EMPLOYMENT TRIBUNALS

Claimant: **Mr C Martin**

Respondent: **Hanson Quarry Products Europe Limited**

Heard at: **Cardiff** **On: 21 August 2018**

Before: **Employment Judge Emery**

Representation:
Claimant: Mr J Bromage (Counsel)
Respondent: Miss S Clarke (Counsel)

JUDGMENT

The claims of automatic unfair dismissal, unfair dismissal and wrongful dismissal all fail and are dismissed.

REASONS

The Issues

1. The claimant, an HGV Driver, was dismissed on 30 August 2017 following a disciplinary process, on the ground that he had committed gross misconduct, the respondent's decision being that the claimant had failed to undertake appropriate safety checks on his vehicle prior to commencing driving, which constituted breach of its health and safety requirements and contractual procedures, amounting to gross misconduct.

2. The claimant alleges that he was dismissed because he had was involved in a dispute about what he considered to be potential unauthorised deductions from his pay, that he was unlawfully dismissed for asserting a statutory right. He also asserts that his dismissal was unfair. The claimant claims four weeks' notice entitlement as he considers his dismissal should have been on notice.

3. The parties helpfully provided an Agreed List of Issues (38A-B) and a Key Party and Chronology 38C-E). The issues are as follows:

4. Automatic Unfair Dismissal

    a. Did the claimant assert infringements of a statutory tight (unlawful deduction from wages) to Arron Burgers immediately before his suspension?

    b. If so was the assertion made in good faith? If yes,

    c. Was the reason/principle reason for the decision to dismiss (by Nick Elliot) the claimant, the fact that he had asserted a statutory right to Mr Burgers?

5. Unfair Dismissal

    a. What was the reason for dismissal?

    b. Can the respondent show that it was it for a potentially fair reason - conduct?

    c. Did the respondent:

        i. have reasonable grounds for believing that the employee was guilty of that misconduct?

        ii. have reasonable grounds for holding that belief?

        iii. carry out as much investigation as was reasonable?

    d. Was dismissal within the range of reasonable responses available to a reasonable employer in the circumstances?

    e. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The *Polkey* issue).

    f. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

6. Wrongful dismissal

    a. Did the claimant commit gross misconduct or repudiatory breach of his contract?

    b. If not, the claimant is entitled to 4 weeks' notice pay.

Witnesses

7. I heard evidence from Mr Nick Elliott, Transport Manager who chaired the disciplinary hearing; Mr Gary Morgan Area Operation Manager who chaired the dismissal appeal hearing. For the claimant I heard evidence from the claimant and his union rep, Mr Gary Sloan, a Regional Officer at Unite. Prior to hearing the evidence, I read all witness statements and the documents referred to in the statements.

8. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, and evidence that was known to the parties during the disciplinary process. Also, this judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The Facts

9. The claimant started working for the respondent in March 2014, at which time he was an experienced HGV Driver; his job description required him to have *"full working knowledge of … relevant health and safety … legislation"* (49). The claimant signed receipt for health and safety information, including the respondent's policy on *"Vehicle Inspection – Daily Vehicle Checks",* requiring the claimant to carry out a daily vehicle check and requiring him to keep a record of checks, that *"It is a drivers' responsibility to ensure their vehicle is fit for purpose before carrying out any work"* (57). He received and signed for training on this issue.

10. On 4 January 2016, the respondent sent a letter regarding its *"Current Non-Contractual Bonus Scheme"* which incorporated various KPSs including *"Truck Inspection/ Daily Walkaround Checks"* and *"WTD/Tacho Compliance".* The letter made clear that any non-compliance with the KPSs would result in a loss of bonus, including for any failure to undertake vehicle inspections and daily walkaround checks *"The company expects to see a clear 15 minutes of other work on the Tacho both at the start and end of your daily shift"* (75).

11. On 8 June 2017 the claimant disputed with Mr Burgers what the respondent considered to be a tachograph infringement, as his tachograph showed he was a few minutes late to commence his mandatory (WTR) driver's break. He argued that the tachograph clock was faulty, that he should not *"pay a*

penalty out of my pay when my vehicle has a fault with its clock". He referred to his anxiety issues and his recent occupational health appointment and he complained that the stress was not helping his health. He asked for understanding, that this was not the pressure a driver should have to put up with at work.

12. On 13 June 2017 the respondent wrote to the claimant saying that he had unsatisfactory levels of tachograph compliance and he was at *"Stage One of the escalation process and should consider this letter as an offer of retraining"* (87). By end June he had another tachograph infringement and was on stage 2 of the process; again he was offered retraining. He was told that as a result of repeated infringements he would lose a total of £80 over 4 weeks in loss of bonus under the 'non-contractual bonus scheme' (90).

13. On 31 August 2017 the claimant drove the vehicle having signed-off on his Driver Vehicle Check (104). Later that day the vehicle was checked and was found to have three *"safety related defects",* including no brake lights/defective relay, and near-side side-light inoperative (107).

14. On 19 September 2017, the claimant had a return to work meeting following a period of sick leave. There was a lengthy exchange at this meeting regarding the tachograph break issue, with the claimant complaining that he was being unfairly penalised an £80 loss of bonus because of his latest infringement; the claimant was told he would be put on a management process; the claimant claimed it was totally counter-productive, that *"everyone's pissed off…"* His interviewer Mr Burgers responded *"well stop having infringements"* (p110E).

15. On 5 October 2017, the claimant attended a disciplinary investigation meeting, chaired by Mark Byfield the Distribution Resource Manager; the claimant attended with a union rep (Steve Sloan). The claimant was told the investigation was instigated following a vehicle service on *"30 August when the service provider found the brake lights were not working and the relay had gone. This led to management investigating to find out why."* (111). The claimant was told that no walkaround checks appeared to have been done, using cctv and tachograph evidence having been considered (111).

16. The claimant's case was that he had done his checks and had checked his brake-light by looking at reflection of lights in a window at the depot (the respondent accepted this was a reasonable way of checking brake lights). He said that on that day he had reversed into one yard and that nothing had been picked up – *'they must have been working at that point".* He said that he had arrived at the depot a 06:55 at the latest, he did his vehicle checks before putting his tachocard in the tachograph, this explained why it was put in at 07:16 and he left the depot at 07:19. The claimant was told there was no evidence he had undertaken the checks on the vehicle camera. The

claimant said that he didn't put in the tacho, that it *"Doesn't bother me in the morning that I lose 15 minutes"*. In response, the claimant was asked *"But you mind when your bonus gets taken away?";* the claimant's response was *"Yeah that just annoys me".* (117).

17. The claimant was invited to a disciplinary hearing which took place on 25 October, for *"a serious breach of health and safety"* which he was told may constitute gross misconduct and could lead to his summary dismissal (119). The meeting was chaired by Mr Elliott, the Transport Manager, the claimant again attended with Mr Sloan. He was told that a vehicle check at the service provider showed that brake lights were not working despite a serviceable driver check being completed. The claimant said that he had done a 15-20 minute check, then put his card in and turn the truck on – he then gets out and does further checks. He then returns to the cab and signs the defects sheet. The cctv footage was looked at by those present and the claimant told by Mr Elliott that *"I can't see you walking round that vehicle checking it"* (128). He was asked why he had checked the box on the Vehicle Check Sheet titled *"trailer couplings"* which were not installed on his truck, and had done so on other reports. The claimant was told *"I have a video, a tacho card and defect reports that suggest to me you are just ticking off without checking"* (129).

18. In his evidence at Tribunal, Mr Elliot said that he had *"listened to the claimant, how long he has been working on vehicles … there was documentation which shows what he needed to do and he knows his obligations. … I cannot understand how vehicle check completed within 3 minutes"* and that doing checks before inserting tacho card *"this is contrary to the law";* that he *"did not believe"* the claimant's explanations.

19. The claimant said in the disciplinary hearing that he considered he was going *"straight to the disciplinary because I'm too outspoken"*, the claimant was told that he was being disciplined *"because it's a serious breach of health and safety…".* Mr Elliott said in his evidence to the Tribunal that he *"had no idea"* the claimant was seen as a troublemaker by Messrs Burgers and Plant; I accepted this evidence as accurate.

20. Mr Sloan pointed out that the claimant had a clean record, that people can *"get comfortable in their routines … and sometimes it takes something like this to remember what they are supposed to do."* He asked for a *"corrective mechanism, and that any penalties would allow him to continue his employment."* (130).

21. It was put to Mr Elliott in cross-examination that the bonus scheme documentation (75) referenced a loss of bonus if the vehicle check KPI is not completed – similar to the claimant's loss of bonus of tachograph non-compliance, that the disciplinary sanction should have been loss of bonus. Mr Elliott stated that this was a serious disciplinary issue, that his contract

makes clear that a contravention of health and safety is a disciplinary issue. Mr Elliott said that the tachograph breach on rest breaks is *"…human nature, and people get it wrong …. However, vehicle checking is fundamental. So it is wrong to take tachograph infringement process as the same as the pre-start process*." He said that drivers *"have to have a higher standard applied to them, including pre-start checks. There are numerous examples of unsafe vehicles. Safety is the only part that is regulated. And reputation of company and officers, as I would be in front of traffic commissioner."*

22. After a 40-minute adjournment, the claimant was told he was being dismissed for gross misconduct; *"even if we dismiss the CCTV footage which is secondary evidence, the tachograph evidence shows you didn't have time to do the checks … I don't believe you did [the checks] and I cannot see proof either. The processes that you have been through as an employee makes this crystal clear what is expected of you."* (131). The claimant was informed he was dismissed as of that date – 25 October 2017 – and he was sent a letter confirming the reason for dismissal, effective 25 October 2017, the following day (133).

23. The claimant appealed, on the basis the evidence was circumstantial and did not take into account the claimant's explanations given at the hearing *"as to why I appear not to have carried out the morning inspections"* (136).

24. The appeal was chaired by Gary Morgan (Area Operations Manager) the claimant was again accompanied by Mr Sloan. He said that the claimant's repeated evidence was that he carried out pre-start checks before starting the vehicle up. *"There may be concerns about the practice but dismissal may be unsafe. Clean record to date and a punitive decision; not given the benefit of the doubt" (138).* The claimant was asked for his driving background, his explanation of events, and his understanding of pre-start checks. He was asked about his sequence of events on the day in question. Mr Sloan said *"There is clearly an issue around when the card goes in for protection of the company and [the claimant]. There is a method of working that has not been picked up and there should have been a warning not a dismissal".* (141).

25. Mr Morgan upheld the claimant's dismissal and in his subsequent letter confirming his decision, he stated that he had interviewed 6 drivers who had confirmed that *"you must insert your tacho card into the lorry prior to completing any checks in order to demonstrate that the pre start check is being completed";* he stated that he checked that the company had made the claimant aware of the requirement to record the inspection – including a document that stated *"the company expects to see a clear 15 minutes of other work on your Tacho both at the start and end of your daily shift … the FTA handbook for which you have signed for states that a driver must have his card in the Tacho from 'the moment they take over the vehicle'".* Mr Morgan confirmed that the video evidence had not been used in the decision or on

appeal. On the fact this was a first offence; Mr Morgan stated that this was *"a serious breach of health and safety rules and therefore gross misconduct. Therefore summary dismissal is the only possible outcome."* (144-5).

Submissions

26. Miss Clarke for the respondent referenced the *Burchell* test: it was reasonable for the respondent to believe that the claimant should be aware of particular rules – the safety check - and when the tacho card should be put into the tachograph. This is within the FDA document and within EU Regs on which the FDA document is mirrored. The claimant did not say during the disciplinary process that he was unaware of the rules, and the respondent is entitled to assume he did know of them; in particular the tacho is evidence of his compliance with the Working Time Regulations. His statement says he was not aware of the 15 minute check, however in the disciplinary hearing he said he was aware of this requirement. It made nonsense for the claimant not to insert his tacho card as he would be paid from that moment, the claimant was unable to provide a plausible explanation for this.

