EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Adrian Lees	AND	AB Agri Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 9 March 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Mr W Ho, Solicitor**

JUDGMENT

The judgment of the tribunal is that the claimant's claim is dismissed.

REASONS

1. In this case the claimant Mr Adrian Lees claims that he has been unfairly dismissed. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair.
2. I have heard from the claimant, and I have heard from Mr Daniel Holding on his behalf. I have heard from Mr Simon Bishop and Mr Jim Haddow on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant commenced employment with the respondent company on 5 July 2004. He was dismissed for gross misconduct with effect from 14 April 2016. Until that time the claimant had had a clean disciplinary record during the 12 years of his employment. At the time of his dismissal the claimant was employed as an HGV driver. His role involved driving a 44 tonne articulated bulk vehicle delivering animal feed from the respondent's site of manufacture, and transporting goods to clients at their farm sites.
5. The claimant had been issued with a written contract of employment, which included a written disciplinary procedure. The non-exhaustive list of examples of gross misconduct which might result in dismissal included: "6.2 Wilfully causing harm or injury to another

employee and 6.9 Using abusive behaviour or language to another employee or customer or client of the Employer."

6. The claimant's contract of employment also included the following provision under the heading Other Activities: "the Employee shall not (unless otherwise agreed in writing by the Employer and subject as provided below) undertake any other business or profession or be or become an employee or agent of any other company, firm or individual or assist or have any financial interest in any other business or profession …" The respondent felt it important for employees to seek permission to carry out any second job, because if the respondent felt that it might affect the employee's job role then they would not agree to it. In the claimant's case he was an HGV driver and responsible driving a large articulated lorry. Part of his job role included accurate declaration of his hours because he was not allowed to drive more than an average of 48 hours per week. The respondent had a requirement to maintain control of driving hours to ensure that correct rest periods were taken in compliance with the relevant legal driving requirements.
7. In addition the claimant had been asked to sign an "Employee Declaration of Other Work" with regard to any alternative employment. The preamble provided: "Please note that charitable work and work undertaken as a special constable, retained fire fighter or the Territorial Army together with any work undertaken for a non-road transport employer will not count towards working time calculations. However if you are in any of these activities you still need to inform us as this may affect your rest requirements under the EU drivers' hours rules." The claimant signed that declaration on 12 October 2015 to the effect that: "I AM NOT currently engaged in any work outside of my commitments to ABN [the respondent]. I undertake to inform ABN immediately if this situation should change at any point during my employment."
8. Towards the end of 2015 the claimant encountered personal difficulties which included the breakdown of his marriage. He decided to do some part-time taxi driving for a local taxi company to supplement his income and he believed that this was potentially manageable within his shift system with the respondent. The claimant's line manager was Mr Paul Baker the Area Transport Manager SW Area. The claimant asked Mr Baker for a reference to support his application to the District Council to become a licensed taxi driver. Mr Baker declined to do so because of the potential impact on the claimant's driving hours. The claimant says that he then asked the Operations Manager Mr Michael Perry, and there was an e-mail exchange on 8 January 2016 between Mr Perry and the HR department concerning this possible reference. Mr Perry referred on the application stating: "All I know is that mid Devon Council require a reference for a licence, I'm not sure what kind, possibly for taxi driving. If he does this then it may impinge on his driving hours for us as he is a 15 hour driver (worry about that if I am correct)." HR replied: "Yes I agree let's worry about this if that is the case. He should be telling you if he is considering getting a second job anyway."
9. The claimant acted as a workplace representative for a number of employees. Mr Baker and the claimant had a meeting on 16 March 2016 by way of a consultation on a proposed workplace agreement. The meeting was courteous and uneventful until Mr Baker raised the matter of the claimant's recent request to him to provide a reference in order to gain the taxi driver permit. Mr Baker explained that he had heard rumours that the claimant had obtained a taxi driver permit from another source, to which the claimant agreed. Mr Baker also said that he had heard rumours that the claimant had been seen driving a taxi locally.
10. At this stage the claimant's attitude changed and he became angry. He challenged the respondent's right to have control over his spare time and Mr Baker tried to explain the relevance of the working time rules and his initial commitment to the company to drive the maximum 48 hours. The meeting eventually ended in a degree of acrimony.
11. On the following day the claimant sent Mr Baker a text message, which left Mr Baker feeling shocked and disturbed. The text message dated 17 March 2016 at 12:29 read as follows: "I'm going to HR about your victimisation comments yesterday. I'll put a stop to it. You asked me for a straight answer. I wonder if your Mrs asked you about how many hookers you've shagged on your bike trips away how straight your answer would be?

You've picked on the wrong bloke." This text could not be said to have been sent in the heat of the moment in that it was sent in the middle of the day following the previous evening's meeting.

12. Mr Baker felt this text to be of a threatening nature which included false and degrading allegations against him which might affect his family. He reported the matter to his manager, Mr Brian Sutlieff, the Area Manager South West. On 18 March 2016 Mr Sutlieff telephoned the claimant to inform him that he was suspended on full pay whilst allegations of misconduct were investigated and he was invited to attend an investigation meeting on 29 March 2016. This was confirmed in a letter dated 18 March 2016. The letter suggested "it is alleged that you have personally threatened Mr Paul Baker using personal information (whether factual or otherwise) to discourage Mr Baker from completing his duties in investigating potential working time directive infringements."
13. The investigation meeting took place on 29 March 2016. The claimant admitted that he had sent the relevant text message. The claimant now disputes the accuracy of the minutes of that meeting, which record that the claimant had explained his marital difficulties and the fact that he had to take on additional borrowing and felt angry that Mr Baker was attacking him personally and questioning what he was doing. He repeated the allegation that Mr Baker had "been in whorehouses with his brother" and said "I bit back with the only thing I knew because I needed to get him off my case." The claimant later admitted: "it was just a lash out. I regret sending it and should not have sent it. I regret sending it. I didn't think anyone else would see it. If I had the chance to apologise I would". Mr Sutlieff responded that when he told the claimant that Mr Baker had taken the text to be a threat the claimant replied "Paul can take it anyway he likes" and when asked to keep it confidential he replied "why should I? If people ask me what is going on I will tell them."
14. By letter dated 7 April 2016 the claimant was then invited to attend a disciplinary hearing to answer four allegations. These allegations were: (i) blackmailing another employee (Paul Baker) via a text message to impose stress and hurtful intent to the employee and his family, for personal financial gain; (ii) threatening behaviour to another employee via text message, specifically the use of intimidation to another employee, for personal financial gain; (iii) breach of contract, specifically working for another employer; and (iv) purposely avoiding declaring the extra hours worked in his second taxi driving job. The claimant was informed that if proven the allegations might result in his dismissal, and was afforded the right of representation by a fellow worker or trade union representative. The claimant was sent copies of all the relevant documents including the disciplinary procedure.
15. The claimant was represented at the disciplinary hearing on 11 April 2016 by Mr Holding, from whom I have heard today. The disciplinary hearing was chaired by Mr Simon Bishop, Area Operations Manager for the Eastern Region from whom I have also heard today. He had not been involved in any of the events leading up to the disciplinary hearing.
16. The claimant accepted that he had sent the relevant text and explained the strain he was under at home and suggested he had acted out of character and apologised for the text. The claimant asserted throughout that it was merely a form of banter, albeit harsh banter. Mr Bishop felt that the claimant's answers with regard to his second job as a taxi driver were inconsistent. The claimant was aware of his obligation to seek permission from the company and he had only recently signed his declaration in October 2015. He initially claimed that Mr Perry was unaware of his taxi driving, but later suggested that Mr Perry was aware. The claimant was aware of his working requirements with regard to the average of 48 hours per week. With regard to recording his hours, the claimant had also given inconsistent versions at the investigation meeting and the disciplinary meeting, namely that at first he had overlooked the requirement and subsequently conversely that he had been logging hours by filling out manual tachographs. He then subsequently arranged for manual tachographs to be delivered which contradicted his earlier assertions.

17. The claimant raised the matter that he was being treated unfairly because his treatment was inconsistent with that of other employees who had alternative jobs. The examples given were Mr Morgan who did some bar work in a pub; Mr Holding who is a partner in a local farm business; Mr Bright who was a gardener; and Mr Pincombe who worked on his family farm. The claimant relies on two other examples which he says he also mentioned, although their names do not appear in the minutes. These are Mr Perry who was a massage trainer and Mrs Lock who worked behind a bar. The claimant argued there was a strong element of "custom and practice" with the respondent and there was no need to seek written permission. The claimant also disputed that his driving hours as a taxi driver were not relevant to the regulated hours as an HGV driver, on the basis that the taxi hours were "non-road transport hours".
18. Mr Bishop investigated the circumstances of these other staff and concluded that none of them was directly comparable, particularly as none of the others were carrying out any other road transport activities. He felt that there was a clear distinction between the claimant's taxi driving and working on a smallholding or working behind a bar. In any event Mr Bishop decided that the company should commence alternative investigations into the other emoployees' activities in order that the respondent should be fully aware of the circumstances and to ensure they were being treated consistently with the claimant.
19. Following the disciplinary hearing Mr Bishop concluded that the claimant had intended his text message to be taken as a threat and that he failed to display any real remorse during the course of the disciplinary hearing. Mr Bishop concluded that taken in isolation the text was an act of gross misconduct. With regard to the allegation of breach of contract, Mr Bishop concluded that the claimant had been aware of the respondent's requirement to declare any additional work and this was clear from his Employee Declaration in October 2015. He concluded that the claimant was well aware of his contractual requirement and had failed to seek authorisation from the respondent to carry out his second job as a taxi driver. He concluded that this was an act of gross misconduct. He also concluded that the claimant had tried to mislead him with regard to the declaration of any extra hours worked. He concluded that the claimant had provided inconsistent information during the investigation and disciplinary hearing regarding the recording of his hours in order to support his position. Mr Bishop believed the claimant had committed gross misconduct. He considered the claimant's length of service and such information as he had with regard to his personal circumstances but determined that summary dismissal for gross misconduct was the appropriate sanction.
20. Mr Bishop confirmed the summary dismissal and his reasons by letter dated 14 April 2016 and the claimant was afforded the right of appeal.
21. The claimant's appeal was heard by Mr Jim Haddow, from whom I have heard. He is Area Manager for the North and had not been previously involved in the matter. The appeal hearing took place on 31 May 2016 and the claimant was accompanied by an employee representative. The appeal was a full rehearing of the earlier disciplinary allegations. Mr Haddow did not accept the claimant's assertion that the text message was banter or a joke. He believed that the text message was sent by the claimant to get leverage over Mr Baker in an attempt to blackmail him so that Mr Baker would not investigate the claimant's second job. With regard to the allegation of breach of contract Mr Haddow was satisfied that the claimant was aware of the relevant clause in his contract that he should not work for a second employer. In circumstances where the claimant was an HGV driver for the respondent and the second job also involved driving he concluded that there were potentially serious health and safety implications for the claimant, third parties and the respondent.
22. The claimant again argued that he had been treated inconsistently compared to other employees whom he said had second jobs. Mr Haddow considered their circumstances and concluded that there was no direct comparison because none of the others had a second driving job. He was satisfied that any other employee in the same circumstances would have been treated in exactly the same way. The final allegation was that the claimant had purposely avoided declaring his hours in his second job. The claimant maintained that he did not think he had to do this as and when he worked the extra

hours. Mr Haddow concluded that because the claimant's explanation for not reporting his hours had changed through the investigation and disciplinary processes that the claimant did not intend to report any extra hours. Mr Haddow concluded that there was no compelling reason to overturn Mr Bishop's decision to allow the appeal. He therefore rejected the appeal

23. The claimant has subsequently produced documents in apparent mitigation of his actions but these were not provided at the relevant times by the claimant, and they were not before Mr Bishop at the disciplinary hearing, nor before Mr Haddow at the appeal hearing.
24. Having established the above facts, I now apply the law.
25. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
26. I have considered section 98 (4) of the Act which provides "…. 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".
27. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
28. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Enterprise Liverpool plc v Bauress and Anor UKEAT/0645/05/MAA; London Borough of Harrow v Cunningham [1996] IRLR 256; Securicor Ltd v Smith [1989] IRLR 356; Hadjioannou v Coral Casinos Ltd [1981] IRLR 352; Paul v East Surrey DHA [1995] IRLR 305; Epstein v Royal Borough of Windsor and Maidenhead UKEAT/0250/07; and Hollier v Plysu Limited [1983] IRLR 260. The tribunal directs itself in the light of these cases as follows.
29. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.
30. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
31. The claimant confirmed at a case management preliminary hearing on 26 September 2016 that he does not allege any procedural breach on the part of the respondent during the dismissal and appeal process. His challenges to the fairness of the dismissal are

twofold. First, that he was treated inconsistently in that other employees had second jobs and they were not disciplined; and secondly that dismissal was too harsh a sanction in the circumstances.

32. In the first place I agree that there were no procedural deficiencies in the respondent's disciplinary process in this instance. The claimant was aware of the allegations against him from the outset and was able to state his case in reply to those allegations in the presence of his chosen representative. There was suspension on full pay before an investigation meeting and then a disciplinary hearing. The claimant was informed that if proven the allegations might result in his dismissal. The claimant was afforded the right of appeal following his dismissal, which was heard by way of a rehearing. The various managers involved were all senior managers who had not been involved in earlier stages of the proceedings. I find that the respondent carried out as much investigation as was reasonable in the circumstances of this case.
33. The first two allegations which the claimant had to face were those of allegedly blackmailing Mr Baker by his text message for personal financial gain, and threatening behaviour and intimidation of Mr Baker again for personal gain. I find that the text message in question was an offensive text which was unprovoked in that there is no evidence of Mr Baker having acted inappropriately towards the claimant before the claimant sent the text. It was not sent in the heat of the moment by the claimant who had an opportunity to reflect on his meeting with Mr Baker the evening before. The claimant asserts that the text was a form of banter and/or in an attempt to prompt a response from Mr Baker to discuss matters in an amicable fashion. However, even in an environment with normal coarse industrial language this text does not appear on its face to be merely banter, and there is no evidence that the claimant followed it up with an attempt to discuss matters amicably with Mr Baker. Mr Bishop and Mr Haddow both genuinely believed that the claimant had committed gross misconduct by sending this text. I find that they were reasonable to hold that belief, not least because it is reasonable to conclude from the text that the claimant was trying to dissuade Mr Baker from challenging his second job by way of a threat to disclose damaging personal information.
34. The third allegation of gross misconduct was acting deliberately in breach of contract by way of working for another employer. Not only had the claimant signed his contract of employment which forbids working for another employer without express written permission, the claimant also signed his “Employee Declaration" on 12 October 2015. Under this document the claimant had declared that he would not engage in any work outside of his employment and that he would immediately notify the respondent if this situation changed. Within about two months the claimant had applied for a taxi driving licence and had commenced driving without seeking permission from the respondent or notifying them that the situation had changed. Mr Bishop and Mr Haddow both genuinely believed that the claimant had committed gross misconduct by failing to comply with the express terms of the contract of employment and the declaration and I find that they were reasonable to hold that belief.
35. The fourth allegation of gross misconduct was deliberately avoiding declaring any extra hours worked as a taxi driver. The claimant gave inconsistent versions at the investigation meeting and the disciplinary meeting, namely that at first he had overlooked the requirement and subsequently conversely that he had been logging hours by filling out manual tachographs. He then subsequently arranged for manual tachographs to be delivered which contradicted his earlier assertions. Mr Bishop was entitled to conclude from this first that he had deliberately avoided declaring any extra hours, and secondly that he had tried to mislead the disciplinary hearing. Mr Bishop generally believed that the claimant had committed gross misconduct in this respect. In my judgment it was reasonable of him to hold that belief.
36. The claimant asserts that he was treated inconsistently with other employees who had alternative employment and who were not disciplined. However, none of these is a true comparator in the same or similar circumstances. None of the other named employees were carrying out driving duties as the integral part of their second employment. The two employees involved in a farm and/or agricultural smallholding may well have been doing

external driving, for instance tractor work, in the course of their alternative employment. However, there is no evidence to suggest that they had failed to disclose the alternative job and/or had refused to declare extra driving hours. It cannot be said that they were treated differently from the claimant in the same or very similar circumstances. In any event, even if they were, the respondent was entitled to take into account the aggravating factors in the claimant's conduct with regard to the abusive text message. The claimant is unable to point to a true comparator who has been treated more leniently in the same or very similar circumstances.

37. The claimant has also argued today that taxi driving is “non road transport driving" for the purposes of the relevant regulations relating to HGV drivers’ hours, and that therefore by implication either the respondent cannot impose restrictions on this extra driving, and/or that the claimant should not be required to disclose all the relevant details. The respondent does not agree with that analysis of the relevant regulations. Whatever the correct analysis might be, it is either compulsory but otherwise at the very least entirely reasonable for the respondent to impose a requirement that an employed HGV Driver must obtain permission before undertaking a second driving job, and that the relevant driving hours are disclosed. The respondent can then take a view as the extent to which the relevant driver might be fit to drive and/or might be in breach of any relevant regulations. That reasoning is expressly set out in the Employee Declaration on Other Work which the claimant had signed only a matter of weeks before commencing his second driving job and without complying with these specific requirements.
38. It is clear in this case that the respondent genuinely believed that the claimant had committed gross misconduct, and that there were reasonable grounds for holding that belief. This followed a full and fair investigation which was clearly reasonable in all the circumstances of the case. The claimant asserts that dismissal was too harsh a sanction, particularly given his personal and marital difficulties at the time, and his 12 years of previous good service. However, in judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. There is a band of reasonable responses to the employee’s conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.
39. In my judgment, the sanction of dismissal is within the band of reasonable responses open to the respondent when faced with these facts, albeit at the extreme end of that band. Accordingly I find that even bearing in mind the size and administrative resources of this employer the claimant’s dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant’s unfair dismissal case.
40. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 23; a concise identification of the relevant law is at paragraphs 25 to 30; and how that law has been applied to those findings in order to decide the issues is at paragraphs 31 to 39.

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Employment Judge N J Roper
Dated 9 March 2017
Judgment sent to Parties on
17 March 2017