EMPLOYMENT TRIBUNALS

Claimant: **Mr Robert Mitcham**

Respondent: **Driver and Vehicle Standards Agency**

Heard at: **Cardiff** **On: 4 and 5 July 2018**

Before: **Employment Judge P Davies**
Members

Representation:
Claimant: In person
Respondent: Ms Hornblower (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.

2. The Claimant contributed to his dismissal and compensation for unfair dismissal (basic and compensatory) is to be reduced by 50%.

3. The Claimant was wrongfully dismissed and is entitled to damages for breach of contract in respect of notice period.

4. If the parties are unable to agree the issue of remedy, there will be a Remedy Hearing on 5 November 2018 – time estimate 3 hours.

JUDGMENT having been sent to the parties on 12 July 2018 and reasons having been requested by the [claimant/respondent] in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. By a claim received on 18 October 2017 the Claimant Mr Robert Mitcham complained of unfair dismissal and also that he was dismissed without any notice period despite his satisfactory performance reports covering the 2 years since the event took place. The Response admits that the Claimant was dismissed but says that it was fair in all the circumstances and cites misconduct as the reason for dismissal. The response also says in paragraph 31 in relation to the claim of dismissal without notice that the Claimant was dismissed for gross misconduct and as such was not entitled to and did not receive notice pay and it is denied that the Claimant is due any payment.

Facts

2. The Claimant commenced employment with the Respondents as a vehicle examiner on 6 March 2000. The work of a vehicle examiner is dealt with in a Respondents document at page 471 of the bundle which says that the DVSA (the Driver & Vehicle Standards Agency) at the request of the Police Inspect Vehicles Involved in Collisions, the purpose is to gather evidence and present it in a way that meets the requirements of the police investigation and the Courts. It should be said that this type of examination is part of the job of a vehicle examiner.

3. The document goes on to say that the examinations primarily involve heavy goods vehicles and public service vehicles which are involved in fatal or serious injury collisions where it is essential to establish the previous mechanical condition of the vehicle and to ascertain or discount the possibility of a mechanical failure which may have caused or contributed to the collision. This therefore is a fundamental part of any investigation.

4. It says that a number of DVSA examiners have received additional extensive training on vehicle collision examination techniques which include collecting evidence and presenting it in the correct manner to ensure the level of service provided to the police when conducting this work is as high as possible and meets with evidential requirements. It also says that additionally the work in gathering information from vehicle collisions and from which a better understanding of how collision occur is an important part of one of the governments initiatives to reduce road casualties, deaths and serious injuries. All post collision inspections will result in the report being generated by the vehicle examiner involved. All inspections reports must be recorded on the electronic case management system and they will be submitted to the Vehicle Safety Branch (the VSB) in Berkley House.

5. The Claimant continued in his employment as a vehicle examiner until 27 January 2014 when he obtained temporary promotion to senior vehicle

examiner. This particular post lasted for about 3 years until March 2017. The Claimant had undertaken specialist training as referred to in the policy document as well as undertaking, as a vehicle examiner, the post collision inspections. It is common and agreed evidence that the Claimant has an exemplary record and there is nothing that has been put forward at all to suggest that he needed any assistance with his performance or with the ability, technical or otherwise, in completion of his work.

6. The Tribunal has heard from the Claimant himself, has heard from Mr Collins who is the Enforcement Delivery Manager for Wales who was the Line Manager of the Claimant during the time that he was a temporary Senior Vehicle Examiner; from Miss Hicks who is the Head of National Enforcement Group, who was the Dismissing Officer; and Mr Mark Giles, the Head of Application and Infrastructure who was the Appeals Officer and was the person who dismissed the Claimant's appeal against dismissal.

7. The events which triggered the disciplinary proceedings occurred in May 2015. On 5 May 2015 there had been a collision which is recorded in the Vehicle Examination Report prepared not by the Claimant but by a person who has been referred to throughout these proceedings as person 1. Person 1 was a Vehicle Examiner based in West Wales who has been dismissed as a result of matters which involve the same set of facts in the main with that of the Claimant. On 5 May an HGV was travelling towards St Clears when it left the roadside and collided with a near side safety barrier mounting the grass verge and rolling onto its off side. The driver sustained serious injuries. Person 1 attended the scene and carried out a further examination of the vehicle on the 8 May together with the Claimant who attended the scene. The Claimant said that in answer to questions which were asked about why he attended that he went there because he had not been to West Wales for some time as far as person 1 was concerned, he had concerns about person 1 but he also said that as part of the quality inspection that that was an opportunity to go down there and to undertake that type of enquiry. Much was made in relation to those answers which will be looked at shortly in relation to the investigation which took place and the disciplinary proceedings.