27. Miss Clarke said that the respondent's conclusion that this was gross misconduct was a reasonable conclusion on the evidence; that dismissal was within the range of reasonable responses. The fact that the bonus document referenced a loss of bonus as a consequence for breach of checks, this did not mean it was not health and safety – it would be difficult to say that the driver would not know that a serious breach of health and safety regulations would not lead to dismissal. This is not a dismissal "at the harsh end" of the reasonable responses spectrum, the claimant committed fundamental error and this was clearly gross misconduct; the claimant, the company and the public all potentially at risk.

28. On *Polkey* and the claimant's contribution towards his dismissal, both should be assessed at 100% fault by the claimant – a failure to insert the tacho, the errors on the defect sheet, breach of health and safety regulations.

29. Miss Clarke said that the claimant had not asserted a statutory right: the claimant had accepted that he was in breach of the Working Time Regulations – page 110D. And in any event, Mr Elliott was not aware of this issue, Mr Elliott based his decision on the evidence, in particular the failure to undertake an adequate check, which the claimant was fully aware he was required to undertake. Mr Elliott's was a reasonable belief.

30. In addition, apart from the time-line (June when the claimant raised this issue to suspension from work in September) Mr Burgers recommendation was that this was a learning issue, he was not recommending disciplinary steps be taken.

31. Mr Bromage for the claimant argued that the bonus policy shows that the lack of check was not an exceptionally serious breach as there was a sanction by fine. If this was so serious, why the bonus policy? He argued that the starting point is a loss of bonus, which should not lead to dismissal for gross misconduct.

32. When considering reasonable grounds the video evidence does not support one or other account. Mr Bromage submitted that the respondent had reliance on that evidence, and there were no reasonable grounds for sustaining this belief. There was no evidence to contradict the claimant's account on the tacho, that he did not put the card fully in until he got into the cab. This was not a reasonable investigation. Mr Bromage submitted the Tribunal should take into account why Mr Byfield the investigating manager was not here, with no explanation. The only evidence before the Tribunal of the claimant not performing checks is the tachograph. This is, however, not sufficient to establish that no checks were undertaken. The respondent cannot be reasonably satisfied that no checks were undertaken.

33. The respondent is also unable to establish a repudiatory breach of contract and the claimant was wrongfully dismissed.

The Law

Unfair Dismissal – s.98 Employment Right Act 1996

34. Fairness s.98 General

(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 subsection (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—
  (a) 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 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.

35. For the purposes of the unfair dismissal claim we accordingly had regard to the following established case law: that a dismissal will be fair if, at the time of dismissal:
    a. The employer believed the employee to be guilty of misconduct.
    b. The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
    c. At the time it held that belief, it had carried out as much investigation as was reasonable.

    British Home Stores Ltd v Burchell [1978] IRLR 379.

36. I reminded myself that in determining fairness, it is not for me as the Employment Tribunal to consider whether the claimant is guilty of misconduct, but whether the employer believed, and had reasonable grounds for believing, the claimant was guilty of misconduct. Reasonable belief means the investigation must be within the 'range of reasonable responses' that a reasonable employer in those circumstances might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). The next question is whether the employer acted within the band of reasonable responses in treating this misconduct as a sufficient reason to dismiss.

37. Range of reasonable responses: I reminded myself that it is irrelevant whether I as the Tribunal would have dismissed the employee in these circumstances, that I must not "substitute" the Tribunal's view for that of the employer's reasonably held views (Midland Bank plc v Madden [2000] IRLR 827), and I must not 'retry' the evidence to determine whether the respondent had reasonable grounds for believing in the misconduct – this amounts to a substitution mind-set. To put it another way, I accepted it was not my role to focus on our view of the claimant's guilt or innocence but I should confine itself to reviewing the reasonableness of the employer's actions.

38. What is a fair process? An employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" (Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588). "All the circumstances" includes the potential effect of the finding upon the employee (A v B [2003] IRLR 405).

<u>Automatic unfair dismissal – s.104 Employment Rights Act</u>

39. S.104 (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

…

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal

…

Wrongful dismissal

40. By dismissing the claimant without notice, has the respondent breached the claimant's contract?

The Tribunal's conclusions on the facts and law

41. I first considered the claimant's case on automatic unfair dismissal. I did not consider that the claimant could show that he had asserted a statutory right. The claimant, reluctantly admitted he was in technical breach of the WTR. He did not dispute that the bonus scheme enabled the respondent to refuse to pay the bonus for non-compliance, including non-compliance with the WTR. The claimant expressed a view that this was unfair and contributed to his stress, that drivers were upset about this. I accepted that

this was the claimant's genuine belief, he was speaking his mind. However, nothing he said asserted a breach of a statutory right, he did not for example say, or suggest, or hint, that the loss of bonus would amount to an unlawful deduction from his wages. He simply said that this was unfair and demoralising. The claimant did not, I considered, make it 'reasonably clear' to his employer that he considered there had been a breach of any legal right.

42. In addition, for the reasons set out below, I also considered that the claimant could not show there was any link between his complaints to Mr Burgers and the decision to dismiss made by Mr Elliott or the decision to uphold this decision by Mr Morgan. Mr Elliott was unaware of the claimant's complaints to Mr Burgers. It was my judgment that the issue at the forefront of both their minds when making and upholding this decision was the health and safety implications of a lack of safety check

43. I therefore did not consider that the reason for dismissing, or if more than one the principle reason, was because of any comment the claimant made about his loss of bonus.

44. The unfair dismissal claim: Bearing in mind the requirement not to substitute my own views for that of a reasonable employer, I considered whether the respondent had a belief in the guilt of the claimant when dismissing him. I concluded yes, that this was the reason for dismissal, that Mr Elliott was genuinely concerned about the health and safety implications of the claimant's actions as he found them.

45. I concluded that the investigation was reasonable, that checks were made of all reasonably available evidence, that the cctv footage was discounted as inconclusive, that the claimant was allowed to present his evidence which was properly considered. I concluded that at the disciplinary hearing Mr Elliott looked for evidence that the claimant had done a vehicle check; but in fact the evidence – the check-list, the lack of tachograph evidence – showed otherwise. Mr Elliott, I considered, acted reasonably in concluding that the claimant would not have voluntarily forgone 15 minutes pay and carried out a check without inserting the tacho card in the tachograph.

46. I concluded therefore that the disciplinary process met the standard of a reasonable investigation and disciplinary hearing – that it was within the range of reasonable responses of a similar sized and resourced employer. I considered that the investigation was undertaken diligently.

47. I noted that on appeal Mr Morgan interviewed other drivers for their understanding of the vehicle check process and the legal requirements, and all reiterated the importance of inserting their tacho card as evidence that a check had been undertaken, that positive proof of a check would be

required in the event of a formal investigation. I concluded that Mr Morgan acted reasonably in assessing the evidence, in seeking further evidence, and in concluding that this was a serious breach of vehicle check policy which was a serious breach of health and safety rules, of which the claimant was fully aware.

48. I concluded that the claimant was fairly dismissed for gross misconduct, that in the circumstances a similar employer would have found this to be a serious breach of vehicle check requirements, a serious breach of health and safety rules with potential serious consequences; had an accident occurred because of the faulty brake lights, Mr Elliott and Mr Morgan reasonably believed that the lack of evidence of a vehicle check could have had serious consequences, potentially involving legal sanctions and serious reputational damage for the respondent. I concluded in these circumstances that dismissal was a sanction within the range of reasonable responses.

49. If the dismissal was unfair, I considered the prospect that the claimant would have been dismissed under a fair process (*Polkey v AE Dayton Services Ltd)*. I concluded that under a fair process an employer would have reasonably considered this was a serious breach and that dismissal would have been an inevitable conclusion and that dismissal would have occurred under a fair process on the same date. The claimant would, I considered be awarded no compensation. I also concluded that by his actions the claimant contributed to his dismissal to the extent of a 100% contribution.

50. Wrongful dismissal: For the reasons set out above, the respondent did not breach the claimant's contract in dismissing him without notice. The claimant had committed an act which the respondent reasonably believed amounted to gross misconduct. The claimant's contract contained the right to dismiss without notice for gross misconduct and I did not consider that the respondent had breached the claimant's contract in so concluding.

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Employment Judge Emery
Dated: **11 October 2018**

JUDGMENT SENT TO THE PARTIES ON

……15 October 2018…….

…….
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS