EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110598/2018

Held in Glasgow on 28 October 2018 & 5 February 2019

Employment Judge: Mel Sangster (sitting alone)

Mr D Lamond — **Claimant**
Represented by:
Mr P Keith
Barrister

Asda Stores Limited — **Respondent**
Represented by:
Mr M Cameron
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal and had acted within the band of reasonable responses.

2. The respondent led evidence from Edward Bryce (**EB**), Transport Manager and David Wilson (**DW**), General Manager. The claimant gave evidence on his own

behalf. A joint set of productions was lodged and some additional documents were added by the respondent, by consent, during the Hearing.

Issues to be determined

3. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?

4. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?

5. If the dismissal was unfair, what, if any, compensation should be awarded taking into account:

   a. whether, if procedurally unfair, the claimant would have been dismissed in any event (***Polkey v AE Dayton Services Limited [1987] 3 All ER 974***); and

   b. whether, by his conduct, the claimant had contributed to his dismissal.

Findings in Fact

6. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

7. The claimant was employed by the respondent as an HGV driver. He worked from the respondent's Falkirk CDC Depot and could be asked to drive anywhere throughout Scotland. His employment commenced in June 2006. He worked 40 hours per week and was latterly paid at a rate of £11.77 per hour. He was a member of the respondent's pension scheme, but received no other benefits.

8. On 5 January 2018, the claimant was travelling to the respondent's store at the Jewel, Edinburgh, with a loaded trailer, to make a delivery. At just after 1.00am, the claimant was involved in a road traffic accident. The HGV which the claimant was driving did not slow down on the approach to the Millerhill roundabout. The HGV mounted the roundabout and eventually came to a halt on the embankment on the other side, blocking the carriageway.

9. The claimant was not injured in the accident and no other vehicles were involved. The HGV was however damaged. The police and paramedics attended the scene of the accident. The claimant was charged with careless

driving at the scene of the accident. The HGV was impounded by the police so checks could be carried out on it.

10. The respondent took the following steps in investigating the circumstances surrounding the accident.

a. Steven Hannah (**SH**) met with the claimant at 10.15pm on the day of the accident. He advised the claimant that he was conducting a formal investigation. The claimant was accompanied by a trade union representative William Mattheson (**WM**) at the meeting. The claimant informed SH that roads were wet at of the time of the accident and that it was spitting rain. The temperature was 2 degrees. It was not icy and there was no fog. The claimant stated that the accident was caused by the brakes on the HGV failing. At the conclusion of the meeting the claimant was informed that he was suspended, pending further investigation. It was noted that the police had impounded the HGV and the company would require to wait until the vehicle was released to ascertain further details from the police, and review the CCTV footage from vehicle hand the tachograph. The claimant signed the handwritten notes of meeting and a copy of these were issued to him.

b. On 11 January 2018, Brian Chalmers (BC) met with police to recover the CCTV hard drive from the HGV and download the information from the tachograph in the vehicle. BC met with PC Martin Hughes who provided him with a copy of the brake rolling test certificates from tests which had been conducted on both the unit and the trailer at the DVSA test centre in Drem. The certificates showed that the unit passed, but the trailer failed. BC was informed by PC Hughes however that the trailer failing was due to no weight being in the trailer at the time of testing. PC Hughes stated that his view, and that of DVSA, was that if there had been weight in the trailer at the time of testing, it would have passed. PC Hughes also informed BC that he had recently spoken with the claimant to inform him that the unit and trailer had passed a brake test and that the claimant could instruct his own test, should he wish. PC Hughes confirmed to the claimant during that call that he had been charged with careless driving

and that a report had been passed to the procurator fiscal. PC Hughes confirmed to BC that the unit and trailer could be released, as soon as recovery of them could be arranged by the respondent. BC prepared and signed a statement confirming these points 16 January 2018.

c. The respondent viewed tachograph and tracking records from the vehicle. These showed the speed the vehicle was travelling at and any harsh braking.

d. The respondent also viewed the CCTV records from the vehicle, taken from a monitor mounted on the windscreen, near the rear view mirror, facing outwards.

e. On 18 January 2018, a further meeting was held with the claimant. This was again conducted by SH. The claimant was again accompanied by WM. At the meeting, the claimant confirmed that he had been contacted again by the police, who told him '*that the lorry was braking fine and he would forward it to the procurator fiscal*.' SH confirmed to the claimant what BC had been told by PC Hughes and passed him a copy of the brake reports. The claimant was passed a copy a report showing the speed of the HGV on approach to the Millerhill roundabout and the harsh braking report. The claimant asked if he was on his mobile phone at the time of the accident. He said he was not. He was shown the CCTV footage from 1.04am on the day of the accident and asked about something that seemed to light up on the claimant's left hand side and seemed to be picked up. He was asked what it was and replied *'it certainly looked like my phone but I didn't pick it up. The phone lies in the centre console.'* The claimant was asked about a section 9 seconds later on the CCTV where the lit up object appeared to be placed down to the claimant's left hand side. He was asked what that was, but said that he did not know. The claimant was then shown footage of immediately following the accident, at 1.12am, where the claimant could be seen reaching down into the footwell of the vehicle to pick up a lit up object.

He was asked what that was. The claimant responded, *'that's my phone'*. The claimant stated that he had not picked up his mobile phone to use or look at it at any point during the journey and that he was aware that it was illegal to do so and against company policy. The claimant signed the handwritten notes of meeting and a copy of these were issued to him.

f. A further meeting was held between the claimant and SH on 25 January 2018. The claimant was again accompanied by WM. The claimant was asked again about the lit up object shown on the CCTV at 1.04am. He was asked what it was. The claimant responded *'my mobile phone lights up ever 15 minutes or so. I don't know what it is, it must be a Samsung thing. It only half lights up, not fully.'* SH asked, *'are you saying the light in the reflection is your mobile phone?'* to which the claimant responded *'Yes. It's all it can be Steven'*. The claimant was asked to explain why the object appeared to move as if it was being lifted up and then placed back down again. He stated it was a reflection, but did not accept that he had moved the phone during the journey. The claimant was asked to explain why he did not slow down at all on approach to the roundabout and informed that there was evidence of harsh braking on impact, but not before. He was asked to explain that, but stated that he could not.

Following an adjournment, SH outlined the findings of his investigation as follows:

i. The HGV had slowed down, almost to a stop, shortly before the accident, at the Sheriffhall roundabout;

ii. The CCTV showed the claimant's vehicle approaching the Millerhill roundabout in the inside lane, despite the claimant stating in the investigation that he would require to be positioned over both lanes on approach to the Millerhill roundabout, given the sharp left turn required there;

iii. The speed reports showed that the vehicle did not slow down on approach to the Millerhill roundabout and continued travelling at around 55 miles per hour until the point of impact; iv. Harsh braking was recorded on entering the roundabout;

v. A lit up object, which the claimant accepted was his mobile phone, was picked up from the footwell immediately following the accident; vi. The accident resulted in significant damage to the unit and trailer;

vii. The DVSA and police were happy with the results of the brake tests;

viii. The claimant had been offered the opportunity to have the brakes tested independently, but did not do so.

g. In light of these points, SH informed the claimant that the matter would move forward to a disciplinary hearing to consider allegations that the claimant used a mobile phone while driving a company vehicle and/or had caused serious damaged to company property, both of which could amount to gross misconduct.

11. The claimant was invited to a disciplinary hearing on 29 January 2018, by letter dated 26 January 2018. The letter stated that, at the hearing the claimant would be asked to respond to allegations that he had committed a serious driving offence namely, using a mobile whilst driving and that he had caused serious damage to company property – a unit and trailer. He was informed that the allegations, if proven, could result in his summary dismissal. He was provided with notes of the investigatory hearings he attended.

12. The disciplinary hearing took place on 29 January 2018, as scheduled. It was conducted by EB and the claimant was again accompanied by WM.

13. At the disciplinary hearing the claimant stated that he was not on his mobile phone during the journey and explained that his phone would light up whenever he received a new text, email or other notification. He stated that the accident was caused by the brakes on the vehicle failing. He disputed that the trailer would have passed the DVSA test if loaded, saying that he had spoken to a friend who was a mechanic about this. EB asked about the alleged brake fail, stating *'at the point of impact with roundabout harsh brake shows which would make you believe brakes worked to show harsh brake – agree with that?'* The claimant responded *'Yes'*. EB referred the claimant to the speed trace, highlighting that on approach to the Sheriffhall roundabout, there was a gradual decrease in the speed of the vehicle from the 250m marker, but no such decrease on approach to the Millerhill roundabout. EB then called an adjournment to enable him to consider matters in detail.

14. The disciplinary hearing resumed on 2 February 2018. At that meeting the claimant confirmed that he kept his phone case open when working, with the sound alerts on. The CCTV was played again and, at 1.04am, EB noted that there were no

street lights, yet a reflection on the windscreen appears to be moving across a diagonal line and then, around 10 seconds later, back again.

The claimant reiterated that he had not touched his phone. EB stated that he had spoken to Scania about how the braking system worked and had been informed that when the brake is applied initially it activates the trailer brake, then splits 50:50 between the unit and the trailer. He suggested to the claimant that, even if the brakes had failed on the trailer, there would have been some reduction in speed as a result of the unit brakes, but there was none whatsoever. The claimant reiterated that the brakes had failed.

15. Following an adjournment, EB summarised his findings. These were that

a. The claimant was fully aware that he should not use a mobile phone while driving.

b. He was speeding on approach to the roundabout (54mph in a 50mph zone).

c. During the investigation meetings the claimant had agreed that the reflection must be his phone, which lights up when alerts/messages are received.

d. The claimant accepted that he left his phone case open when driving. EB believed this was so the claimant could check his phone.

e. EB believed that the reflection on the windscreen was the claimant picking up his phone to check it and then returning it. There were no streetlights in the area, so EB did not accept the claimant's explanation that this was responsible for the moving lit up object on the windscreen.

f. Following the accident, the CCTV showed the cab light being put on and the claimant immediately lifting his lit mobile phone from the footwell of

the unit and placing it on the central console, despite the claimant saying that it was there all the time. EB stated that he believed as a result that the claimant was using the phone in some manner (although not necessarily a call) prior to the accident and then dropped it at the point of impact.

g. The police and DVSA were happy with the brakes and the claimant was charged with careless driving.

h. Harsh braking was recorded on impact.

16. EB confirmed that his decision was to summarily dismiss the claimant for using a mobile phone while driving and causing serious damage to company property, namely the unit and trailer.

17. A detailed letter, dated 5 February 2018, was sent to the claimant confirming these findings and this conclusion. It also mentioned, as part of the rationale for EB's conclusion, the following

a. EB's discussion with Scania re how the unit and trailer braking system works and the fact that there was no reduction in speed at all, despite the claimant's position that he was braking on approach; and

b. The fact that the claimant had agreed with EB when he stated that harsh braking was recorded at the time of impact, which suggests that the brakes worked at that point.

18. The claimant appealed against his dismissal. His grounds of appeal were that

a. he did not hold, use or interact with his phone while driving, that there was no evidence of this; and

b. the trailer brakes had been found to be inadequate and the trailer would not have passed its MOT as a result.

19. An appeal hearing took place on 12 March 2018. The appeal was conducted by DW and the claimant was again accompanied by WM. The claimant indicated at the meeting that he had evidence which would prove that he had not been using his mobile phone. The meeting was adjourned to allow the claimant to provide this evidence and for DW to consider matters.

20. The meeting was reconvened on 29 March 2018. By this stage the claimant had provided a partial phone record for a mobile phone. It did not have any of the claimant's details on it, but DW accepted it was a record related to the claimant's phone. DW highlighted however that it only showed that no outgoing calls were made at the time of the alleged usage: it did not show if any incoming calls, text messages, emails or social media alerts were received, or that the phone was idle during the journey.

21. DW stated that, having reviewed the CCTV footage he could find no other reasonable explanation for the reflection on the windscreen and therefore agreed with the conclusion that the claimant had used his mobile phone while driving. In relation to the brakes, he stated that having reviewed all the evidence presented through the investigation and disciplinary hearing, in terms of the speed/brake trace and brake test completed, he found no evidence to support the claimant's assessment that the brakes failed. In light of those points, he rejected the appeal.

22. The appeal outcome was confirmed by letter dated 30 March 2018.

23. The claimant was entitled, under the respondent's procedures, to a further appeal, but he chose not to submit a further appeal.

Relevant Law

24. S94 ERA provides that an employee has the right not to be unfairly dismissed.

25. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

26. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (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."

27. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell [1978] IRLR 379***, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

i. whether the respondent genuinely believed the individual to be guilty of misconduct;

ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

28. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones [1982] IRLR 439***).

Submissions

Claimant's submissions

29. Mr Cameron for the claimant referred to the Burchell tests and stated that the respondent did not have a genuine or reasonable belief that the claimant committed the offences he was dismissed for. There was insufficient evidence and the respondent's position rested solely on the CCTV footage, which was

not clear. There was no evidence of the claimant using his mobile phone and it was not clear what constituted 'use' in this context. The brake tests clearly showed that the vehicle failed and no loaded retest was undertaken. The respondent conducted an inadequate and partisan investigation where the facts were cherry picked to support a predetermined conclusion.

30. Pension loss should be disregarded in any calculation of the compensatory award, as being de minimis.

Respondent's submissions

31. Mr Keith, for the respondent, also referred to the Burchell case. He stated that there was sufficient evidence for the respondent to reach the conclusions they did, referring to the CCTV evidence, the brake tests conducted, the speed trace and the harsh braking report. It was reasonable for the respondent to rely on the statement from the police that the trailer would have passed the brake test if loaded. The respondent conducted a fair investigation. EB had a genuine belief that the claimant committed the misconduct alleged and had reasonable grounds for reaching that conclusion.

Discussion & Decision

32. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

33. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a

sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

34. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did EB have a genuine belief?

35. The Tribunal concluded that EB did have a genuine belief that the claimant had used his mobile phone while driving and that the claimant had caused serious damage company property, namely the unit and trailer. His evidence was clear on this point and this was consistent with the explanation provided at the disciplinary hearing and in the letter confirming the claimant's dismissal.

Did EB have reasonable grounds for his belief?

36. EB set out in detail the rationale for his findings, both at the conclusion of the disciplinary hearing and in the letter dated 5 February 2018 confirming the claimant's dismissal. The grounds for his belief were as follows:

a. The claimant accepted that he was aware that he should not use a mobile phone while driving.

b. The claimant accepted that he left his phone case open when driving, with the sound alters on. EB believed this was so the claimant could

check his phone and that there was no other reasonable explanation for the claimant doing so.

c. On viewing the CCTV footage, a lit up object appeared to move across the windscreen on two occasions at 1.04am.

d. EB believed that the reflection on the windscreen was the claimant picking up his phone to check it and then returning it. There were no streetlights in the area, so EB did not accept the claimant's explanation that this was responsible for the lit up object moving on the windscreen.

e. The claimant had agreed that the reflection which appeared on the CCTV footage must be his phone, which lights up when alerts/messages are received.

f. Following the accident, the CCTV showed the cab light being put on and the claimant immediately lifting his lit mobile phone from the footwell of the unit and placing it on the central console, despite the claimant saying that it had been there throughout the journey. EB believed as a result that the claimant was using the phone in some manner (although not necessarily a call) prior to the accident and then dropped it at the point of impact.

g. The claimant was speeding on approach to the roundabout (54mph in a 50mph zone). The speed trace showed that there was no reduction in speed at all as the claimant approached the roundabout.

h. EB had discussed with Scania re how the unit and trailer braking system worked and understood that, even if the trailer brakes had failed, the unit brakes would have at least slowed down the vehicle if the claimant had indeed been braking on approach to the roundabout. The braking records did not however show any braking, in either the unit or the trailer, on approach to the roundabout.

i. Harsh braking was recorded on impact. This suggested that the brakes were in fact working at that point. The claimant agreed with this proposition when it was put to him during the investigation.

j. The police and DVSA were happy with the brakes and released the unit and trailer back to the respondent.

k. The claimant was charged with careless driving as a result of the accident.

37. The Tribunal accepted that these were the grounds for EB's belief and find that these amounted to reasonable grounds for EB to conclude that the claimant had used his mobile phone in some capacity prior to the accident and that the claimant caused the accident which resulted in serious damage to company property. These findings, and the finding that the claimant's conduct amounted to gross misconduct, were open to EB in the circumstances and fell within the band of reasonable responses.

38. Having reached the conclusion that the claimant committed gross misconduct by his actions, EB concluded that the claimant should be summarily dismissed. That conclusion fell within the band of reasonable responses open to EB in the circumstances.

Was there a reasonable investigation?

39. The respondent conducted a thorough investigation. The Tribunal noted that the respondent took into account all the records available to them, such as the CCTV, the speed trace, the braking report, the tests conducted on the unit and trailer following the accident and the information provided to them by the police. There were no further steps which should, reasonably, have been undertaken.

40. The claimant asserted that the trailer's brakes should have been retested when loaded. The respondent did not do so as they had been informed by the police that, whilst the test results showed the trailer brakes failed the test conducted by DVSA, both the DVSA inspector and the police felt if weight had been in the trailer, it would have passed the test. They were also informed at that stage that the unit and trailer would be released back to the respondent and that the conclusion of the police investigation was that the claimant's actions constituted careless driving and that a report had been passed to the procurator fiscal in relation to this. In these circumstances, the Tribunal find that the respondent's decision not to retest the brakes on the trailer fell within the band of reasonable responses open to them.

Procedure

41. The respondent investigated the allegations. The claimant was invited to a disciplinary hearing and provided with the opportunity to review the CCTV footage and the other evidence which the respondent had gathered in the course of the investigation. He was given the opportunity to respond to the allegations at the disciplinary hearing and provided with the two levels of appeal, only one of which he exercised. The respondent followed their internal Disciplinary Procedure in doing so.

42. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Conclusions re s98(4)

43. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.

44. For these reasons, the claim of unfair dismissal is dismissed.

Employment Judge **Mel Sangster**

Date of Judgment **19 February 2019**

Entered in register copied to parties **20 February 2019 and**

I confirm that this is my judgment in the case of Lamond v Asda Stores Limited and that I have signed the Judgment by electronic signature.