EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104199/2023

Final Hearing Held in person in Dundee on 22 and 23 November 2023

Employment Judge Russell Bradley

Ian Cartmill	**Claimant** **Represented by:** **B McKinlay,** **Trainee solicitor**
Always Transport	**First Respondent** **Represented by:** **Ms E Mayhew-Hills,** **Litigation consultant**
Jean Murray	**Second Respondent** **Represented by:** **Ms E Mayhew-Hills,** **Litigation consultant**
Frank Shaw	**Third Respondent** **Represented by:** **Ms E Mayhew-Hills,** **Litigation consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. The claims insofar as brought against the second and third respondents are dismissed with the consent of the claimant;

2. The claim for notice pay succeeds; the first respondent is ordered to pay to the claimant the sum of ONE THOUSAND FOUR HUNDRED AND SIXTY EIGHT POUNDS AND THIRTY EIGHT PENCE (£1,468.38);

3. The claimant was unfairly dismissed; the first respondent is ordered to pay to the claimant: -
    a. A basic award of TWO THOUSAND SIX HUNDRED AND SIXTY THREE POUNDS AND NINETEEN PENCE (£2,663.19)
    b. A compensatory award of ONE THOUSAND EIGHT HUNDRED POUNDS AND SEVENTY SIX PENCE (£1,800.76)

4. The claim for accrued untaken and unpaid holiday pay succeeds; the first respondent is ordered to pay to the claimant the sum of TWO HUNDRED AND TWENTY ONE POUNDS AND NINETY THREE PENCE (£221.93); this sum is expressed in gross terms and should be paid to the claimant under deduction of the appropriate amounts of income tax and employee's National Insurance contributions

5. The claim under section 38 of the Employment Act 2002 succeeds; the first respondent is ordered to pay to the claimant the sum of TWO THOUSAND THREE HUNDRED AND SIXTY SEVEN POUNDS AND TWENTY EIGHT PENCE (£2,367.28).

REASONS

Introduction

1. On 3 August 2023 the claimant presented an ET1. On 3 September the first respondent lodged an ET3 in which it resisted the claims. They were of; unfair dismissal; notice pay; holiday pay; and for a failure to provide a written statement of particulars of employment. In his paper apart the claimant also sought an uplift of 25% for a failure to comply with the ACAS Code of

Practice on Disciplinary and Grievance Procedures. No response form was lodged by either of the other respondents.

2. The claimant was employed by the first respondent as a lorry driver. The first respondent is a partnership. The second and third respondents are partners in its business. The first respondent's business (as its name suggests) provides transport and distribution services throughout the UK.

3. It was agreed that as the first respondent is a legal entity separate from its partners and as it was the claimant's employer, the claims against the second and third respondents could be dismissed. That agreement is reflected in the judgment.

4. On 8 September the tribunal issued standard orders. Parties were agreed that they had been complied with. As per paragraph 2 of the Order, a joint bundle of 67 pages was produced. As per paragraph 4, the respondent did not argue that there had been a failure on the part of the claimant to mitigate loss.

5. In discussions prior to the start of evidence and under reference to the schedule of loss and a "*Holiday Pay Analysis*" document (**page 47**) parties agreed that the claimant was entitled to pay in lieu of accrued and untaken holidays representing 1.5 days. The judgment reflects this.

The issues

6. In a brief discussion with the parties' representatives before hearing evidence I set out what I understood to be the relevant issues for me to decide:-

    a. What was the reason for the claimant's dismissal? The first respondent offers to prove it was gross insubordination, and thus related to conduct.

    b. At the effective date of termination did the first respondent believe that the claimant was guilty of gross insubordination?

    c. At the effective date of termination did the first respondent have a reasonable basis on which to reach that belief?

d. At the effective date of termination had the first respondent carried out sufficient of an investigation to have reached that (reasonable) belief

e. Was the dismissal fair taking account of section 98(4) of the Employment Rights Act 1996?

f. If the dismissal was unfair should any reduction be made to the compensatory award to reflect antecedent misconduct by the claimant?

g. If the dismissal was unfair should any reduction be made to the compensatory award to reflect "*Polkey*"?

h. Has there been a failure to follow the ACAS Code of Practice on Discipline and Grievance? If so, was that failure unreasonable? If so, in all the circumstances what (if anything) is just and equitable as an increase on the compensatory award?

i. If the dismissal was unfair should any reduction be made for "*contributory conduct*"?

j. Was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the first respondent to summarily terminate it? If not, what damages is he entitled to for that summary termination?

k. In terms of Regulation 14 of the Working Time Regulations 1998 to what payment in lieu (if any) is the claimant entitled?

l. Did the first respondent fail to provide a statement conform to section 1 of the Employment Rights Act 1996? If so, what award is the claimant entitled to taking account of section 38 of the Employment Act 2002?

Witnesses

7. I heard evidence from (i) Jean Murray the second respondent, (ii) Marvin Murray, the first respondent's transport manager and (iii) the claimant.

Findings in Fact

8. From the evidence which I heard and the documents spoken to from within the bundle I found the following facts admitted or proved.

9. The claimant is Ian Matthew Cartmill. His date of birth is 15 August 1962. The respondent is Always Transport. It is a partnership. Its two partners are the second and third respondents. The first respondent's business is in the provision of transport and distribution services throughout the UK. It has premises in Meigle, Blairgowrie, Perthshire and in Hamilton, Lanarkshire. The claimant's employment as an HGV lorry driver with the respondent began on 1 December 2019. It ended on 13 April 2023. In or about April 2023 the first respondent employed 10 employees. One of them is Marvin Murray, its transport manager. He is the second respondent's son. He was the claimant's line manager. In the period of his employment the claimant had not been issued with a written statement of his terms and conditions. Unlike other employee drivers of the first respondent, the claimant worked a pattern of four days on and four days off. That pattern had been for some time shared by the claimant with another employee who had previously left. Ms Murray's opinion was that it was difficult to have one employee only on such a shift pattern. The claimant was paid weekly. Ms Murray knew that the claimant was entitled to a statement of his employment terms. She had not completed one for him because his shift pattern had made it more difficult than the norm.

10. One of the first respondent's customers is a food manufacturing business with premises in Carlisle. At those premises, the customer manufactures mashed potatoes for a well-known brand name food retailer. The first respondent's contract with the customer requires it to deliver potatoes to the production line in Carlisle on a daily basis. Non-delivery or late delivery of potatoes to Carlisle could result in financial penalties for the first respondent.

11. On 6 March 2023 while driving, the claimant was stopped by a police officer. The reason was that the claimant was driving while he had a mobile

telephone in his hand. The claimant was charged with that offence that day. He was issued with a fixed penalty notice. The officer told him that he would be reporting the incident to the Traffic Commissioner. The officer was aware that he could do so because the claimant's license indicates that he is a lorry driver. A fixed penalty notice, or a conditional offer of fixed penalty, is an administrative alternative to prosecution which includes a fine and in most cases penalty points. The claimant accepted the notice at the time. He believed that he had 30 days from 6 March in which to formally accept the notice (with the imposition of penalty points) or risk a prosecution for the offence. The claimant did not advise the respondent of the incident at the time or at any time before 14 April.

12. Between Tuesday 21 and Friday 31 March the claimant worked every day (**page 43**). On or about 31 March, Mr Murray asked the claimant to work the next day, Saturday 1 April. In that discussion, the claimant agreed to do so on the basis that he could finish early on Friday 14 April. In that discussion, the claimant explained that he wanted to finish early on 14 April because he and his partner were intending to travel from home to Glasgow to attend a concert that evening. Mr Murray agreed. At that time Mr Murray knew that two other drivers would be on annual leave on 14 April. He told the claimant of this in their discussion. Notwithstanding, Mr Murray's view was that it would be possible to work things out for 14 April such that the claimant could finish early that day.

13. On Saturday 1 April 2023 the claimant's total working time was 4 hours and 37 minutes (**page 43**). 2 hours and 22 minutes were driving time.

14. In week commencing Monday 10 April 2023 the claimant was scheduled to work Tuesday to Friday, 11 to 14 (see **page 38**). He did work (both driving and other work) on those days (see **page 43**).

15. By about 5.00pm on Thursday 13 April the claimant was "*parked up*" for the night in Penrith. At about that time, Mr Murray telephoned him. Mr Murray said to the claimant that; there was a loaded trailer at the Hamilton depot; he needed the claimant to pick up the trailer from there and take it to the

customer in Carlisle the next day 14; the contract was critical for the first respondent; there was pressure on the first respondent to make the delivery to Carlisle the next day and that he was "*absolutely stuck*" for a driver. The claimant refused. He was unwilling to drive from Penrith to Hamilton and then make a return trip to Carlisle because in his opinion he would not be finished early, or at least not early enough that he could travel home and then to Glasgow for the concert that evening. In the course of a second conversation on 13 April Mr Murray told the claimant to return to the Hamilton depot the next day and at that stage he would be "*finished*." At 19.04 on 13 April the claimant sent a text message to Mr Murray. It said, "*Did you mean finish for good tomorrow wasn't sure*" (**page 36**).

16. At about 5.00am on 14 April the claimant left Penrith. He arrived at the first respondent's Hamilton depot at about 7.00am. He took his personal possessions from the first respondent's vehicle which he had driven from Penrith. He left Hamilton in his car.

17. Mr Murray arranged for a sub-contractor to take the delivery to Carlisle from Hamilton on 14 April.

18. On Sunday 16 April at 16.15 the claimant sent a text message to Mr Murray. It said, "*What's happening Tuesday*." The claimant's intention in asking that question was to find out if he was to work. Mr Murray did not reply to either of the claimant's text messages.

19. By Sunday 23 April, 30 days after 23 March the claimant had not disputed the fixed penalty notice issued to him. The second respondent's view is that the claimant was under a statutory duty to inform the first respondent on receipt of the notice. It is her opinion that the claimant was under a statutory duty to also inform the Traffic Commissioner of it at that time. In her view the issuing of the notice and the failure to report it to the first respondent's insurers could have had a materially detrimental effect on its insurance policy.

20. Sometime after 23 April the claimant's driving license was endorsed with 6 penalty points for the offence committed on 23 April. The endorsement code is CU80. The offence for which the code was applied was the use of a mobile

telephone while driving. In the second respondent's view had the claimant disclosed the penalty and the circumstances which led to it, she would have dismissed him for gross misconduct.

21. On 26 April at 12.00 noon the claimant sent a text message to the second respondent. It said "*Disappointed about not receiving any word from pension or explanation of dismissal, need P45, no disciplinary procedure was carried out, it would appear you ignore all messages, you give me no choice to go to tribunal*," (page 37).

22. On 6 May the claimant met with the second respondent. She gave him a letter dated 29 April (**pages 38 and 39**). It said that it detailed as best she could "*the events and circumstances leading up to dismissal on Friday 14 April 2023*." That detail was based on information provided to her by Mr Murray. After narrating her understanding of the background, the letter said, "*Your refusal to work to the timescale that you had previously agreed placed the company in jeopardy of losing a vital contract and causing financial hardship. This was in the company view "Gross Misconduct" as the only reason given for the refusal was that you would be too tired to enjoy the concert, even although you would have been finished work by lunchtime (12pm)*."

23. Sometime in May, the first and second respondent learned of the endorsement of the claimant's driving license. They thus learned of the endorsement code and the imposition of the penalty points. They learned from a consultant engaged by the first respondent who assists it with road traffic compliance issues. (**page 45**) In the second respondent's view had the claimant still been employed at that time he would have been summarily dismissed for gross misconduct for either the offence/endorsement or for his failure to report it timeously.

24. Sometime around mid-May the first respondent obtained an "*Overspeed Events*" document relative to the claimant (**pages 34 and 35**). Its date range is the period 1 January to 14 April 2023. It shows the registration number of the vehicle driven by the claimant as being SL21ZYF. It shows 13 entries

within the period 19 January to 24 February in which the claimant's vehicle exceeded the speed limit.

25. While employed by the first respondent the claimant's gross weekly pay was £591.82. The net version was £489.46.

26. On or about 23 May 2023 the claimant began employment with Stewarts of Tayside Limited (see **page 54**). In that employment he earns on average (net) £402.29 per week (**page 31**).

27. On or about 25 September the first respondent obtained a "*Driver Activity Totals Report*" relative to the claimant (**pages 42 to 44**). Its date range is the period 1 January to 24 April 2023. It shows a number of entries within the period 20 February to 24 April 2023. It shows, amongst other things, "*Total Drive*" and "*Total Other Work*" in hours and minutes.

28. The first respondent accepted that Marvin Murray fell short of the standards expected of his role in the instance of his actions with the claimant (**page 28**). It accepted that he did not follow the correct procedure being "*a policy in place covering the Disciplinary and Grievance process that should be applied in all circumstances*." Mr Murray was given a written warning to be kept on his record for 3 years. Mr Murray has agreed to attend an HR refresher course covering discipline and other aspects of the employee and employer responsibilities towards each other in the workplace.

29. When these proceedings began on 3 August 2023 the first respondent had not issued to the claimant a statement of his terms and conditions of employment.

Comment on the evidence

30. While Jean Murray's evidence provided some useful background it was not primary evidence relevant to the question of the fairness of the claimant's dismissal as it was "*second hand*" provided to her by her son. She accepted that her letter of 29 April 2023 (**pages 38 and 39**) was based on information provided to her by him.

31. Not all of the documentary evidence which was relevant was produced. For example, there were other text messages between the claimant and Mrs Murray prior to their meeting which were not in the bundle.

32. There was a dispute between the claimant and Mr Murray about their agreement that the claimant finish early on Friday 14 April. The claimant's version was that he "*traded*" his work on Saturday 1 April (which Mr Murray had requested) in exchange for it. Mr Murray's evidence was that the claimant had simply requested an early finish and had been paid for his time on 1 April. While not critical to the issues for me, I preferred the claimant's version principally because it was within the respondents' gift to prove that the claimant had been paid for 1 April. The corresponding payslip could have been produced which would have shown hours worked (and paid) for the week which included 1 April. The respondents did not produce any payslips. The respondents had notice of this part of the claimant's case from his ET1 paper apart.

33. Regrettably, there was no clear evidence as to what was an "*early finish*". That is probably understandable where the claimant's working hours, including start and finish time, varied.

34. In its response to the claim, the respondent said; "*Any delay* [in supplying] to the first respondent's customer in Carlisle] *meant that severe penalties could be incurred or even loss of the contract in the event of a non-delivery*" (**page 28**). There was no evidence that any penalty was incurred, nor that the contract was lost. This is perhaps obvious given that Mr Murray was able to find someone else to take the load in question to Carlisle on 14 April. The first respondent would (obviously) have known that at the time.

Submissions

35. The parties made oral submissions. I mean no disservice in not repeating or summarising them here. To the extent relevant and necessary I refer to what was said on each side below.

The law

36. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine; (b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on the termination of the employee's employment*." Article 5 does not apply in this case.

37. Section 98(1) of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is a reason which falls within subsection (2) or is for some other substantial reason. Subsection (2)(a) provides that a reason is one that "*relates to the conduct of the employee*."

38. Section 98(4) of the 1996 Act 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 reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

39. Section 38(3) and (4) of the Employment Act 2002 provides "*If in the case of proceedings to which this section applies — (a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer*

was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (in the case of a claim by an worker) under section 41B or 41C of that Act, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. (4) In subsections (2) and (3) — (a) references to the minimum amount are to an amount equal to two weeks' pay, and (b) references to the higher amount are to an amount equal to four weeks' pay."

40. "*The Employment Tribunal is not concerned with the reasonableness of the employer's decision to dismiss, but the factual question, was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?*" ***Enable Care & Home Support Limited v Pearson*** UKEAT/0366/09/SM at para 28.

41. Insofar as relevant in deciding the issues and on remedy I have referred to other statutory provisions and caselaw below.

Discussion and decision

42. The claimant was summarily dismissed. The respondent's pled case is that he was dismissed for "*gross insubordination*." Ms Murray's letter of 29 April (at **page 39**) asserts that the claimant's conduct which led to his dismissal was "*gross misconduct*." Adopting the approach from ***British Home Stores v Burchell*** [1980] ICR 303, I accept that at the (agreed) time of dismissal Mr Murray genuinely believed in the guilt of the conduct alleged, being the claimant's refusal to work to a timescale that he had previously agreed. But at the time of his decision Mr Murray had not carried out any investigation such that his decision was a reasonable one. The respondent has not satisfied parts two and three of the Burchell "*tests*". That being so, the claimant's dismissal was unfair. The dismissal was instant, and an immediate reaction to the circumstances which prevailed in the evening of 13 April. No investigation occurred. A reasonable employer would have carried out an investigation prior to reaching a decision (see paragraph 5 of the ACAS

Code). Paragraph 6 of the Code provides that different people should, where practicable, carry out the investigation and the disciplinary hearing. In this case, either of the partners in the business (the second or third respondent) could have conducted a disciplinary hearing but of course they did not. A reasonable employer would have provided sufficient information prior to a disciplinary hearing so as to allow the claimant to answer any allegations. A reasonable employer would have held a meeting to which the claimant would have been invited (with reasonable notice) and would have afforded him the right to be accompanied at it. Had these steps been taken, any penalty or loss to the first respondent would have been clearer. Had these steps been taken, the first respondent would have considered the claimant's answer to the allegation in the context of a formal process and heard his explanation in it. In its response document, the respondent accepted that it had a policy covering discipline and grievances that "*should be applied in all circumstances*." The respondent accepted that it did not follow its own policy in these circumstances. That being so, it is in my view extremely difficult to maintain that the claimant's dismissal was fair. In her submission, Ms Mayhew-Hills sought to rely on the decision of the Scottish EAT in the unreported case of ***Gallacher v Abellio Scotrail Limited*** UKEATS/0027/19/SS decided by the then President Mr Justice Choudhury. In that case, the claimant was unsuccessful in her appeal from a decision of the employment tribunal which had found her dismissal to be fair for "*some other substantial reason*" where no procedure had been followed. At paragraph 43, the President said, "*The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether*." And at paragraph 45 he said, "*In the present case, the Tribunal expressly stated that it did not consider that any procedure would serve any useful purpose*." That case involved two senior managers who needed to be able work

together effectively in order the deliver what the respondent's business required at a critical juncture. Several points are noteworthy. First, the reason relied on in ***Gallacher*** was a breakdown in that relationship and so "*some other substantial reason*" as per section 98(1)(b) of the 1996 Act. That is clearly distinguishable from the facts here where the allegation is one of gross misconduct. Second (and as Ms Mayhew-Hills accepted) for the claimant's dismissal to be fair it would need to be an "*unusual and rare case*". There is nothing which made the facts of this case unusual or rare. There was a dispute between the claimant and his line manager. That dispute arose from tension between Mr Murray's instruction to the claimant to carry out work for which he was employed and the claimant's position which was that in the circumstances of their agreement the instruction was not a reasonable one. Third, the respondents accept that their own disciplinary procedure should have been followed. I have set out above my views on what benefit there may have been had it been followed. To borrow the words of the EAT in ***Gallacher***, "*fundamental notions of natural justice*" may well have been observed if the respondents had followed their own disciplinary procedure.

43. The extract from ***Pearson*** is uncontroversial. I require to answer, on the evidence in this hearing, the factual question; was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? In my view the answer is "*no*". In my view, the claimant had reached an agreement that he would be allowed to finish early on Friday 14 April. When he refused to make the round trip from Hamilton to Carlisle (starting the day in the early morning about 2 hours away from Hamilton) he was entitled to say that in all likelihood he would not be able to finish early. That being so, his refusal of Mr Murray's instruction was not unreasonable.

44. By agreement of the respondents, the claim for accrued, untaken and unpaid holiday succeeds.

45. The claim in respect of a failure to provide a statement conform to section 1 of ERA 1996 succeeds. Ms Murray accepted that she knew that one should have been issued. Her explanation was that his work pattern (4 on 4 off)

made it more difficult to complete it. Schedule 5 of the Employment Act 2002 lists the jurisdictions to which section 38 applies. They include (i) unfair dismissal and (ii) a breach of the Working Time Regulations 1998.

Remedy

46. It is convenient to deal with the claim for notice pay first. In his schedule of loss the claimant seeks an amount representing the statutory minimum period of notice, in this case three weeks. Mr McKinlay agreed that loss should be based on net pay. The amount due and as per the judgment above is therefore £1,468.38. That amount represents net pay for the period from 13 April to 4 May.

47. On the claim of unfair dismissal, the second respondent took no issue with the calculation of the basic award, £2663.19. In my view the period of loss for the compensatory award begins from 4 May because the claimant has been compensated for the earlier period by the award for loss of notice pay. Section 123(1) of the 1996 Act provides that subject to the provisions of the section and other which are not relevant for present purposes "*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*." Mr McKinlay did not refer to any authority to support the proposition that the claimant would be entitled to an award of damages for the notice period and also be compensated for the same period in the compensatory award. Such a suggestion seems to me to be contrary to the primary words of section 123(1) of the 1996 Act, "*such amount as the tribunal considers just and equitable in all the circumstances*". In the case of ***W. Devis & Sons Ltd. v Atkins*** [1977] I.C.R. 662 the House of Lords held that since the amount of compensation to be assessed in accordance with what is now section 123 had to be "*just and equitable in all the circumstances*" a tribunal in assessing that compensation may take into account evidence of misconduct, which came to light after the dismissal, and reduce the compensation which would otherwise have been awarded. I have found that sometime in May, the first and second respondent learned of the

endorsement of the claimant's driving license. It is likely to have been after 6 May. Had Ms Murray know about it before then it is likely that she would have either amended the letter of 29 April or she would have said something about it when they met. She did neither. Sometime around mid-May the first respondent obtained an "*Overspeed Events*" document. It is probable that it was around the same time that the respondents learned of the CU80 offence. It is therefore likely that following a disciplinary process the first respondent would have dismissed the claimant by 1 June based on either the fact of that offence or the claimant's failure to report it to them. It is more likely than not that that dismissal would have been fair. The first respondent's unchallenged evidence was that it took the offence of using a mobile telephone while driving extremely seriously. Accordingly, the period of loss for the compensatory award is from 5 May to 1 June a period of 4 weeks. In that period the claimant's loss of earnings was £1,957.84. By 1 June (on 23 May) the claimant had obtained alternative employment earning (net per week) £409.29. He had thus mitigated that loss by £517.23 being 9 days' net pay. On this basis the compensatory award would be £1,440.61.

48. Ms Mayhew-Hills sought a reduction to reflect the impact of "*Polkey*". I reminded myself of what was said by Langstaff J, then the EAT President in ***Hill v Governing Body of Great Tey Primary School*** [2013] I.C.R. 691 *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done)...The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand*." If a fair process had occurred (by which I mean one which was carried out in accordance with the first

respondent's procedure which in turn complied with the ACAS Code) my view is that the first respondent would not have dismissed the claimant for the circumstances on 13 April which it labelled "*gross insubordination*". It appears from the letter of 29 April (**pages 38 and 39**) that a significant (if not principal) element of the complaint focused on the "*jeopardy of losing a vital contract and causing financial hardship*" to the first respondent. While that may have been a live issue in Mr Murray's conversations with the claimant on 13 April, by the time of any disciplinary hearing it would have been obvious that that element (that jeopardy) had diminished if not disappeared.

49. The claimant in his schedule of loss seeks an uplift of 25% to any compensatory award alleging an unreasonable failure to comply with the ACAS Code. There was self-evidently a failure to do so in this case. The potential for adjustment to the compensatory award only applies if the failure to comply with the provisions of the Code was 'unreasonable' (see ***Kuehne and Nagel Ltd v Cosgrove*** UKEAT/0165/13/DM). In my view the failure in this case was indeed unreasonable. On the first respondent's written case; its own disciplinary process was not followed "*due to the stress of the situation he* [Mr Murray] *found himself in*"; and he was called to a meeting and reminded of the correct procedure to be applied as per the Company Policy before an employee can be dismissed **(page 28**). A reasonable inference to draw is that Mr Murray was aware of the procedure which (again on the written case) should be applied in all circumstances. It was, given what Mr Murray knew or at least should have known during the conversations which he had with the claimant on 13 April, an unreasonable failure not to comply with the Code. *" … the relevant circumstances must nevertheless be confined to those which are related in some way to the failure to comply with the statutory procedures … The circumstances which will be relevant will inevitably vary from case to case and cannot be itemised, but they will certainly include: (a) whether the procedures were ignored altogether or applied to some extent (see* ***Virgin Media Ltd v Seddington & Eland*** *UKEAT/0539/08, at paragraph 20); (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there are circumstances which may mitigate the blameworthiness of the failure. Those*

factors are sometimes embraced under the labels of the "culpability" or "seriousness" of the failure." (***Lawless v Print Plus*** UKEAT/0333/09/JOJ at paragraph 10). The first respondent's own procedure was ignored. Even after the second of the claimant's text messages it did not occur to the Mr Murray (and thus not to the first respondent) that it could (or perhaps should) have offered a right of appeal. It is certainly possible that had the first respondent complied with Paragraph 6 of the Code a more objective view of the incident would have prevailed. There are no mitigating factors. In my view it is appropriate to increase the compensatory award by 25%. It is thus increased to £1,800.76.

50. In considering the question of contributory fault, a tribunal must identify the conduct which is said to give rise to it. Having identified it, it must ask whether that conduct is blameworthy. The Tribunal must ask whether that conduct caused or contributed to the dismissal to any extent. If it did so, then the Tribunal moves to the next question; to what extent should the award be reduced and to what extent it is just and equitable to reduce it? The respondent suggested a reduction in any compensatory award (and a corresponding basic award reduction) based on; the claimant's refusal to make the delivery on 14 April and his attitude in the telephone conversations on 13 April. On my analysis, that conduct is not blameworthy. The claimant's refusal to drive to and from Carlisle was based on his understanding of an agreement which had been previously reached with Mr Murray. It was (on my findings) not unreasonable for him to refuse that work. Any "*attitude*" which he had in those conversations resulted from that understanding and was equally not blameworthy. I have therefore not reduced the compensatory award for any contributory conduct.

51. The parties are agreed that the claimant is entitled to a payment representing 1.5 days accrued untaken and unpaid holiday. Any order for the payment of accrued holiday pay should use gross figures, and the sum should be taxed by the first respondent. The corresponding judgment above reflects this.

52. By Section 38 of the Employment Act 2002 an award of an amount equal to two weeks' pay is mandatory. But an amount equal to four weeks' pay may

be made if I consider it is just and equitable in all the circumstances. The first respondent is a licensed national UK operator. It is obvious from Mr Murray's reaction on 13 April that he believed that one of its contracts was in jeopardy because the claimant was unwilling to drive a vehicle. A reasonable inference to draw from that is the importance of its drivers to its business. Despite that importance, the claimant had not, in a period of over 3 years, been issued with a section 1 statement. The belief that drafting a version to suit the claimant's work pattern was difficult is no real excuse for that failure. In my view the circumstances here (the importance of drivers such as the claimant and the absence of a credible reason) justify an award of four weeks' (gross) pay, and thus of £2,367.28.

Employment Judge: R Bradley
Date of Judgment: 21 December 2023
Date sent to parties: 22 December 2023