8. On 8 May the Claimant was there for about 3 hours or thereabouts and in his own words assisted person 1 in carrying out the examination. The report which I have already referred to was made by person 1 and the report is dated incorrectly January 2015 and it should be 7 January 2016. There are two separate reports in relation to the tractor, the HGV unit, and the trailer that was attached at one time to that vehicle.

9. A few days after the Claimant had helped person 1 in relation to the examination there was an email sent by the Claimant to Mr Collins regarding his work. That document is on page 222 of the bundle and is dated 19 May

2015 and what it says is over the last few months the position has been increasingly difficult with diminishing resources which is causing severe difficulties in fulfilling DVSA's enforcement and testing obligations. "Since accepting the role I have done my level best to satisfy the requirements of my position whilst keeping the staff motivated in order to keep the area afloat. This has been a difficult job and becoming almost impossible at present by the badly managed change processes throughout DVSA. It goes on to say I have not told you before but the stress of the role started to affect my health and home life. I do not suffer with headaches but I have recently which I attribute to my job. I rarely visit my doctor but have done so twice in recent weeks. Added to this I feel that no matter what I do it is never good enough for you and you often call me and inform me that you are unhappy with something I have done or the way I have handled a situation. Having considered my position and the fact that I see no end to the abysmal situation the organisation has reach I have no alternative but to resign as a manager and return to the position of Vehicle Examiner upon my return from leave on Monday 1 June 2015."

10. Much has been made about the use of the word 'resign' and 'resignation' and again this is something that will be returned to in this Judgment. The response from Mr Collins was to say to HR not to process this because he asked the Claimant to reconsider. Mr Collins said in his evidence on about three occasions the Claimant had indicated he wished to give up the post and that in effect Mr Collins had talked him out of that or it was something which the Claimant had changed his mind within a short period of time and was just an unconsidered reaction to the circumstances. However, what it clearly demonstrates is that the Claimant was finding it extremely difficult to undertake the managerial responsibilities which he had at that time. The Claimant puts it down to a number of matters and they include the fact that shortly after he took this promotion there was a major change in the way that HGV testing was undertaken from what is called the NGT changes which had taken place which involved the Claimant in not only having to deal with those but also to have additional responsibility which had been undertaken by a local testing manager who ceased to act in that capacity and seven further members of staff that he had responsibility for.

11. Mr Collins also said in his evidence that he had said on more than one occasion to the Claimant not to undertake any examinations which indicates that although he was the Senior Vehicle Examiner with managerial responsibilities in circumstances because of the demands of work that the Claimant was undertaking examinations which he need not do and was juggling in effect the various responsibilities.

12. Mr Collins was quite frank in describing how the pressure of work from 2014 to 2015 but indicated that it was beginning to ease off as a result of the changes in about the middle of 2015 and the end of 2015. The view of Mr

Collins about what was happening at that time was given to the Dismissing Officer Miss Hicks in an email of 15 September 2017. In that email Mr Collins talks about the management team and their extreme pressure and he recites all the changes which had taken place and that he considers that the Claimant was totally outside his comfort zone as to his credit he did not lose a single day testing, that throughout the period they considered that the Claimant had not been given a fair opportunity with development and what he refers to about calmer waters they wanted the Claimant to return once he was fit. That is a reference to the fact that the Claimant was off with sick leave from October 2015. What Mr Collins also says in that email is in relation to this resignation word that he is sure that the Claimant has used the wrong terminology he has never formally offered his resignation to the Human Resources business partners and he says that in recognition of the Claimant's efforts and the tremendous job he has done that Mr Collins nominated the Claimant for a special performance bonus which was accepted by the business in formal recognition of his efforts.

13. It is clear that Mr Collins had enormous sympathy for the Claimant during this period of time and recognised the level and standard of work that was being undertaken by the Claimant whilst clearly he was finding it overwhelming on occasions. The period of ill health referred to was from October 2015 until December 2015 and the Claimant describes in his witness statement how he was feeling at that time in paragraph 24. He says, in October 2015 the effects of his workload had taken their toll and "I couldn't cope any more. This resulted in me leaving my desk at Llantrisant and driving straight to see my GP who diagnosed work related stress and determined I was unfit for work. I had been suffering with depression for many years, now my work had affected my mental health to a degree that I broke down in the GP's surgery, something I have never experienced before."

14. The resignation from the temporary job or reverting from that position did not occur and the Claimant continued when he returned after the period of ill health in January 2016.

15. There was a request for the report in relation to the accident that had happened in May 2015 and that was noted on the quality returns at page 324. Emails were sent by the Claimant to person 1 on a few occasions chasing up this document and the document dated January 2016 doesn't seem to have been sent to the central collation office until much later. In 2016 there had been a complaint in relation to, or a request for documentation in relation to this accident. There are notes by the Claimant in relation to having chased up from person 1 resulting from this request and a case was not formally closed until the end of 2016 by the Claimant who accepts that it was not officially audited as it should have been at that time.

16. In January 2017 there was a request and a complaint from solicitors acting for the injured party, the driver involved in the collision in May 2015. It prompted the Respondents to conduct preliminary investigations into what had happened firstly by Mr George Lynn, secondly by Mr Malcolm Tipping and as a consequence of what they had discovered the Claimant was told that the Respondents would be conducting a formal disciplinary investigation. The Claimant reverted to that of Vehicle Examiner on 31 March 2017 and continued in that post until he was dismissed.

Investigation

17. The disciplinary investigation was undertaken by Mr Steven Hesmondla. That investigation generated ultimately a typewritten document which had been disclosed to the Claimant and to the Disciplinary Officer. Much has been made about the fact that the handwritten notes upon which the typewritten notes were said to have been based, were destroyed in accordance with the usual procedure and it is said that this was in fact contrary to the policy regarding the keeping of records. I do not consider that it is in breach of any policy in relation to the keeping of records. It is always the case that it is better to preserve original documents particularly ongoing investigation notes which are likely to lead to further stages including appeal stages and which may involve questions about what was said or done because these proceedings are not recorded digitally or otherwise, which is often the case now. Where there is no such recording then it is good practice to keep the original documents but it is not a breach of the policy as to what the policy says about keeping records that these original handwritten notes were destroyed.

18. Arising from that is said to be a number of errors or omissions in relation to what was said, but the Claimant could not indicate where these errors occurred, where these omissions occurred. It is an empty point to make that there was not disclosed handwritten documents because the gist of what is said there is accepted as being what was discussed and what was said. One of the matters, which was touched upon, is in relation to what was said regarding the reason for the attendance and what was said by the Claimant. It is not necessary to repeat everything that is in that document. In the first paragraph it indicates what the allegation against the Claimant was and that is he was actively involved in the post collision investigation and that his involvement called into question his competency in carrying out the activity. The investigator sets out in considerable detail what documents he has had, what was said and what were the views of the Claimant in relation to various aspects of which he was concerned.

19. The conclusion of the investigator was that, notwithstanding everything which had been urged, there was not details of all the evidence in the report that was available and reference was made to defects to the steering

system identified during the inspection, details of service records, details of driver defect reporting records and brake performance records from the trailer annual test and there is reference to documents that had to be added when it was drawn to the attention of the Claimant about that. The conclusion is that the Claimant failed to support the examiner in doing the investigation and that the DVSA have failed to fully investigate. It is interesting terminology used because it is the collective word that is used, the DVSA have failed to fully investigate the cause and impact of the noise from the offside brake drum, the live impact of the differing brake travel between the nearside and offside brakes and axel one; the continuous reporting of braking and steering defects made by the driver, the live impact of differing brake test results on the trailer between those recorded on the nearside and those recorded on the offside, the deviation from the straight path during a dynamic brake test. The investigator goes on to say "it is evident from the report produced by person 1 is incomplete as it fails to contain all of the available information and has not considered all the relevant points certified during his investigation. To this end the report is inaccurate and maybe considered misleading."

20. It is accepted that the Claimant would not have had sight of this report until 22 August 2016 15 months after the incident and there is reference to the report then being available to the third party. In the last paragraph it says this, "the Claimant is an experienced vehicle examiner that is fully PCE trained. Whilst it is accepted he had a heavy workload during this period, would not have had visibility to the late completion of the reports and was only in attendance to QC check the work it is evident that he has failed to capture key information regarding the investigation and has failed to chase completion of the report in a timely manner and has failed to support person 1 in carrying out a full investigation. It is therefore clear that there is a case to answer." The Claimant disputed that conclusion and points to the fact that he did fill in forms, that he did undertake tests, that he did chase up person 1 in relation to the report, but has accepted that the report was wholly deficient in what it is set out to do which is in relation to trying if possible to determine causation as to why this incident occurred.

21. As far as the investigation is concerned there was ample material that was found by the investigator for this matter to move as it did into the disciplinary arena. There has not been any failure to follow the policy or generally in relation to fairness regarding the investigation. The Claimant was involved with it, he knew what was being investigated, he had a full opportunity to participate and to put his point across. The matter proceeded to that of a disciplinary hearing.

Disciplinary Hearing

22. The disciplinary hearing was arranged for the 7 June 2017. The letter to the Claimant is on 22 May 2017 and it says it "will consider the allegations that

you carried out a post-accident investigation on an HGV operated which fell significantly short of the expected standard relating to an accident on 5 May 2015. It then says that "the post-accident investigation carried out by person 1 and yourself fell significantly short of the expected standard and has been sent to Essex to consider whether misconduct and disciplinary action should be taken." The letter goes on to say that Mr Hill will be a notetaker and record the discussion, the Claimant can be accompanied by a Trade Union Representative and it says that the allegations represent gross misconduct offences and the meeting may then result in dismissal without further notice or payment in lieu of notice.

23. The disciplinary hearing was recorded by the notetaker and was also recorded by Miss Hicks. The typed minutes are on 391 of the bundle. Miss Hicks in her evidence indicated that the notetaker Mr Hill seemed to have been less experienced than Miss Hicks would have liked and that her own notes were combined in order to produce the typed version which is on 391. There was a question asked about "you went there to help not to do a QA check?" and "QA checks were there but they fell down. I was there to help not really to do a check on QA." "Why did you tell the investigation you were there to do a QA check?" "I did say as a QA activity, but I will be honest with you I didn't do a QA check, I said that as a comment to Steve." "When you were interviewed you said you were there as a QA, but with no forms. Did you go there for a QA check?" "No I didn't in all honesty." "Why did you tell Steve you went to do a QA check?" "I don't know. Person 1 was chasing cases so I was helping him with that." "Your purpose was to go there to help the post-collision report?" "Yes."

24. The report that was produced was referred to by the Claimant as "I know this is a shocking piece of work and is not acceptable" and then the Claimant is asked "you said you tendered your resignation" and the Claimant says "well maybe it wasn't a resignation. They did not refuse my resignation, we battled on, 95% of the work was done correctly and within policy." The reference was made to the fact that Mr Collins did not provide a statement about the work undertaken by the Claimant and generally the work situation at that time although that was stressed by the Claimant in the disciplinary hearing. Reference has already been made to the enquiries made by Miss Hicks of Mr Collins and his response to the enquiry. I am satisfied that Miss Hicks did undertake further enquiries as a result of what was told to her at the disciplinary hearing including making contact with Mr Collins to establish what he had to say about matters touched upon by the Claimant. The result of the disciplinary hearing was that Miss Hicks considered that the Claimant had been guilty of gross misconduct categorised as gross negligence and that the integrity of the Respondents had been put at significant risk and demonstrates a complete breakdown in the level of trust between employer and employee.

25. In a detailed letter of 13 June 2017 at page 416 of the bundle Miss Hicks sets out her findings in the first part by saying that in coming to this decision the following factors were considered. It was a serious accident that occurred and there was failure in many respects and then Miss Hicks refers to "you were only present to complete the quality assurance check, however admitted to me in the decision meeting that wasn't correct, that you had gone with the intention of helping person 1 with the PCE work. These are two very different versions of events and it is unclear why you didn't inform the investigation officer of the same information that you did during our meeting" and that invites a contrast between what the Claimant said at the investigation meeting which is that there was a reference to quality control but almost as soon as it is said indicating that that never took place and that in fact he did undertake examination work with person 1, so whilst there might have been some inconsistency that inconsistency was very quickly clarified by the Claimant in relation to what happened and why he was there.

26. As part of failures, there is also reference to a very critical analysis of person 1's work which the Claimant had said at the disciplinary hearing but it was pointed out that he had given a staff appraisal of person 1 with a box marking of 2 indicating he fully meets all of his behaviours and performance expected of a vehicle examiner. Miss Hicks says this is incongruous with "your evidence during this investigation". It is not right to say, as was submitted on behalf of the Respondents, that reference to these matters only occurs under the mitigation where they are referred to as duplicity. It is clear that if that was the view of the author of this letter by including them in the first part, and the whole letter must be read as a whole, that Miss Hicks had come to a view that the Claimant was less than honest in what he had been saying to her at least because of the views regarding these three matters. In the next section which is to do with mitigation Miss Hicks says "throughout this investigation there has been a level of duplicity in your evidence wrongly claiming that your role was only as a quality check. Person 1's box marking conflicting with your evidence to his behaviour and performance and the claim of the refused resignation. It is not acceptable that a manager would seek to avoid their personal responsibility and blame others." Although Miss Hicks in her evidence talked about the trust in the Claimant and the DVSA and that it was incumbent upon the Claimant to have completed the record no records were undertaken and there was a significant breach of trust, and trust in the future, and it was unsuitable for the Claimant to have carried on as a vehicle examiner.

27. Reading the letter written to the Claimant the Claimant was right to be alarmed and concerned that what Miss Hicks was saying was that he was not being honest, not being truthful, being duplicitous and that that must have figured into the reasoning as to why there was lack of trust in the Claimant as a vehicle examiner. Miss Hicks does not on the one hand take any dispute with the fact that as Mr Collins confirmed the Claimant was

competent, that he was a hard worker, that he had an exemplary work record, had worked for by then about 16 years with the Respondents and had progressed by way of professional training to a temporary position and that these were significant matters which when the documents are read properly, such as the resignation matter. Unduly harsh unsupported unobjective conclusions were made by Miss Hicks about the personality of the Claimant, and that fed into the question of whether there was any trust going forward in the future and was a significant matter that Miss Hicks put in the balance in coming to the view regarding penalty. In respect of penalty, Miss Hicks said that this was a case which was gross negligence, a matter that she had discussed with HR case worker and if these were the views that Miss Hicks was putting forward as clearly expressed in the letter, one could understand how HR might consider there was gross negligence being a gross misconduct matter.

28. When all these matters are properly looked at in the round it is impossible for a reasonable employer to have come to a conclusion that there was a lack of trust in the work undertaken by the Claimant as a vehicle examiner in all these circumstances based upon what matters are referred to in the letter. Of course it is not necessary for a single act to amount to gross misconduct, there can be a series of acts. The policy sets out examples of serious misconduct, gross misconduct and minor matters and the policy emphasises that in coming to a decision about those matters and to look at mitigation that it is essential for the decision manager to read carefully the investigation report including witness statements and any other supporting information. That other supporting information would be what Miss Hicks had from Mr Collins about the Claimant and about the work situation in Wales at that time and to fully reflect on discussions that took place at the disciplinary meeting. Reference was made to the fact that the Claimant accepted that the report was unacceptable. The report was not a report by the Claimant it was a report by person 1. There was input by the Claimant as manager and as assisting in the examination, but this was an examination whose report was filed by person 1 who was the vehicle examiner. The policy says consideration of mitigating factors is of vital importance particularly in cases where dismissal is a potential outcome. Mitigation should be taken into account when considering all penalties. It talks about mitigation taking various forms and typical examples to be cases of ill health or conduct due to medication, issues related to disability for example where the condition can influence behaviour. Exceptional pressures upon the employee and where there appear to have been acting out of character, particularly where they have an unblemished record, where the employee may have volunteered information about the misconduct and gives an explanation prior to any disciplinary action being started. All of those boxes are actually ticked in this case, but not referred to and given sufficient or any balance and weight by Miss Hicks as the Disciplining Officer. Although there is reference to understanding that there was

pressure and stress at this time in circumstances where, as a result of the pressure, there has been an extended period of sick leave albeit some months afterwards. Mr Collins had said had been excessive pressure in relation to work at this time. No particular weight appears to have been given to those factors by the Disciplining Officer in this case.

Appeal

29. The dismissal was appealed by the Claimant who made a number of points in the document appealing the dismissal at page 433. Some are repetitive points making the same point but in a slightly different way, but they cover some significant points such as the lack of handwritten documents which are referred to. The appeal was undertaken by Mr Giles. Although at one time it was suggested by the Claimant that Mr Giles was in some way biased or prejudiced because he has a relative working in the same section/department as Miss Hicks, that was not pursued ultimately after cross examination of Mr Giles and rightly because there is no evidence upon which it could be properly suggested that Mr Giles was in any way biased. What is said by the Claimant is that Mr Giles failed to properly undertake his role as Reviewing Officer and undertook an appeal that was lacking in detail and consideration of the points that he put forward.

30. The policy regarding appeals makes it clear that the appeal is not a re-hearing and that it is to review the decision of the Dismissing Officer, and to consider any new evidence. There is nothing unusual that it should be an appeal in that way. The notes of the appeal indicate that, the issue for example, to do the handwritten notes was dealt with and an explanation given by Mr Giles at that meeting. Mr Giles had not undertaken this type of appeal previously at all. His only experience was some 15 years ago as a member of a panel. Criticism is made of Mr Giles who dismissed the appeal in the very short letter that was sent by Mr Giles which did not specifically go through the various points which had been raised by the Claimant. It does refer to the question of handwritten notes and says that he had considered everything that had been said.

31. There is some legitimate criticism to be made of Mr Giles in the brevity with which he approached this. It would be better practice to have dealt with individually the points in the appeal made by an Appellant because the Appellant is entitled to know in some detail how his points have been regarded and given weight or not given weight, but I am satisfied that Mr Giles did approach this matter in a way where he was not prejudiced because of any association with anybody in Miss Hicks's team. However, the lack of particularity in dealing with the complaints is highly suggestive of a failure to grasp the nettle in relation to the consideration of what the policy says ought to be considered, namely the background of the Claimant in his work history, his health, his work situation as it was at the time and his involvement in the actual examination and his role in relation to that. A clear

distinction needed to be drawn between failures as a manager in managing the situation which may involve chasing up and ensuring that all reports were properly undertaken, and what he had himself filled in the forms were adequately reflected in the report which was given bearing in mind that the Claimant himself, as Miss Hicks said, voluntarily went and took it upon himself to assist in that. The reasons why he did that are not irrelevant and the limited role that he had in that, bearing in mind that the report was undertaken by the vehicle inspector person 1. So a clear distinction should have been made between his role as a manager and his failures in undertaking those duties and the role of vehicle examiner and what he did in relation to that which was to assist and not to be the vehicle examiner. The question was not properly looked at by Mr Giles and his lack of particularity in detail is evidence of the failures to properly balance and weigh up those matters.

Conclusion

32. The consequence in relation to these findings must be looked at from two causes of action point of view. The first is in relation to the claim for unfair dismissal. There are a wealth of reports and Authorities in relation to what is gross misconduct about about the conduct of hearings and allegations in relation to unfair dismissal. A recent decision of the Employment Appeal Tribunal of Mr Justice Choudhury the case of ***Mbubaegbu -v- Honnerton University Hospital NHS Foundation Trust*** is a useful summary in relation to issues in connection with unfair dismissal or wrongful dismissal cases which are based upon the ground of misconduct.

33. In paragraph 29 in summarising submissions of Counsel there is reference to the Judge being reminded that the assessment of whether misconduct is sufficiently serious to warrant summary dismissal is that it must be such as to undermine the relationship of trust and confidence between employer and employee and reference is made to the passage in ***Newry -v- Dean of Westminster*** **[1999]** which says “what degree of misconduct justifies summary dismissal?” I have already referred to the statement by Lord James of Hereford in ***Clueston & Company -v- Corry*** that case was applied in ***Laws -v- London Chronicle Indicator Newspapers Limited*** where Lord Evershed Master of the Rolls said “it follows that the question must be if summary dismissal is claimed to be justified whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.” In ***Sinclair -v- Neighbour*** the whole question is whether that conduct was of such a type there was inconsistent in a grave way incompatible with the employment in which he had been engaged as a manager. And Lord Justice Sax referred to the well established law the servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master, but is inconsistent with the continuance of confidence between them. In ***Lewis -v- Motorworld Garages Limited*** Lord Justice

Glydewell stated the test whether the conduct of the employer constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment and claiming that he had been dismissed. This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.

34. In the analysis and conclusions section in paragraph 32 Mr Justice Choudhury says "in my Judgment the Tribunals approach to the acts of misconduct relied upon was not erroneous. Whether or not the label of gross misconduct is applied to such conduct is not determinative, it is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct."

35. The Judgment goes on to state that there was no challenge on the facts of that case to the reasonableness of the investigation or the procedure. The sole challenge was as to the Tribunals conclusion that the sanction of dismissal fell within the range of reasonable responses. That range is undoubtedly a broad one, given the factors identified above as undermining the relationship of trust and confidence it is not possible to say that the Tribunal erred in law in concluding the dismissal fell within the range.

36. I am grateful for the submissions that were made in the Skeleton Argument by the Respondents regarding the approach to the well-known case referred to which I am not going to go into detail about. It is in the written Skeleton Argument and that this is a case in which there was a genuine belief there were reasonable grounds for considering that there had been misconduct, and there had been a reasonable investigation.

37. The real question is whether the sanction of dismissal fell within the range of reasonable responses and that of course, as already said, is a broad one. What one reasonable employer may decide is a sanction may not be what another reasonable employer may decide is a sanction. The question is does it fall outside that. I am reminded in relation to the Respondents submissions that the Tribunal must not substitute its own view to that of a reasonable employer because to do so would be an error of law and it is submitted that in this case that there was a serious issue about integrity that the Claimant was shirking his responsibility, there was no other sanction

which was appropriate, he sought to distance himself from responsibility and it was against a background of what he was undertaking.

38. What the Claimant says the label of gross misconduct is harsh, that he had difficulty because he was not being supported by staff, that the policy was not properly considered and the investigation when he left it was far from over, that is when he left the scene on 8 May as he left it to person 1 to continue to complete the investigation and also for Dyfed Powys Police who have a role to ask for additional enquiries if they so consider, and that, in the circumstances, it was not gross misconduct and it should not have been a dismissal.

39. My conclusion is that this was not something which could properly be regarded by a reasonable employer as gross misconduct. It certainly was misconduct and there was failure by the Claimant in relation to his role as a manager in this situation and legitimate criticisms have been made about that particular aspect.

40. As to the issue of wrongful dismissal as the case where Mr Justice Choudhury deals with unfair dismissal and what is referred to examples of misconduct for unfair dismissal Mr Justice Choudhury also goes on to consider the question of wrongful dismissal and says “whereas in determining whether dismissal was fair or unfair the Tribunal’s task is to assess whether the employer’s response fell within the range of reasonable responses, its task in determining whether dismissal was wrongful is rather different.” As stated by Lord Justice Maurice Kay in ***Boardman -v- Regent Care Society*** on the issue of wrongful dismissal it was appropriate and even necessary for the Employment Tribunal to make its own findings of fact. The issue was whether the Claimant had breached her contract of employment in such a way as to justify summary dismissal. The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination and that refers to findings of repudiatory breach by the actions of an employee. That is a different analysis which I have to undertake because there is a claim for wrongful dismissal and that is to do with notice monies and there is some overlap that is not the same as unfair dismissal. I find in this case that there had not been a repudiatory breach of contract by the Claimant on this one occasion in the way that he had conducted himself although blameworthy it was not such as to justify summary dismissal and therefore there was an entitlement to notice monies in this case.

41. On the question of unfair dismissal the test is the statutory test set out in s.98(4) of the Employment Rights Act 1996 which says “where the employers fulfil the requirements of sub section (1) the determination of the question of whether dismissal is fair or unfair having regard to the reasons

shown by the employer A depends on whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity in the substantial merits of the case." Having regard to the findings which I have made and applying the statutory test I find this was an unfair dismissal and that there will be a declaration to that effect.

42. However, that is not the end of the matters which require to be determined by the Tribunal because there has been raised the issue of contributory conduct by the Respondents who say that in these circumstances the contributory conduct should be assessed at 100% and that therefore there should be no compensation which is payable to the Claimant as a result of the behaviours of the Claimant.

43. The basic award shall be reduced where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basis award to any extent and the Tribunal shall reduce or further reduce that amount. The test for the compensatory award reduction is slightly different because where the Tribunal finds the dismissal was to any extent caused or contributed to or by the action of the Complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to their findings.

44. It is the case that there was contributory conduct on the part of the Claimant both in the sense of the conditions for reduction for the basic award and from the compensatory award. There must be a reduction in both those awards to take account of the misconduct in the general sense or behaviour of the Claimant in not fully engaging and undertaken the assistance given to the vehicle examiner to a standard which has been referred to in the various documents and evidence. The extent of that I assess at 50% and there will be a reduction in any compensation payable to the Claimant to take account of his contributory conduct by 50%.

_____

Employment Judge P Davies
Dated:2 November 2018

REASONS SENT TO THE PARTIES ON

9 November 2018

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS