Case Number 1302697/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs S Johnson		**JC Bamford Excavators Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Stoke on Trent **ON** 15 & 16 February 2017
23 February 2017
(Panel Only)

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Ms S Garner (Counsel)**
For Respondent: **Mr E Beever (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant was fairly dismissed by the respondent; her claim for unfair dismissal is not well-founded and is dismissed.
2 The claimant was lawfully dismissed in compliance with her contract of employment; her claim for wrongful dismissal is dismissed.

REASONS

Introduction

1 The claimant in this case is Mrs Sandra Johnson who was employed by the respondent, JC Bamford Excavators Limited, as an HGV Driver, from 16 October 2006 until 1 July 2016 when she was dismissed. The reason given at the time for the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 27 October 2016, the claimant claims that she was unfairly and wrongfully dismissed.

3 The respondent admits that the claimant was dismissed; but asserts that she was dismissed for a reason relating to her conduct; and that her dismissal was fair. The respondent further asserts that the claimant was lawfully dismissed

in accordance with her contract of employment. Accordingly, both claims are resisted.

The Evidence

4 The respondent called two witnesses to give evidence: Mr Joannes Van Osta - General Manager for Group Transport and Logistics; and Mr Robert Owen - Group Manufacturing Director. Mr Van Osta was the dismissing officer; and Mr Owen heard the claimant's appeal. The claimant gave evidence on her own account; she did not call any witnesses.

5 In addition to the oral evidence, the tribunal was provided with an agreed bundle of documents running to more than 350 pages. I have considered those documents from within the bundle to which I was referred by the parties during the hearing.

6 I found the evidence of Mr Van Osta and Mr Owen to be clear and straightforward. Their evidence was consistent with each other and consistent with contemporaneous documents. Their evidence remained internally consistent and did not vary when tested by cross-examination.

7 The claimant was not satisfactory witness: her evidence was internally inconsistent; she changed her account during cross-examination. There are two aspects in particular of the claimant's evidence which I do not accept: -

(a) It was the claimant's case that she was unaware of having transgressed the Drivers' Hours Regulations on 28 June 2015 until this was pointed out to her on 9 June 2016. The claimant was pressed on this point because it was clear that she had been aware at the time she had worked on seven consecutive days; and she knew this was the transgression under investigation. The claimant kept repeating that she had been "*unaware*"; when pressed further as to what it was that she was unaware of, her ultimate explanation was that when she finished driving at 11:42am on Sunday 28 June 2015, she still thought that it was earlier than 6:30am. (The claimant's understanding being that had she finished driving before 6:30am there would have been no breach of regulations.) I wholly reject this evidence - in my judgment, it is plain nonsense for the claimant to suggest that 11:42am she still believed that it was earlier than 6:30am.
(b) The claimant was aware that she was required to complete a record book to record her weekly driving hours. She maintained that she believed that the book need only record driving hours whilst working for the respondent; and need not record driving hours whilst working for other employers. I find this evidence to be quite incredible: when pressed, the claimant acknowledged that the record book would serve no purpose unless it recorded all driving hours. And furthermore, although the claimant

asserted that she had been inadequately trained in how to complete the record book, the requirements are clear from the face of the document itself; which clearly asks for details of all employers for whom a driver works

8 Where there is a conflict, I prefer the evidence given by Mr Van Osta and Mr Owen over that given by the claimant. On this basis, I have made my findings of fact.

The Facts

9 The respondent is a transport and logistics company operating within a much larger group. The respondent is responsible for the co-ordination of incoming shipments from suppliers globally to all group plants and distribution centres; for the coordination of inter-company shipments between plants globally; and for the delivery of finished machines to dealers and customers globally. The claimant worked in a relatively small unit of JCB trucks responsible for inter-company shipments within the UK; there were a total of 8 drivers employed in the unit.

10 The claimant commenced her employment with the respondent on 29 October 2007; this was her first job as an HGV driver. The claimant has a previously unblemished disciplinary record.

11 The claimant was aware from the outset of the need to complete weekly record sheets showing her total driving hours. At first these were individual sheets which were handed in on a Friday; but, since 2011, the claimant has used a record book which was handed in on a Friday afternoon for checking and collected again when reporting for work on Monday morning (the unit in which the claimant worked did not operate at weekends).

12 The claimant underwent all appropriate training as to drivers' hours; record-keeping; and the use of tachograph recording equipment.

13 The respondent's vehicles were fitted with analogue tachograph recording equipment requiring the insertion of a record card each day. These record cards would also be handed in each Friday and retained by the respondent.

14 More modern vehicles are fitted with digital tachograph recording equipment where each driver has their own digi-card which is to be inserted into the vehicle at the commencement of each tour of duty. Any driver in possession of a digi-card is required to hand it to their employer periodically for downloading. This applies even where the vehicles used for the employer have analogue recording equipment. On any view, data from a digi-card would be downloaded up to six weeks in arrears.

15 In July 2014, with the respondent's consent, the claimant started to undertake occasional, unpaid, work for her partner's company outside of her normal working hours with the respondent. The claimant's partner's company operated vehicles which were fitted with digital tachograph recording equipment; the claimant had her own digi-card. It was the claimant's responsibility to ensure that any driving she did for her partner's company did not conflict with her obligations to the respondent – in particular, to ensure that she always complied with the Drivers' Hours Regulations.

16 On 9 June 2016, the claimant's line manager, Ms Carole Ball, asked for a meeting at the end of the working day. Ms Ball presented the claimant with a summary of her working hours over the weekend of the 27/28 June 2015; this appears to have followed a download of the claimant's digi-card on 22 March 2016; the claimant could readily see that she had exceeded her driving hours by working a full working week for the respondent ending on Friday 26 June 2015; then working for her partner on both the 27 and 28 June 2015; and then working again for the respondent for the full working week commencing Monday 29 June 2015. It was common ground between the parties that by the time the claimant presented for work on Monday 29 June 2015, and for each subsequent day thereafter until Friday 3 July 2015, she was driving illegally.

17 There was no dispute that the claimant presented her digi-card to Ms Ball on a regular basis - approximately monthly. The respondent has never offered any explanation, to the claimant or to the tribunal, for the delay in the analysis of the digi-card until 22 March 2016; or for the further delay until 9 June 2016 in bringing this matter to the claimant's attention. Whilst this delay appears to be unacceptable; and is unexplained; it is also the case that the transgression would have come to light much earlier if the claimant had included in her record book her driving hours for the 27 and 28 June 2015 but she failed to do so. It subsequently transpired that there were a further 39 occasions upon which the claimant had worked at weekends for her partner's company without disclosing these driving hours in her record book. This fact was not known to Mr Van Osta at the time of the claimant's dismissal; it was known to Mr Owen by the time of the appeal. There is no suggestion that those 39 occasions involved illegal driving.

18 On 13 June 2016, Ms Ball wrote to Mr Bamford (who I assume to be a senior manager or director of the respondent) advising him of the claimant's transgression. It is clear from the terms of her letter that Ms Ball was concerned as to her own position (perhaps an acknowledgement that the digital tachograph analysis should have been conducted much earlier); and she also appears to have, to some extent, prejudged the situation; stating in her letter that the matter would have to be dealt with by way of a written warning at least. The letter was copied to Mr Van Osta.

19 Mr Van Osta requested Ms Ball to conduct a formal disciplinary investigation. Ms Ball conducted an investigatory interview with the claimant on 14 June 2016; Ms Ball was accompanied by an HR adviser Holly Whelan; the claimant was told of her right to be accompanied by a trade union representative or work colleague; she chose to proceed without a companion. Having readily acknowledged, on 9 June 2016, that she had driven illegally by driving for 7 consecutive days in June 2015, during the investigatory meeting, the claimant appeared to be unaware of any tachograph transgressions; and asked if there was anything she had done wrong. I find that the claimant's approach during this meeting was wholly disingenuous; she was aware of her transgression; and what was under investigation. In addition to her meeting with the claimant, Ms Ball also sought further and confirmatory information from the claimant's partner's company.

20 Ms Ball reported to Mr Van Osta who concluded that a disciplinary hearing was appropriate. He wrote to the claimant on 23 June 2016 setting out three disciplinary charges: -

(a) **Serious Breach in Health and Safety**: this related to the claimant's breach of Drivers' Hours Regulations over the period 22 June 2015 onwards; and falsifying the record book which she submitted to the company by excluding reference to the hours worked on 27 & 28 June 2015. It was also indicated that there were further alleged breaches of Drivers' Hours Regulations in August and December 2015 and January 2016.
(b) **Gross Negligence**: this referred to presenting herself as fit for work on 29 June 2015 knowing that she had driven on 7 consecutive days in breach of regulations.
(c) **Breach of Trust and Confidence**: this charge basically related to the consequences of the other two charges.

21 The disciplinary hearing was held on Monday 27 June 2016: the hearing was conducted by Mr Van Osta who was accompanied by Holly Whelan; the claimant attended accompanied by her trade union representative Mr Gordon Richardson. The claimant's stance during the disciplinary hearing was very much to transfer responsibility to Ms Ball. The claimant's case was that Ms Ball had clearly not downloaded the information from the claimant's digi-card on a regular basis as she ought to have done; and, had she done so, the claimant's transgression would have come to light sooner. The claimant also claimed that she was unaware of the need to include additional hours in her record book; she asserted her belief that she was only required to record hours driving for the respondent. Somewhat inconsistently, the claimant, on the one hand, confirmed that she was aware that she was driving illegally when she drove on the seventh day and beyond; but, on the other hand, claimed to be unaware that she was

driving illegally when she reported to for work on Monday 29 June 2015 – notwithstanding that this was the eighth consecutive day.

22 Following the meeting, Mr Van Osta considered the position carefully. It is clear from documents in the bundle that he was sensitive to the fact that Ms Ball had not performed her own job adequately; he was careful to recognise this; but nevertheless, was concerned that the disciplinary proceedings were about the claimant's conduct and responsibility and not that of Ms Ball. Essentially, Mr Van Osta concluded as follows: -

(a) That the claimant was aware that she was breaching regulations when she drove on the seventh and subsequent consecutive days.
(b) That the claimant was aware of the requirement to include all driving hours in her record book.
(c) That the claimant had failed to include her additional driving hours in her record book to conceal them from the respondent - possibly the claimant was aware that Ms Ball did not conduct proper analysis of the digi-card; and took advantage of the situation.
(d) That, in any event, when the claimant attended for work on the morning of Monday 29 June 2015 she knew that she would be to driving the respondent's vehicle illegally. But, rather than declaring the position, she went ahead and drove illegally on that day; and on four subsequent days.

The allegations relating to December 2015 and 2016 were not established.

23 Mr Van Osta considered the claimant's previous unblemished disciplinary record; but, nevertheless, concluded that her offence was serious; it appeared to be deliberate; and she had attempted to conceal it. In the circumstances, he concluded that the appropriate sanction was that of summary dismissal. On 1 July 2016, Mr Van Osta reconvened the disciplinary hearing; he explained his decision to the claimant and Mr Richardson and he handed the claimant a letter confirming decision and advising her of her right to appeal.

24 On 8 July 2016, the claimant submitted her appeal in writing. The grounds of appeal again sought to lay considerable responsibility with Ms Ball; and the claimant appeared to accept very little responsibility herself. She also claimed that, in view of her long service, the sanction of dismissal was too severe.

25 The appeal hearing took place on 22 July 2016: the appeal was heard by Mr Owen who was supported by Ms Chantelle Molloy - HR Business Partner. The claimant was accompanied by Mr Colin Griffiths - her trade union representative. Immediately following the appeal the respondent entered its three-week annual leave shutdown; the claimant was therefore aware that she would not receive an outcome until the return from shutdown on 15 August 2016.

26 Before coming to a decision, Mr Owen investigated matters which had been raised by the claimant at the appeal. These included her assertion that other drivers were driving at weekends without recording the hours in their record books. Mr Owen investigated and found that this was not in fact the case. This investigation did however reveal one driver who had been driving illegally; but he had been recording the hours in his record book. This matter had been addressed by informal counselling; Mr Owen explained that the company was satisfied that this driver had acted honestly throughout; and had simply not understood the regulations.

27 In her appeal, the claimant had stated that she felt that she had been discriminated against as the only female driver in the team. Mr Owen investigated this; and could find no reason to reach such a conclusion. There was no claim of sex discrimination before the tribunal.

28 After considering the points raised by the claimant in the appeal, Mr Owen's conclusion coincided with that of Mr Van Osta. He too was satisfied that the claimant had knowingly driven in breach of the Drivers' Hours Regulations; and that she had concealed this fact by omitting the relevant details from her record book. Mr Owen upheld Mr Van Osta's decision; and concluded that summary dismissal had been the appropriate sanction. By letter dated 26 August 2016, Mr Owen confirmed his decision in writing.

The Law

Unfair Dismissal

29 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

30 **Cases on Unfair dismissal**

British Homes Stores v Burchell **[1978] IRLR 379 (EAT)**
In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal must decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**
It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**
The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

RSPCA -v- Cruden **[1986] ICR 205 (EAT)**
Christou -v- London Borough of Haringey **[2002] IRLR 622 (EAT)**
Delay in the conduct of a disciplinary investigation can imperil the fairness of a dismissal even where no specific prejudice is established. The ACAS Code emphasises the importance of establishing the facts; and putting allegations to the employee; promptly before recollections fade.

Boys & Girls Welfare Society -v- Macdonald **[1996] IRLR 129 (EAT)**
Where an employee admits the misconduct alleged; and the relevant facts are not in dispute; it may not be necessary to conduct a full investigation.

31 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

Wrongful Dismissal

32 The wrongful dismissal claim is a simple claim under the law of contract: under the terms of his employment contract the claimant was entitled to a period of notice of termination of her employment (a minimum of 8 weeks). If she was to be dismissed with a less than that period of notice she is entitled to claim damages for the losses arising from the breach of contract. Frequently such a claim can be quantified by a payment equivalent to the wages which the employee would have earned during the notice period.

33 The only effective defence to the wrongful dismissal claim (and the only potential defence advanced in this case) is that, by her conduct, the claimant was herself in repudiatory breach of her employment contract; and that, by dismissing her, the respondent merely accepted the breach and chose not to waive it.

34 The principal burden of proof is on the claimant to establish that she was entitled to a period of notice - in this case this is not in dispute. It is the respondent who asserts that the claimant was in repudiatory breach; and the burden of proof is on the respondent to establish this on the balance of probabilities.

35 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether the claimant had acted in repudiatory breach of contract.

The Claimant's Case

36 In her closing submission on behalf of the claimant, Ms Garner accepted that the sole reason for the claimant's dismissal was a reason relating to her conduct; she further accepted that Mr Van Osta had a genuine belief that the claimant was guilty of the relevant misconduct. But, she maintained that Mr Van Osta did not have reasonable grounds to sustain his belief; and that the investigation had been inadequate. She further argued that the sanction of summary dismissal was too severe; and outside the range of reasonable responses.

37 The aspects of Mr Van Osta's decision which Ms Garner argues are unsustainable are the findings that the claimant deliberately and knowingly breached the Drivers' Hours Regulations; and that she deliberately concealed that fact.

38 On the investigation, Ms Garner's case is that a detailed examination of the claimant's driving hours since 2014 would demonstrate that she genuinely appeared not to understand the requirement to include in her record book hours driven for other employers; and such examination would also reveal that the incident over the weekend of 27/28 June 2015 was an aberration; a wholly isolated incident.

39 Ms Garner relies on what she describes as manipulation by Ms Ball; who, when reporting to senior managers, highlighted the claimant's culpability whilst minimising her own failure to properly monitor the claimant's driving hours by regular downloading and analysis of the digi-card data. To this extent, Ms Garner submits that Ms Ball, the Investigating Officer, had a vested interest in ensuring that the claimant was subject to disciplinary proceedings. Regardless of the isolated breach of the Regulations, there appears to have been no investigation into the fact that the digi-card analysis must have shown earlier occasions where the claimant had driven at weekends and not included the details in her record book.

40 Ms Garner submits that the delay in bringing this matter to the claimant's attention, a period of nearly 12 months, is inherently unfair. However, the fact of the delay clearly established that, by the time of the disciplinary proceedings, the events of 27/28 June 2015 were already an anomaly.

41 So far as sanction is concerned, Ms Garner submits that Mr Van Osta went straight from the finding of a breach of Regulations to a decision to dismiss. Ms Garner submits that breaches of Driving Regulations are not uncommon; and dismissal is not the inevitable result. Bearing in mind that this appears to have been an isolated incident, she submits that the decision to summarily dismiss

was excessive; and outside the range of reasonable responses. A written warning would have been most appropriate.

The Respondent's Case

42 The respondent's case is that the investigation and the disciplinary hearing rightly concentrated on the claimant's conduct; and not on that of Ms Ball. On any view, Ms Ball could not have prevented the breach of regulations; because, whether by analysing the digi-card data, or by reviewing a correctly completed record book, Ms Ball could not have been aware of the claimant's weekend driving until after the event. Mr Beever urged the tribunal to concentrate on the claimant's conduct on the morning of Monday 29 June 2015 when she reported for work. She alone knew that by then she had already worked on seven consecutive days in breach of the Regulations; only she could have disclosed this; and she must have decided not to do so. The result was that she continued to drive illegally in the respondent's vehicle for five days.

43 Mr Beever submitted that Mr Van Osta had ample grounds to conclude that the claimant had acted deliberately; and had chosen to conceal; or otherwise not to disclose the position known only to her. In the circumstances, the sanction of summary dismissal was within the range of reasonable responses. Furthermore, the facts of the claimant's misconduct were not in dispute; and, accordingly, the investigation had been adequate. Ms Ball's potential conflict-of-interest was wholly irrelevant because Mr Van Osta had applied his own independent mind to the position; and as the transgression was clearly documented; and readily admitted; the question of delay was also irrelevant.

Discussion & Conclusions

Unfair Dismissal

The Reason for the Dismissal

44 I am satisfied, and the respondent has established, that the sole reason for the claimant's dismissal was a reason relating to her conduct. This is a potentially fair reason for the purposes of Section 98(1) and (2) ERA.

45 More specifically, the conduct found against the claimant was that she had breached the Drivers' Hours Regulations; that she had done so wilfully and knowingly; that she had chosen not to disclose the facts; and that, on 29 June 2015, she knowingly drove the respondent's vehicle illegally. It needs to be emphasised that the claimant was not dismissed merely because of a breach of regulations.

Fairness

Genuine Belief

46 It is clear, and indeed it is not in dispute, that Mr Van Osta genuinely believed that the claimant was guilty of the misconduct summarised at Paragraph 41 above.

Reasonable Belief

47 In my judgment, Mr Van Osta clearly had material available to him from which he was entitled to reach the conclusion that he did as to the claimant's conduct. It was never in dispute that the claimant understood that it was a breach of regulations to drive for seven consecutive days; it is simply absurd to suggest that the claimant was unaware that, by Sunday 28 June 2015, she had done so. It was patently the case that she did not disclose the position; and equally clear therefore, that she drove illegally on Monday 29 June 2015 and thereafter. Whether or not the weekend driving hours had been included in the claimant's record book could not have prevented the breach of regulation occurring, however, the fact that the claimant did not subsequently disclose the information in her record book was inevitably a cause for concern in Mr Van Osta's analysis. In my judgment, Mr Van Osta was entitled to dismiss the claimant's suggestion that she was unaware of the requirement to include all driving hours in the record book. The claimant herself agreed in evidence that the book would serve no purpose otherwise.

The Investigation

48 It is certainly arguable that it was ill-advised to ask Ms Ball to carry out the investigation in this case; clearly her own conduct and job performance came under scrutiny. However, on the facts of this case, Ms Ball's involvement did not create any unfairness or the risk of unfairness. I reach this conclusion because Mr Van Osta (whose responsibility it was to ensure an adequate investigation) correctly concentrated on the relevant matters; namely, the claimant's conduct. Ms Ball's conduct and/or performance is another issue. The relevant facts were not in dispute: by 28 June 2015 the claimant had worked seven consecutive days; the claimant could not be unaware of this fact; the claimant did not disclose the position; and the claimant did not include the relevant details in her record book. There was nothing about the investigation which could have changed; or modified; or provided any additional insight; into those undisputed facts.

49 Even by reference to Ms Garner's closing submissions, all that might have been established by further investigation by someone other than Ms Ball might have been that the claimant's digi-card had been regularly downloaded and analysed; the fact that she had worked weekends therefore became known; and

the claimant was not taken to task over the omission of her weekend driving hours in the record book. The potential relevance of this is obvious; but it could only imperil the safety of the claimant's dismissal if the omission from the record book was central to Mr Van Osta's analysis.

(a) Firstly, Mr Van Osta carefully considered the position as to whether or not he could accept the claim from the claimant that she was unaware of the requirements of the record book. He dismissed her claim and, in my judgment, he was entitled to do so. Having heard the claimant's evidence on this; and having examined the record book; I find the claim incredible.
(b) More importantly, the absence of the information from the record book was not central to Mr Van Osta's analysis. His principal concern was the fact that on Monday morning, 29 June 2015, the claimant must have been aware that, by then, she could no longer drive legally - she chose not to disclose this; and deliberately drove the respondent's vehicle when she could not legally do so.

50 In my judgment therefore, any criticism which might legitimately be made about the investigation is of limited relevance on the facts of this case. And, on those facts, the investigation was perfectly adequate.

Ms Ball's Conduct

51 Mr Van Osta correctly identified that he was concerned with the claimant's conduct; and not that of Ms Ball which was a separate matter. Furthermore, having heard Mr than Osta's evidence, I am quite satisfied that he brought his own independent mind to bear; and was not influenced by Ms Ball's opinion as to the appropriate outcome.

Delay

52 In closing, Ms Garner made passing reference to the lapse of time between the misconduct and the dismissal. Her principal point was that this lapse of time could and should have reassured the respondent that the misconduct would not be repeated. I have considered the question of delay on a somewhat wider basis: and, clearly, there are cases where such a delay might render the dismissal unfair. In my judgment, this is not such a case: here, the misconduct under investigation was clearly documented; it was not disputed; and the claimant herself was in part responsible for the fact that it did not come to light earlier (if she had correctly completed the record book the facts would clearly have been known by no later than Friday 3 July 2015). Accordingly, I conclude that the fact of the delay does not, of itself, imperil the fairness of the claimant's dismissal.

Procedure

53 Subject only to the observations already made concerning Ms Ball and the question of delay, in my judgment, the respondent followed a conspicuously fair procedure; which fully complied with the ACAS Code.

54 In her written opening submissions, Ms Garner made some specific criticisms of the disciplinary process. By the time she made her closing submissions she expressly abandoned those criticisms.

55 In addition to a properly conducted disciplinary hearing at which the claimant was accompanied by her trade union representative, the claimant was given the opportunity of an effective appeal. She raised issues at the appeal which had not been raised at the disciplinary hearing; particularly regarding the conduct of other drivers. These matters were properly investigated by Mr Owen; he found that they were without merit; before dismissing the claimant's appeal.

Consistency

56 Ms Garner did not specifically raise the issue of consistency in the context of fairness. She did make passing reference to it when addressing the question of sanction; she asserted (without evidence but non-contentiously) that breaches of the Regulations are commonplace and they do not automatically result in dismissal. Ms Garner may be correct in this assertion; but she loses sight of the fact that the claimant was not dismissed merely because a breach of the Regulations; she was dismissed because of the deliberate nature of her actions; the lack of disclosure; and, as Mr Van Osta found, her attempt to conceal the true position.

57 Mr Owen's investigations as part of the appeal did apparently throw up another driver who had breached the Regulations. Unlike the claimant however, he had included all of his driving hours in the record book; and therefore could not be said to have attempted to conceal anything. I was told in evidence that the respondent had concluded that the driver genuinely did not understand the Regulations; his transgression had therefore been dealt with by way of informal counselling. There was never any question that the claimant did not understand the Regulations.

58 Insufficient detail was placed before me to enable me to consider whether the claimant's case and that of any other driver were truly comparable; and, as stated earlier, Ms Garner did not advance the question of consistency as a ground for unfairness.

Sanction

59 In considering the question of sanction, there are two matters which must be uppermost in my mind: firstly, the wording of Section 98(4) ERA "the determination of the question whether the dismissal is fair or unfair (*having regard to the reason shown by the employer*) …" and secondly, the fact that I must not substitute my own view for that of the respondent.

60 I must therefore consider whether the sanction of summary dismissal was within the range of reasonable responses in the light of Mr Van Osta's finding that the claimant had deliberately driven knowing that it was illegal for her to do so; that she had failed to disclose the fact; and that, indeed, she had attempted to conceal it.

61 Having regard to the claimant's previously unblemished disciplinary record, and the fact that this appears to have been an isolated incident, many would regard the sanction of summary dismissal to be harsh. Some employers may well have dealt with the matter in the manner suggested by Ms Garner – namely, the issue of a written warning. But that is not the test which I must apply: I must consider whether the sanction of summary dismissal was within the range of reasonable responses. Put another way, can it be said that no reasonable employer would have concluded that summary dismissal was the appropriate sanction? In my judgment, when this test is properly applied, the inevitable conclusion is that Mr Van Osta's decision was within the range of reasonable responses and cannot be impugned.

62 Accordingly, and for these reasons, I find that the claimant was fairly dismissed by the respondent; her claim for unfair dismissal is not well-founded and is dismissed.

Wrongful Dismissal

63 On the evidence I have heard - principally from the claimant herself, it is clear that on Monday 29 June 2015 the claimant knew that she had driven on seven consecutive days; she therefore knew that it would not be legal for her to drive again that day; or on subsequent days until she had taken the required rest days; the claimant chose to drive; and she did not disclose the fact that it was illegal for her to do so. In my judgment, this is a clear and serious breach of her employment contract - which must be taken to include that she would not knowingly drive illegally. (I am sure it would be uncontroversial to suggest that the claimant should not knowingly drive with excess alcohol - the principal is the same.)

64 I am therefore satisfied that, by her conduct, the claimant was in repudiatory breach of her contract of employment. The respondent was entitled

to accept the breach and did so promptly once the claimant's conduct discovered.

65 Accordingly, in my judgment, the claimant was lawfully dismissed in accordance with her contract; and her claim for wrongful dismissal is therefore dismissed.

Employment Judge Gaskell
20 April 2017

Judgment sent to Parties on

24 April 2017
C Campbell