EMPLOYMENT TRIBUNALS

Claimant: Mr L Richards

Respondent: Asda Stores Ltd

Heard at: Leicester

On: 26 and 27 September 2018

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Mr Thakurar of Counsel
Respondent: Mr Collins of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The complaints of an unlawful deduction of wages and holiday pay are dismissed upon withdrawal by the Claimant.

2. The Claimant was unfairly dismissed but contributed to his dismissal. The basic and compensatory awards shall be reduced by 75%.

3. The issue of remedy is agreed.

REASONS

1. In these proceedings, Mr Leon Richards brings a complaint of unfair dismissal and an unlawful deduction of wages and unpaid holiday pay. The complaints of both outstanding wages and holiday pay were withdrawn at the commencement of the hearing and are accordingly dismissed.

2. In coming to my decision, I have taken into account the witness statements and oral evidence of the Claimant as well as that of Mr Sean Embleton (the investigation officer), Mr Mark Stafford (the dismissing officer) and Mr Steven Gamble and Mr Warren Carter (both of whom heard appeals against dismissal).

3. The facts of the matter are not unless otherwise indicated in dispute. Mr Richards was employed by the Respondent as an HGV driver from 2 November

2002 until 24 June 2017, the latter being the 'effective date of termination'. Mr Richards was based at the Respondent's Lutterworth Distribution Depot. He normally drove a large lorry which had a trailer. He was summarily dismissed for gross misconduct. It is common ground that the letter of dismissal would not have reached the Claimant until 24 June 2017. The Claim Form was presented on 17 November 2017. It has been presented in time and is ACAS conciliation compliant.

4. On 10 May 2017, Mr Richards was manoeuvring his lorry within the confines of Asda's Petrol Filling Station (PFS) at Fosse Park, Leicester. This is not part of the Depot, indeed some distance away. Mr Richards had stopped to fuel his lorry as part of his deliveries to Asda stores that day. Unfortunately, whilst manoeuvring the vehicle it hit a fence post and damaged the right side of the lorry. In particular the side rails which are long bars at the side of the lorry broke off and were not manually replaceable. There was damage to one of the mud flaps. No other vehicles were involved.

5. Mr Richards immediately telephoned his manager, Mr Wayne Hendry, and informed him of the accident. It is not agreed but I accept the Claimant's account that Mr Hendry was somewhat abrupt and curt and abruptly ended the call before the Claimant wanted it to. What is agreed is that before the call ended Mr Hendry told the Claimant to take photographs of the damage which the Claimant did. Mr Hendry did not arrange for an independent inspection nor did he ask for any photographs to be sent over to him immediately by email or via a messenger service so that he could see the extent of the damage for himself. A key issue in this case is the amount of information which the Claimant provided to Mr Hendry about the damage. In the subsequent investigation Mr Hendry said that if he had known of the true extent of the damage he would not have advised the Claimant to carry on with his duties.

6. It is the Claimant's case that he gave an adequate description of the damage, made good the vehicle as best he could and after clearing up any debris, he continued with his onward journey to Shepshed which is approximately 15 miles away. That would involve a journey on the M1 motorway and at least some minor roads.

7. When the Claimant ultimately returned to the Depot there was an inspection of the vehicle by the Transport Shift Manager and photographs were taken by them as to the damage. The Claimant was not suspended.

8. On 16 May, the Claimant was invited to an investigation meeting to take place on 25 May 2017. The investigation was to be conducted by Mr Embleton.

9. The investigation meeting was adjourned and reconvened on 31 May 2017. The notice inviting the Claimant to the investigation meeting simply said:

"*The purpose of the investigatory hearing is to*

- *explain the allegations against you and present all the evidence*
- *listen to your response*
- *decide what disciplinary action, if any, might be appropriate in accordance with our disciplinary procedures.*"

10. On 8 June 2017, Mr Embleton set out his findings in relation to the investigation in a handwritten note which simply said:

"*It is therefore my decision to forward this to a disciplinary hearing. This is a serious breach of health and safety following the incident on 10/5/17 at Leicester PFS …*"

11. On 13 June 2017, Mr Richards was invited to a disciplinary hearing to take place on 19 June.

12. The notice of the disciplinary hearing referred to a 'serious breach of health and safety which could endanger yourself and others'. The notice went on to say that the purpose of the disciplinary hearing was to:

- *explain the allegations against you and present all the evidence*
- *listen to your response*
- *decide what disciplinary action, if any, might be appropriate in accordance with our disciplinary procedures.*"

13. Included in the letter of invite were the minutes of 8 June 2017 and a copy of an interview with Mr Hendry.

14. The Claimant attended the disciplinary hearing with his trade union officer. It was adjourned to continue the next day. On 22 June 2017 Mr Stafford, in what is a fairly lengthy letter, wrote to Mr Richards with his decision. The key passage of the letter is as follows:

"*Based on these findings, I concluded that in summary Leon, the accident occurred due to your misjudgement; this misjudgement caused severe damage to property and trailer. You failed to report the damage that had been caused to the trailer and decided from that point that it was safe to continue to drive. Categorically it was not safe to drive, you were driving illegally. This is regarded as a gross misconduct offence, and I determine that you should be summarily dismissed in accordance with the disciplinary procedure, that is dismissal without notice or lieu of notice and with immediate effect.*"

15. Asda has a two-stage appeal process against dismissal. The first stage appeal was dealt with by Mr Gamble. He wrote to the Claimant on 14 July 2017 dismissing the appeal.

16. Mr Richards appealed to the second stage. Mr Carter, who has considerable experience both of working with Asda and of hearing appeals, also dismissed the second stage appeal by a letter of 4 September 2017.

17. Mr Richards presented his claim to the Employment Tribunal on 17 November 2017.

THE LAW

18. The law in this case is not controversial. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") state :

"(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 capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

19. Once the employer has established that the reason for dismissal fell within one of the potentially fair reasons under section 98(1) ERA 1996, the Tribunal must go on to consider the question of 'reasonableness' under section 98(4) ERA 1996. This states:

"(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."

20. In **HSBC Bank plc v Madden** [2000] ICR 1283, the Court of Appeal set out the correct approach of applying the statutory provisions which is that:

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal……is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

21. The range of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (**Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

22. In **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 the Court of Appeal reminded tribunals of the importance of not substituting their views for that of the employer. I have been conscious of the importance of not doing so.

23. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied in cases of dismissal by reason of alleged misconduct. Firstly, the Tribunal should decide whether the employer held an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal must consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, it should decide whether the employer had

carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof in unfair dismissal cases, the three-step process is still helpful in determining cases involving dismissal for misconduct.

24. An employee can be unfairly dismissed yet have contributed to the dismissal. This has the effect of reducing any compensation. Sections 122(2) and123(1) and (6) of ERA 1996 deals with contributory conduct and reduction of basic and compensatory awards. Those provisions state:

Section 122(2)

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

Section 123(1) and (6)

"(1) Subject to the provisions of this section and sections 124, 124A and 126, 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.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any 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 that finding."

25. In relation to the framing of the misconduct (or what may loosely be described as the 'charge sheet') the Court of Appeal in **Strouthos v London Underground Ltd** (2004) EWCA Civ 402, made it clear that:

"…….the charge against the defendant or the employee facing dismissal should be precisely framed and that evidence should be confined to the particulars given in the charge."

THE ISSUES

26. The issues are as follows:

26.1 Whether the Respondent had at the time of dismissal an honest and genuine belief in the misconduct and whether the belief was based on reasonable grounds;

26.2 Whether at the time of the belief the employer had undertaken a reasonable investigation;

26.3 Whether the decision to dismiss fell within the band of reasonable responses, that is whether the dismissal was reasonable within the meaning of section 98(4) ERA 1996.

26.4 Whether the Claimant contributed to his own dismissal;

26.5 Whether there should be any reduction in compensation pursuant to the decision in ***Polkey v AE Dayton Services*** *[1987] IRLR 503*, that is absent any procedural defects the end result would still have been the same.

CONCLUSIONS

27. It is perhaps worth stating at the outset that what the Claimant was *not* dismissed for. He was not dismissed for causing damage to the vehicle or any other property. That is clear from Mr Stafford's letter where he says:

"The accident itself and therefore your ability to continue to operate our fleet during investigation would not have resulted in an allegation of gross misconduct …"

28. There is however a degree of escalation as to what the Claimant was culpable of. In the investigation the issue seems essentially to be one of a breach of health and safety. Indeed the notice of the investigation meeting does not actually say what the investigation is to be about at all. At some point a Transport Manager who is not involved in the investigation, takes the decision after the investigation that it is a 'deliberate or serious breach of health and safety'. The distinction is important because this is then deemed as a gross misconduct offence. The decision to dismiss is principally because the Claimant was driving illegally which is said 'to be regarded as a gross misconduct offence' though not apparently the same offence as the one identified by the Transport Manager.

29. At the first stage appeal the primary concerns of the Respondent were damage to the Asda's reputation and the Claimant's poor past driving record. In his witness statement Mr Gamble says (at paragraph 20):

"*Even though nothing happened on route back to the site, in the event that the vehicle had been stopped by VOSA, it could have been deemed to be illegal which could result serious repercussions for the business. VOSA have more power than police for trailers. Had VOSA stopped Leon it could have had an impact on our ability to transport goods as they can stop the whole depot from running until all vehicles were stopped. They could stop us from distributing to anyone. But ultimately he could have seriously injured a member of the public.*"

30. It has to be said that whilst there is some justification for believing there could potentially be an injury to a member of the public with a vehicle driven without side bars, it is hardly conceivable that this incident alone could have resulted in the Depot from being unable to undertake its distribution activities. It is plainly absurd to suggest that this incident could have grounded all of Asda's fleet from one of their largest distribution centres. It is however an example of how the perceived misconduct appears to have magnified from a health and safety breach where Mr Embleton appears to have been under the impression that the maximum penalty would be only be a warning to one where the entire distribution of the Depot is potentially at risk.

31. One of the basic safeguards in unfair dismissal law is that the employee should know precisely what the alleged misconduct is. Whilst it can reasonably be accepted that the Claimant was told of health and safety issues, he was never informed in the investigation or dismissal stage that illegality was an issue. Moreover, there has been no reference to any specific road traffic regulation that has been deemed to have been breached. Illegality was not even investigated by Mr Embleton and was not identified as an act of alleged misconduct in the notice of the disciplinary hearing.

32. I find firstly that the investigation process was wholly inadequate. There is no proper investigation report. The note is in manuscript form, at times difficult to read and on a form not designed for that purpose. More importantly, it falls outside the band of reasonable responses required of a reasonable investigation for the following reasons:

32.1 Mr Embleton failed to ask Mr Hendry some basic questions such as why Mr Hendry had not asked for photographs of the damage to be sent to him via a mobile phone or email so that he could properly assess the extent of the damage;

32.2 There was no enquiry, questions or investigation as to why Mr Hendry did not arrange for an inspection of the vehicle before allowing Mr Richards to continue the onward journey;

33. Mr Richards' evidence, which I accept , was that Mr Hendry was short and abrupt and put the phone down on the Claimant whilst he was speaking. There was no investigation or finding as to Mr Hendry's unhelpful and uncooperative approach to the matter which was highly relevant in the circumstances. It is clear from the investigation that Mr Richards received little or no guidance as to what he should do in the circumstances yet that was not investigated at all. Asda then failed to take into account the difficulties which the circumstances presented for the Claimant. Put simply, the difficulty for the Claimant was that the Respondent's policies and procedures left the final decision as to whether to continue with the rest of the day's duties to the Claimant himself. There is an inevitable danger that the driver will either underestimate the risk of carrying on (particularly if they are under pressure to meet deadlines as Mr Richards was) or to overestimate damage and risk which may appear as though a driver was shirking his responsibilities. As it was, it left the Claimant in an impossible position. Such matters were not considered in the investigation or the subsequent processes.

34. Turning to the dismissal process, this failed to take into account the lack of clarity in the 'charge sheet'. No identifiable offence had been mentioned to Mr Stafford prior to the disciplinary hearing and illegality emerged for the first time in the dismissal letter. It was unreasonable of Mr Stafford to consider an issue which had not been part of the charges against the Claimant.

35. Mr Stafford took into consideration previous warnings of the Claimant. Whilst the Respondent's case does not rest upon the existence of previous warnings under a totting up procedure, and whilst it is not fatal to the Respondent's case to consider them, it was unfair in the circumstances to do so for two reasons. Firstly, Mr Stafford did not inform the Claimant that he was considering previous warnings and thus the Claimant did not have the opportunity to comment upon them at the disciplinary hearing. Secondly, the Claimant's past conduct was not one that would cause a reasonable employer to have any legitimate concerns. In a job where a driver is likely to be out on the road every day, and one in which the Claimant had almost 15 years of service, there were only two previous 'disciplinary' matters (in 2015 and 2016) and one of them was not even deemed sufficient for a disciplinary sanction resulting only in 'counselling'. The 2015 warning had long expired.

36. There are two other matters I should deal with for the sake of completeness. The first is the Claimant's contention that he rang VOSA to seek guidance before he set off with a damaged trailer. I find that he made a call to VOSA *after* he had undertaken the necessary journey to the next stop. That is clear from his own trade union officer's account of the disciplinary hearing. That is relevant to contributory conduct.

37. The Claimant alleges inconsistent treatment by reference to a number of other matters. However, I find that none of those matters referred to are truly comparable situations. In any event a 'tariff' approach (that is having fixed sanctions for any given situation) is not appropriate.

38. For the reasons given, I find that the decision to dismiss the Claimant fell outside the band of reasonable responses and was therefore unfair.

39. I do consider however that the Claimant has caused or contributed to his dismissal and that it is just and equitable to reduce his compensation as a consequence. In ***University of Sunderland v Drossou*** *[UKEAT/0341/16]*, the Employment Appeal Tribunal made it clear that any percentage reduction should generally by the same for both the basic and compensatory awards. I will therefore apply the same percentage.

40. In ***Hollier v Plysu Ltd [1983] IRLR 260***, the Employment Appeal Tribunal suggested that contribution should generally fall into four categories – wholly to blame (100%); largely to blame (75%); employer and employee equally to blame (50%) and employee slightly to blame (25%).

41. This is not a case of a 100% reduction as Mr Collins submits. There were clearly defects in the Respondent's approach which were not the fault of the Claimant. However, I do find that the Claimant was 'largely to blame' for the dismissal for the following reasons:

41.1 He could have done more to explain the circumstances of the damaged vehicle before setting off to his next destination. There was nothing to stop him from sending photographs to his manager of his own accord or asking if Mr Hendry wanted to see them. He may have been apprehensive of Mr Hendry's reaction but he was sufficiently experienced to appreciate that this would be the proper approach than take the decision entirely himself with the consequent risks.

41.2 He appreciated the risk to other road users by the vehicle not having side bars but continued to drive the vehicle anyway. Side bars are important to stop cyclists from being 'sucked' into or under the wheels of a lorry. The Claimant's onward route would almost certainly involve coming close to cyclists using the road.

41.3 He should have telephoned VOSA prior to continuing his duties from the PFS rather than afterwards.

42. In all of the circumstances a reduction of 75% of both the basic and compensatory awards seems to appropriate.

43. This is not a case where a '***Polkey'*** reduction is appropriate. The dismissal was not just 'procedurally' unfair.

44. Following the announcement of the decision on liability the issue of remedy was agreed.

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Employment Judge Ahmed
Date: 4 December 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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