe that Mr Majeed's notes do not reflect a great deal of information. According to Mr Majeed's handwritten notes, the meeting was no more than putting an allegation to the claimant, hearing his response and then telling him that there would be a disciplinary process.

41. Gary Maddock attended the investigation meeting as a note-taker. Mr Majeed conducted the meeting. Mr Maddock's notes have never been seen because, according to Mr Majeed, they compared notes at the end of the meeting and Majeed's were better.

42. The handwritten notes record that the claimant at first said he did not remember the incident. Upon being given details, the claimant said that he did remember and said that he had reported removing the card to Mr Majeed and Mohammad Taha. It is recorded in the handwritten notes that Majeed said that he did not remember being

told that, and then said “The investigation shows that you have clearly removed your card from the tachograph head to avoid a break.” Maddock is recorded as saying something very similar, though his role was note-taker.

43. The typed notes, purported to be based on the handwritten notes, are even more explicit. It is recorded in the typed notes that Majeed says, “The investigation that I have carried out from the tachograph analysis shows that you have clearly removed your card from the tachograph head to avoid a break. “

44. The claimant said that he ejected his card by mistake when trying to do a printout. The claimant was asked why he did not re-insert the card and it is recorded in the handwritten notes that he said “I pass.” The claimant is informed that there would be a disciplinary hearing the following week, which he accepted. The claimant was not shown the notes at the end of the meeting.

45. The claimant claims that at the end of this meeting he asked Mr Maddock if he should look for another job. The claimant claims that Mr Maddock said that the claimant would get a better reference if he did. According to the Appeal Hearing Investigation Report by Nitu Patel, Maddock denied saying this, but in fact did admit that the claimant asked off the record if he should resign and claimed to have responded that “this was up to him but [it] was a serious allegation and I did not say anything else.” I prefer the claimant’s evidence on this point and accept that Maddock said something to the effect that the claimant would get a better reference if he resigned.

46. The claimant expressed the belief that this meeting had been recorded, because the typed notes were, he said, close to verbatim and much more complete than the handwritten notes. Mr Majeed says that the meeting was not recorded. It is not necessary for me to make a finding on this issue. What is clear is that the typed notes are far more detailed than the handwritten notes.

47. The claimant says that after this meeting, he rang Mohammad Taha and asked him if he remembered speaking about the tachograph card on that day. The claimant claims that Taha said he vaguely remembered it. I find that this evidence in the circumstances does not reach the balance of probabilities.

48. Hammad Majeed wrote to the claimant on 15 January 2020, stating that the decision had been “taken to conduct a full and proper investigation into these allegations” and suspending him from work.

Disciplinary hearing

49. In a hand-delivered letter dated 16 January 2020, Gary Maddock invited the claimant to a disciplinary meeting on 20 January 2020.

50. Mr Maddock and Mr Majeed ostensibly switched roles they had occupied in the investigation meeting. Maddock chaired the disciplinary meeting and Majeed was the note-taker. The records of this meeting are poor.

51. It was not appropriate to have the same two managers conduct the investigation and disciplinary meetings. This is particularly because Hammad Majeed's notes are the record for both meetings, and because he was known to be a witness by the time of the disciplinary meeting.

52. Mrs Di-Nardo assisted the claimant at that hearing because the respondent had refused to allow Stephen Creighton to attend. On the respondent's evidence, their reason for him not being involved is that he may have to take part as a manager eventually.

53. The handwritten notes are skeletal and difficult to understand at points. The typed notes are more detailed and are written in complete sentences. According to these notes, before the claimant had put his explanation that he had spoken to Mr Majeed and Mr Taha on the day (6 November 2019), Maddock stated that the meeting was concluded and the claimant was advised that he would receive the outcome in writing.

54. According to the notes, Ms Di-Nardo had to ask whether Mr Taha had been interviewed. In response, Mr Maddock is recorded as saying in the handwritten notes that it was "Not pertinent until it is appealed" and in the typed notes as saying "We will review it and it is likely to be pertinent to any appeal details should we need it".

55. I do not accept that the meanings of these two sentences are congruent. If the typed notes represent a better record of what was said, then the handwritten notes are completely unreliable, because it is not at all obvious that the handwritten sentence above represented what was actually said in the typed one. But in either case, I find that it was not fair to disregard the inquiry about Mr Taha, especially as the claimant maintained that Taha was equivocal about remembering that it was raised with him. It was clearly important evidence to consider to determine if the claimant had misled the respondent.

56. There is a typed, non-contemporaneous note of a purported conversation between Majeed and Taha on 15 January 2020. The note records that the conversation took 15 minutes, but there are a total of two questions and two answers recorded, which would have taken a matter of seconds to exchange and which shows that this note is at best a summary. Again, these are Mr Majeed's notes. The summary states that Mr Taha said that he had spoken to the claimant "a number of times over the last couple of days about the incident and the current investigation...he does not specifically remember any discussion about the incident on the date in question."

57. I find that this is inappropriate because the claimant had said in the investigation meeting on 10 January that he had spoken to both Taha and Majeed, and Majeed had denied it in that meeting. So, a witness in the investigation interviewed another witness in the investigation and recorded what can only be a broad summary of that conversation. Unsurprisingly, it is recorded that Mr Taha agreed with Mr Majeed.

58. According to the typed notes of the Disciplinary Hearing, this record of Mr Taha's purported answers were not put to the claimant at all. There is no indication in any of the notes of 20 January 2020 that Mr Maddock was even aware that Mr Majeed had spoken to Taha. This is inexplicable because the claimant's claim to have spoken to Mr Taha is raised more than once in that meeting. Either Maddock did not know that Majeed had spoken to Taha, or chose not to reveal that to the claimant, or the conversation between Majeed and Taha had not happened at all. Mr Majeed himself, despite being exercised enough by the claimant's evidence to interject in the meeting to deny his claims, did not feel that it was appropriate to point out that he had spoken to Mr Taha already. This is inexplicable.

59. Mr Majeed said in evidence that he could not sit quietly while the claimant said that he had been informed of the incident on the day. He felt compelled to respond to the claimant's evidence in that hearing, saying in his witness statement that he was "frustrated" because it was a "bare face lie". This may have been reasonable if he had attended as a witness, but was not as part of the investigation. In the disciplinary hearing, I find that Mr Majeed elided his roles as a Transport Manager and as a witness.

60. It is particularly inappropriate because Majeed was aware of the claimant's claim to have spoken to him after the investigation meeting on 10 January. Knowing full well that this was the claimant's case, if he could not contain himself as a note-taker to listening to the claimant's evidence without challenge, then he was not an appropriate person to fill that role.

61. I do not accept the claim that Maddock and Majeed were the only managers available because the others were busy. The size and nature of the respondent's business is such that it would have been "practicable" (ACAS) to find another employee of appropriate seniority; Darren Robinson was a Transport Manager; Masood Raza and Stephen Creighton had also not been involved previously and so were free to take part. I also note that Mr Taha's demotion from Transport Manager took place in February 2020, ie later than this disciplinary hearing. Of course, Mr Taha was also a witness, but that did not prevent Mr Majeed from taking part. In any event, the respondent set the times of the meetings and, considering the size of the business, could have arranged for other managers to take part. This did not render the whole process unfair, but was unnecessary and should have been avoided.

62. It seems to me that there was nothing inappropriate about Mr Maddock being involved in the disciplinary matter because he was new to the business, as the claimant asserted. I accept that he was a qualified and experienced Transport Manager. There is no dispute that disciplinary matters of this type are dealt with in the first instance by Transport Managers. The job of Transport Manager includes a set of responsibilities to enforce compliance with regulations and law that do not change between employers. The fact that he was new to the company, having started in January 2020, does not make him inappropriate to deal with a disciplinary matter per se.

63. The handwritten notes in the bundle record “SC + TM – Can work with.” It is unclear what this means. The claimant asserts that SC refers to Stephen Creighton and that this shows that he told the meeting that Creighton had been informed of the incident on the day it happened. It is recorded in the typed notes differently; in the typed version, the claimant admitted that he had spoken to Creighton in the days before the disciplinary meeting, contrary to instruction in the invitation. The evidence does not support the claimant’s assertion that he told this meeting that Creighton had been informed on the day of the incident.

64. There was no response at all in the disciplinary hearing to the claimant’s claims that he was affected at the time by recent events in his life and especially his children’s difficulties on the day. Had the disciplinary process ended there, it would have been arguable that the disciplinary process was unfair. As set out below, Nitu Patel’s appeal process ameliorated these deficiencies.

Disciplinary outcome

65. On 21 January 2020, Mr Maddock wrote to the claimant to advise that he was dismissed for gross misconduct on the basis that there was a reasonable belief that the claimant “intentionally attempted to deceive the company by removing your tacho card to avoid taking a statutory break...”. The letter went on to refer to “deliberate recording of incorrect working hours, serious or gross negligence and falsification of records and dishonesty”.

Appeal

66. The claimant advised the respondent by letter that he intended to appeal his dismissal.

67. The claimant was invited to an appeal hearing by a letter that he received on 4 February 2020. The letter was dated 27 February 2020, which is agreed to be an error. It was actually dated 27 January 2020. The appeal hearing was scheduled for 6 February 2020 at 11am. The letter requested the claimant’s confirmation that he would attend and if he would be accompanied by a representative by 11am on 4 February 2020. The claimant spoke to Darren Robinson who extended the claimant’s time to respond to the next day, 5 February 2020. The claimant attended the hearing with Emma Di-Nardo.

68. Darren Robinson took notes of the appeal hearing, which was also recorded by everyone’s consent.

69. In the hearing Nitu Patel suggested to the claimant that Mr Creighton may have been excluded because he was a potential witness. Ms Di-Nardo makes the point in response that on that basis, Majeed should not have taken part.

70. Mr Majeed told Nitu Patel as part of the appeal investigation that he was not sure whether Gary Maddock took notes in the investigation meeting, saying he assumed so because Maddock was the designated note-taker. This is different than

the evidence Majeed gives in these proceedings, which is that they compared notes and his were more complete than Maddock's.

71. Nitu Patel found as a result of the appeal that the claimant did not have a designated person who was his supervisor for disciplinary matters, and he could take up matters with effectively any Transport Manager or Stephen Creighton.

72. Maddock says in the dismissal letter dated 21 January 2020 that in addition to Taha's denial that the claimant informed him about the incident on the day, in any event "Taha is not a manager with authority to mitigate the issue." This is contrary to Mr Majeed's evidence that Taha was management "and could deal with anything". It is further contrary to Mr Taha's own evidence to Nitu Patel as recorded in the investigation meeting notes dated 24 February 2020, in which Mr Taha says that he did have day-to-day involvement with drivers and agreed that drivers would bring matters to him "if they have done something wrong".

73. Notwithstanding the respondent's witnesses' assertion that Mr Creighton was not appropriate to take part in the claimant's disciplinary process, Mr Majeed described a disciplinary process that I take to be contemporaneous for another employee as being conducted by Mr Creighton and Mr Taha.

74. In Nitu Patel's investigation meeting notes of 24 February 2020, Mr Maddock is recorded as saying that he did not refuse a request for Mr Creighton to accompany the claimant to the disciplinary. Maddock said that Mr Creighton refused, and said that Creighton told him this personally. This is contrary to Mr Majeed's evidence about this point, as well as Ms Di-Nardo's and Mr Creighton's. Majeed said that in evidence that he refused the claimant's request to be accompanied by Mr Creighton at the disciplinary hearing because Mr Creighton may have to get involved at a later stage as a manager, and it was a small business at the time. I find that Mr Majeed is content to assert whatever is necessary to justify his own actions and the process that was followed in this case.

75. Mr Creighton said in his witness statement that Mr Majeed had in fact decided at an early stage that the claimant would be dismissed and that Creighton should not get involved. Emma Di-Nardo said that Mr Maddock gave her on 20 January 2020 the same reasons that Majeed gave, ie that as a manager it was inappropriate and that Mr Creighton may have to take part in proceedings down the line.

76. The respondent's disciplinary process was hampered by sloppiness and the deficiencies of the disciplinary hearing, which understandably contributed to the claimant's view that it was unfair. But I find that Ms Patel's appeal process ameliorated the failings of the disciplinary by taking evidence from witnesses and putting that to the claimant for his response.

77. Nitu Patel's report along with the notes of her interviews with Taha, Majeed and Maddock is comprehensive. I find that the issues that the claimant raised in appeal against his dismissal were adequately addressed.

78. It seems to me that the claimant had a reasonable opportunity to present his claim that his distress on the day was the reason that he had removed the card and not re-inserted it.

79. Ms Patel finds that the outcome was not pre-determined. In all the circumstances, considering the distance from the depot at which the card was removed and the fact that it was not re-inserted, I accept that the investigation, inclusive of the appeal, was reasonable to conclude that the claimant was avoiding a break.

80. I have criticised the investigation process above. Hammad Majeed in particular took an inappropriate role in the investigation, failed to adequately present results of the investigation, and I find is willing to change his account to best suit the respondent's case. But the question comes down to whether, in all the circumstances, a reasonable employer could conclude that the card had been removed and/or, crucially, not re-inserted over such a distance so as to avoid a timed break. I find that a reasonable employer, following a fair process, could conclude this.

81. Ms Patel also finds that the outcome of the disciplinary process was not overly harsh. Ms Patel considered the claimant's good record and long service. The respondent company at that time in 2019 had recently had serious regulatory compliance problems and was seeking to improve its poor record. This was the reason that Beverley Bell had been hired as a consultant. I find that the outcomes of the various cases the claimant relied upon of other drivers who drove without cards are not directly comparable to the claimant's own. This is because the cases were either demonstrably less serious or because the driver could have been fairly dismissed.

Law

82. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

83. Section 98(4) provides that 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) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

84. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal

to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

85. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: “If no reasonable employer would have dismissed him then the dismissal was fair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair...in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

86. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

87. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the “band of reasonable responses” test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

88. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that 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) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

89. Beverly Bell’s evidence was of a general nature to the effect that tachograph cards are an important part of transport records and removing one is serious, which I

accept. She did not have direct knowledge of the incident in this case and played no part in the disciplinary process.

90. With reference to the first issue, namely, the respondent can establish that the sole or principal reason for the dismissal was the claimant's conduct, a potentially fair one in accordance with sections 98(1) and (2) of the ERA, the Tribunal found that the principal reason was conduct.

91. I find that whether the claimant intended to avoid the break or whether he simply made a mistake in ejecting the card as well as running the print-out is not determinative of whether he was fairly dismissed. The respondent genuinely believed the claimant had committed misconduct. The circumstances of the event might lead a reasonable employer to conclude that the tachograph card was ejected to avoid the required break, which would have been required two minutes after the card was ejected. The fact that the card was not re-inserted before reaching the depot lends weight to the idea that this conclusion is reasonable.

92. The claimant has focused on the fact that driving without a tachograph card is not gross misconduct *per se*. There are several examples of other drivers who were not dismissed despite driving without a tachograph card inserted in various circumstances. The respondent considered the claimant's action to fall under categories including "deliberate recording of incorrect working hours", "falsification of records..." and breach of health and safety rules.

93. For the purpose of unfair dismissal, I do not need to find that the claimant was deliberately avoiding a statutory break in order to find that the claimant's conduct fell within the reasonable range. The question for me is a step removed from that; it is whether the respondent had a reasonable belief that the claimant had committed misconduct serious enough to dismiss him.

94. I accept the evidence from the respondent's witnesses that the correct use of tachograph cards and maintaining accurate records is vital for safety, as well as important for running the business appropriately. The claimant did not dispute any of this. The claimant's argument is that the misconduct was mitigated, and his reasons for his actions explained, as soon as was reasonably possible when he told Stephen Creighton, Mohammad Taha and Hammad Majeed what he had done when he returned to the depot on 6 November 2019. I find that the respondent reasonably concluded that the claimant had failed to raise the issue.

95. The claimant's case amounts to the claim that the respondent should have accepted his mitigation and explanation, and that had the dismissal process been fair and impartial, then it would have. I find that, while clearly harsh to reject the claimant's explanation for his actions, in the circumstances it was reasonable for the respondent to conclude that the claimant removed the tachograph card deliberately to avoid the break. The fact that the card was not re-inserted along the way at any stage reinforces the reasonableness of this belief.

96. According to the respondent's witnesses, the company had a poor regulatory compliance record in the period before this incident and was attempting to improve standards. It is reasonable that the respondent would treat such potential infringements seriously.

97. I have considered the various shortcomings of the respondent's procedures set out above, such as conflation of the roles of chair and note-taker, the poor quality of the notes taken, the failure to interview Stephen Creighton in the investigation and simultaneous refusal to allow him to accompany the claimant to the disciplinary meeting for spurious or misleading reasons, the failure to exclude witnesses from conducting the investigation, etc.

98. The criticisms have force, and the respondent's witnesses were at times nonchalant about this sloppiness. But the claimant was able to put his defence to the claim of gross misconduct and, at least by the Appeal, all of the respondent's witnesses had been interviewed and their evidence put to the claimant. It is not clear that the claimant sought to include Stephen Creighton as a witness at the disciplinary hearing stage. In these circumstances, I find that the procedure was reasonable and fair.

99. With reference to issue, namely, was dismissal fair or unfair in accordance with section 98(4) of the ERA, and, did the respondent in all respects act within the "band of reasonable responses" when it dismissed the claimant, I find that the dismissal in the particular circumstances of this case did. There is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view and I was satisfied the respondent had reasonably concluded the claimant's conduct was so serious dismissal should follow.

100. Having conducted an objective assessment of the entire dismissal process, including the investigation, without substituting myself for the employer, and having regard to equity and the substantial merits of the case, the dismissal did fall within the band of reasonable responses open to employer in all the circumstances of the case.

101. In conclusion, having regard to the reasons shown by the respondent (including the size and administrative resources of its undertaking) it acted reasonably in treating the claimant's misconduct as a sufficient reason.

102. The claimant's claim for unfair dismissal is not well founded.

Wrongful dismissal / Notice pay

103. I find that the respondent has proved on the balance of probabilities that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice.

104. I found that objectively assessed the claimant's action amounted to repudiation of the whole contract, whether he intended this or not. I am satisfied that on the

balance of probabilities, that there was an actual repudiation of the contract by the claimant when he drove the entire way back from the point he removed the card without re-inserting it. It is not enough for the respondent to prove that it had a reasonable belief that the employee was guilty of gross misconduct, The test for a wrongful dismissal claim is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief is necessary as part of the legal test.

105. The claimant says that he ejected the tachograph card unintentionally. He says that his intention was to start a print-out of the day's record to be handed in at the office, to save time so he could leave sooner. In his unthinking state of mind he pressed the same buttons he generally did at the end of the day, which resulted in starting the print-out but also ejecting the tachograph card. This sequence of buttons, he accepts, is different to the sequence that starts the print-out without ejecting the card. He says that he had not intended to eject the card but that he was on "autopilot" and unthinkingly pressed the buttons in the most familiar sequence, the one he did at the end of every working day. But if there was no intention to avoid the break, the obvious course is to re-insert the card at some point along the 3.5 km route. The claimant was experienced enough to know this, notwithstanding his distressed state. His argument that he was not trying to avoid consequences would be more effective had he re-inserted the card and driven through the break time.

106. The respondent was not in breach of contract when it summarily dismissed the claimant, and his claim for wrongful dismissal is not well-founded and is dismissed.

Employment Judge Ficklin

Date: 26 October 2022

JUDGEMENT & REASONS SENT TO THE PARTIES ON

26 October 2024

FOR THE SECRETARY OF THE TRIBUNALS