EMPLOYMENT TRIBUNALS

Claimant: Mr S Rostron

Respondent: British Telecommunications Plc

HELD AT: Manchester **ON:** 3 and 4 May 2017

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr Francis, Friend
Respondent: Mr Proffitt, Solicitor

Judgment having been sent to the parties on 12 May 2017 and the claimant having requested written reasons by e-mail dated 14 May 2017, the following reasons are provided:

REASONS

Issues

1. By a claim form presented on 20th June 2016, the claimant brought a single complaint of unfair dismissal.
2. The issues were clarified at the start of the hearing and further narrowed during the course of final submissions. It was common ground that the claimant had been dismissed by the respondent after a qualifying period of continuous employment. I had to determine:
   2.1. whether the respondent could prove the sole or principal reason for the dismissal;
   2.2. whether that reason was one that related to the claimant's conduct; and
   2.3. whether the respondent acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the claimant.
3. On the question of reasonableness, at the claimant's invitation, I concentrated in particular on:
   3.1. whether the respondent had carried out a reasonable investigation; and

3.2. whether there were reasonable grounds for believing that the claimant had committed the alleged misconduct.

4. The claimant did seek to argue that the sanction of dismissal fell outside the range of reasonable responses if the respondent reasonably concluded that the claimant had done the alleged misconduct.

5. Further issues would have arisen in relation to remedy if the dismissal had been found to be unfair.

Evidence

6. The respondent called three witnesses: Mr Pitchford, Mr Hamer and Mr Hogg. The claimant gave evidence on his own behalf. I also read a statement from Mr Webb which the claimant's representative Mr Francis asked me to read. Having done so, I agreed with Mr Francis's original assessment of Mr Webb's statement. That is to say, the statement was "not particularly relevant". In any event, Mr Webb's statement was untested by cross examination and I was unable to place any significant weight on it.

7. I considered documents in a bundle marked CR1. In keeping with the warning I gave the parties I did not read every page. Rather, I studied the documents that they brought to my attention in witness statements or orally during the course of the hearing.

Facts

8. The respondent is a very large organisation with something approaching 80,000 employees.

9. The claimant was employed by the respondent from 4 August 1986 to 26 February 2016. He had nearly thirty years unblemished service. At the time with which this claim is concerned, the claimant held the role of Field Operative within the respondent's Open Reach division.

10. The respondent issued written guidance to managers ("the HR Guidance") available on the Human Resources pages of the respondent's intranet. Relevantly, the HR Guidance provided:

10.1. "When a disciplinary matter arises, as the manager you should raise a disciplinary case … for the HR Case Management Discipline Team to view. You should contact the HR Case Management Discipline Team for advice….You should promptly establish the facts and, where appropriate obtain statements from any available witnesses. Where it is necessary to interview an alleged offender to establish the facts there is no legal right to be accompanied as this is not a disciplinary hearing. However, if requested you should consider whether it is appropriate to have a friend present to accompany the employee. The HR Case Management Disciplinary Team should be contacted in these circumstances for further advice…"

10.2. "Following the fact finding meeting the employee may wish to submit a written explanation putting forward any mitigation and an explanation. A written explanation should be submitted as soon as possible and usually within 24 hours of the fact find meeting."

11. Work was allocated to Field Operatives using bespoke software known as Task Force. This software would record progress on each job and compile data that could be used to measure the operative's efficiency. The main tool for efficiency monitoring was known as the Day Minus One report. As the name suggests, it was compiled each day using the data from the previous day. Each operative had their own Day Minus One report.

12. The claimant's work was mainly conducted in the Preston area. It took him as far north as Garstang. He had a colleague called Mr Mark Taylor who covered the Lancaster area.

13. In order to do his work, the claimant was provided with a company van. The claimant's latest and last van was issued to him in April 2015.

14. In approximately 2009, the vans in the Open Reach fleet were fitted with a piece of equipment known as an Internet Location Monitor (ILM), or more colloquially as a "tracker". The ILM and software were provided by a business known as Trimble.

15. Many of the arguments in this case are based on the detailed workings of the ILM and the incorporation of the data into Task Force. It is therefore necessary to set out in some detail how the system operated. Before doing so, I should pay tribute to Mr Francis' very clear explanation, assisted by his helpful diagram which, in evidence, Mr Hamer confirmed as accurate.

    15.1. The ILM was located in a secure compartment above the glove box in the front of the vehicle. It was connected to the vehicle battery using a lockable connector which was sealed with tamper-proof paint. The compartment itself was secured with screws. There was no other legitimate use for that compartment other than to house the tracker.

    15.2. The ILM would receive location data from a satellite GPS system. Those data would be transmitted in "real time" by the ILM to a mobile telephone mast which would carry the data signal onwards to Trimble's servers. Trimble would automatically and immediately forward the data to the respondent's servers where it would be merged with Task Force data.

    15.3. As and when they carried out their work, operatives would input data into Task Force using their Open-Reach issued tablets. Those data would include information about the progress of each job. They would be combined with ILM data received from Trimble to produce a record of where the operative had been at any time. This record would show up on the Day Minus One report.

    15.4. ILM data would only appear on an operative's Day Minus One report if the operative was logged in to Task Force at the time when the real-time ILM data was being transmitted to the respondent.

    15.5. Task Force did not have any means of retrospectively incorporating ILM data. It would only read data transmitted in real time. If, for any reason, the respondent's servers did not receive real-time data, the Day Minus One would omit the vehicle's movements during the period in which the data was not being received. As a result, the Day Minus One report could be misleading. For example, a vehicle might make several stops at customer premises during a 4-hour period, but if, during that period, Task Force had

not received ILM data, the Day Minus One report would show a continuous journey of 4 hours during the down time.

15.6. There is a dispute before me as to what would happen if the ILM was disconnected from the vehicle battery. The parties agree that the ILM would stop transmitting data in real time. But they disagree about whether the ILM would stop *recording* those data. Mr Hamer, whose involvement will be explained shortly, thought that data recording would continue. It was his belief that the ILM was fitted with an internal lithium battery for that purpose. The claimant, on the other hand, was adamant in his evidence to the tribunal that there was no such battery. For reasons which I shall explain, I did not find it necessary to resolve that dispute.

16. Along with the introduction of the ILM came a code of practice. The code provided, amongst other things, for a scheme of accreditation and annual renewal for managers concerned with the operation of ILMs. The code was not, in my view, intended to override the Disciplinary Policy. It was not intended to be prescriptive about how a disciplinary investigation should be conducted, nor was it designed to specify any minimum qualification for managers carrying out disciplinary investigations into alleged abuse of an ILM.

17. When the claimant received his company van in April 2015, it had already been used for a substantial period of time. It had previously been fitted with an ILM.

18. At all relevant times, the claimant's line manager was the Operations Manager, Mr Mark Pitchford. Mr Pitchford had received no formal accreditation in ILM devices but knew in broad outline how they operated.

19. Between 13 and 22 November 2015 the claimant was absent on sick leave. He returned to work on 23 November 2015.

20. From 23 November 2015, the respondent's servers stopped receiving ILM data. As a result, from 23 November 2015 the Day Minus One reports incorrectly recorded the claimant's vehicle movements. Apart from one very brief period, the server did not receive any real-time ILM data from that day until 23 December 2015.

21. At the beginning of December 2015, as is well known, there was severe flooding in Cumbria and North Lancashire. There was widespread disruption to services. During the ensuing weeks, the respondent's Open Reach operatives were kept particularly busy with call-outs.

22. On 5 December 2015 there was a staff Christmas party. It so happened that, on that day and the day before, Mr Taylor had borrowed the claimant's van. After work, Mr Taylor went to the party. He had a conversation with a colleague about the van he had been driving. Mr Pitchford, who was also at the party, took an interest and listened to what they were saying. Whether he secretly eavesdropped or involved himself openly in the discussion is not entirely clear, but I do not find this detail to be particularly important. At any rate, Mr Pitchford heard Mr Taylor say two things of particular interest. Mr Taylor had noticed that the screws to the ILM compartment had been missing and that the paint seals had been broken.

23. Mr Pitchford waited for over a month before acting upon what he had heard. That is not to say that he was not concerned. I am satisfied that his initial inaction was

because of the high workload in the wake of the flooding, followed by the holiday period.

24. The claimant took annual leave over the holidays. 23 December 2015 was his last day at work. At 8.51 that morning, the respondent's computer system began to receive data from the claimant's ILM once more. It is not clear whether the respondent received any ILM data after 23 December 2015 and, if so, for how long.

25. The claimant was due back from annual leave on 30 December 2015. In fact, on that day, he began a period of sick leave from which he did not return until 19 January 2016.

26. On 12th January 2016, Mr Pitchford finally got round to inspecting the claimant's vehicle. He found that the screws to the ILM compartment had been removed, the paint seals had been broken and the ILM was disconnected from the power supply. Mr Pitchford took photographs and decided to investigate further.

27. Precisely what Mr Pitchford did next is not entirely clear. Two things are certain. On 13 January 2016, Mr Taylor sent Mr Pitchford an email in these terms:

> "I used Steve Rostron's van on 4 and 5 December 2015. When I was looking for boot covers I opened his glove box and what I thought was another storage space above this and I realised it was not a storage space and it was I assumed the tracker. I observed that the screws had been removed from the trim covering the tracker and the orange security paint seals appeared to have been broken on the trim screws and tracker."

Mr Taylor did not expressly state that the ILM had been disconnected from the power supply but that was the very clear inference from his email. Likewise, although not stated in terms, the e-mail suggested that it had been solicited in some way by Mr Pitchford.

28. The other thing of which I can be sure is that, a few hours after receiving Mr Taylor's email, Mr Pitchford logged the case with Human Resources and began to take advice.

29. This sequence of events suggests to me that Mr Pitchford did not properly follow the HR Guidance. It is likely that Mr Pitchford did something to prompt Mr Taylor to send his e-mail and that he took that step (whatever it was) before seeking Human Resources advice.

30. On 19 January 2016 the claimant's vehicle was examined by a separate division of the respondent called BT Fleet. A member of BT Fleet staff took some further photographs clearly showing the broken paint seals and the disconnection of the ILM device from the power supply.

31. Also on 19 January 2016, Mr Kevin McGhee, Volume Operation Manager, e-mailed Mr Pitchford stating that the claimant "had historic issues with his ILM" when he was driving a different vehicle. "Whilst carrying out some analysis it became apparent that [the claimant's] ILM had failed to transmit any data. I arranged for a repair to take place at that time." The e-mail went on to relate that the claimant had informed Mr McGhee that the engineer had concluded that the ILM had not transmitted due to a disconnection.

32. I do not know the circumstances in which Mr Pitchford obtained this e-mail. In my view it does not matter. There was nothing on the face of the email that suggested that Mr Pitchford had revealed to Mr McGee any of the detail of the investigation against the claimant. In fact it did not even indicate that Mr McGee had been informed that there was any fact finding investigation going on.

33. On 20 January 2016, at Mr Pitchford's invitation, the claimant took part in a fact finding interview with Mr Pitchford. There are a number of disputes about what happened at that interview. Some things, however, are common ground:

    33.1. The claimant asked to be accompanied by a trade union representative. Departing from the HR Guidance, Mr Pitchford did not take Human Resources advice but simply refused. He told the claimant that he would be better to stay and answer questions.

    33.2. Mr Pitchford asked the claimant a series of questions enabling the claimant to explain how the tracker device had come to be disconnected. The claimant did not offer an explanation at that stage.

    33.3. The claimant asked to see the ILM for himself. Mr Pitchford took him to the vehicle and showed him. The trip to the vehicle was not recorded in the notes of the meeting.

    33.4. The claimant asked for Mr Pitchford to arrange for the ILM to be finger printed. Mr Pitchford refused. He did not consider that bringing the police in would be a reasonable course of action. This was, in his view, a disciplinary matter, not a criminal investigation.

    33.5. It will be remembered that the HR Guidance provided for the claimant to submit a written statement within 24 hours of the fact-finding meeting. Mr Pitchford did not remind the claimant of that opportunity at the meeting.

    33.6. At the conclusion of the meeting, Mr Pitchford informed the claimant that he was being suspended.

34. Within a very short time of the meeting, Mr Pitchford decided that the claimant had a case to answer. He notified Human Resources a few hours after the meeting that the case should be taken forward to a disciplinary hearing on an allegation of gross misconduct. By this time, Mr Pitchford had examined the Day Minus One reports and discovered that there was virtually no ILM data for the period 23 November to 23 December 2015. It is not entirely clear when Mr Pitchford carried out this analysis, but to my mind it does not matter.

35. The claimant's suspension was confirmed by letter dated 22 January 2016. The final paragraph stated:

> "You will be contacted again in due course and advised of the outcome of initial investigations. At this time you may be invited to put your version of events either personally or in writing to your second line manager."

36. This letter came more than 24 hours after the investigation interview. It also gave the impression that a written statement would be taken into account not by the investigating manager, but by the manager conducting the disciplinary hearing. This was not what the HR Guidance conveyed.

37. On or about 25 January 2016, Mr Pitchford prepared a pack of documents for use at a disciplinary hearing. Included in the pack were a report from Mr Pitchford,

the Day Minus One reports, the minutes of the fact-find meeting, Mr Pitchford's photographs, Mr Taylor's e-mail, Mr McGhee's e-mail and the report from BT Fleet with accompanying photographs.

38. By letter dated 29 January 2016 the claimant was invited to a disciplinary meeting and provided with a copy of the disciplinary pack.

39. The disciplinary meeting took place on 11 February 2016, it was chaired by Mr Hamer, Senior Operations Manager and the claimant's second line manager. The claimant was represented by his Communication Workers Union (CWU) representative, Mr Morgan. In advance of the meeting, the claimant was shown the material which formed Mr Hamer's pack.

40. According to the code of practice, Mr Hamer's accreditation in the use of ILMs was out-of-date, in that it had not been renewed at 12-monthly intervals. We are satisfied, however, that Mr Hamer was familiar with the operation of ILM devices.

41. At the disciplinary meeting, the claimant and his union representative made various points:

    41.1. One was to question why Mr McGee's email had been included, it was argued that it was suspicious and irrelevant and related to a different van.

    41.2. The claimant stated that he believed that the screws to the glove box to be tamper-proof which required a special screwdriver to open. Mr Taylor was the only person known to have tampered with the screws before the van went to BT Fleet.

    41.3. It was argued on his behalf that there must have been a conversation between Mr Pitchford and Mr Taylor that preceded the email on 13 January 2015.

    41.4. It was also claimed that there had been a known issue with ILM data but the records had mysteriously disappeared. As evidence of ILM problems, the claimant referred to an occasion in July 2015 when he had taken his vehicle into the garage. The van was only booked in to look at the brake light and to replace the brake pads. Whilst the van was in the garage, however, he had been asked to get the ILM checked due to "sporadic data". The claimant said that Mr Hunt, a technician, had checked the ILM, but the claimant could not find the sheet relating to that particular visit.

    41.5. The claimant made a variety of points aimed at suggesting that the ILM might not have been deliberately disconnected but might have worked itself free.

    41.6. The claimant did not say at this meeting that he believed anybody had tampered with the ILM after 23 December 2015.

    41.7. Neither the claimant nor Mr Morgan asked for any raw data from the Trimble to be disclosed to them. They did, however, ask for "a Trimble report" to be obtained. It was not clear whether they wanted an expert report in relation to the physical evidence of tampering or whether they wanted further evidence about what data had been transmitted by the ILM.

    41.8. In the hearing before me, Mr Francis sought to explain the discrepancies in the Day Minus One reports by suggesting that the problem was one of transmission between Trimble and the respondent, rather than

any problem with the ILM itself. One could not assume from the fact that the respondent was not receiving ILM data that the ILM had been disconnected, or even that the ILM had stopped transmitting. Another of Mr Francis' points was that the lack of an internal battery meant that, if the ILM had been collecting data, it must have been connected to the vehicle's power supply. None of these point was made at the disciplinary meeting.

42. Following the meeting Mr Hamer made some further enquiries. One step he took was to obtain Trimble connectivity data for the period between 2 November and 23 December 2015. The Trimble records contained vehicle movements captured by the ILM continuously between 23 November and 23 December 2015. Mr Hamer did not forward these records on to the claimant. Nor did the claimant ask to see those records.

43. On 25 February 2016, Mr Hamer emailed Mr Layton and Mr Hunt at BT Fleet. He asked them to recall whether they had been visited in July and, if so, whether there was any conversation about personally inspecting the ILM. The reply from Mr Hunt was,

> "I cannot recall Steve Rostron coming into the workshop. This is not to say that he didn't as it was nearly six months ago and we have a large volume of customers coming through the doors each day. I have checked the history of the vehicle and there is no task logged on the system for an ILM repair."

44. Mr Hamer took Mr Hunt's e-mail into account in reaching his decision.

45. Very shortly after receiving Mr Hunt's e-mail, Mr Hamer came to a conclusion. He decided that the claimant should be dismissed for gross misconduct. It was Mr Hamer's view that the claimant had deliberately tampered with the ILM device and disconnected it from the power supply.

46. Essentially Mr Hamer's reasoning was as follows:

46.1. Mr McGhee's e-mail was irrelevant and should be discounted.

46.2. There were some inaccuracies in the minutes of the fact-finding meeting, but they did not weaken the case against the claimant. Mr Hamer was prepared to accept the claimant's version of how the meeting had occurred.

46.3. There was ample evidence that somebody had tampered with the ILM. Screws had been removed, paint seals broken and a locking connector disconnected. No further evidence was needed from Trimble to show deliberate disconnection. The only question for him was who was the most likely person to have done it.

46.4. There was no evidence that Mr Taylor was the culprit. Mr Hamer accepted that Mr Pitchford had learned of Mr Taylor's observations at the Christmas party.

46.5. The Day Minus One reports demonstrated to him that the ILM had stopped transmitting data between 23 November and 23 December 2015.

46.6. In Mr Hamer's view, the existence of ILM data on Trimble's database for the period 23 November to 23 December 2015 did not mean that the ILM must have been connected to the vehicle battery between those dates. He believed, rightly or wrongly, that those data were explained by the ILM

recording the data, but failing to transmit it in real time. The reason for that, he thought, was that the ILM had an internal battery that would enable recording but not transmission.

46.7. It was a surprising coincidence that the ILM had stopped transmitting data on the day of the claimant's return to work and had re-started whilst the claimant was still in charge of the vehicle.

46.8. Mr Hamer found that, notwithstanding the claimant's 30 years' length of service and the availability of potential penalties short of dismissal, the only sanction open to him was summary dismissal.

47. Mr Hamer's decision was communicated to the claimant by letter dated 25 February 2016.

48. The claimant appealed. In support of his appeal, his union representative, Mr Morgan raised a number of questions by e-mail. The questions were referred to Mr Hamer for comment. Mr Hamer replied by email dated 8 March 2016.

49. One of the questions raised by the claimant related to an apparent discrepancy in the data for 2 November 2015. That date was, of course, before the beginning of the period with which Mr Haymer had been concerned at the time he made his decision. Nevertheless, on attempting to reconcile the Day Minus One data to the Trimble data, Mr Haymer was fortified in his view that he had made the right decision. According to Day Minus One, the claimant's vehicle had been travelling between 8.06am and 10.13pm from Garstang Road, Broughton to his appointed task location at Park Hill Road in Garstang. The journey time of 126 minutes seemed very long for a distance of just a few miles. When he looked at the Trimble data, he discovered that, in fact, between 8.17am and 10.10am, the claimant's vehicle had been parked at an address in Dimples Lane, Bowgreave. This location was several miles from the appointed task location.

50. The matter went to an appeal meeting which took place on 11 May 2016. It was chaired by Mr Carl Hogg, who at that time was the Operational Engineering Manager for UK North.

51. Originally, the person designated to hear the appeal was the claimant's third line manager. That person had been given advice from Human Resources to obtain a report from Trimble. When Mr Hogg took over responsibility for the appeal, that advice was not repeated to him. Nor was Mr Hogg made aware that that advice had been given to the claimant's third line manager.

52. The claimant attended the appeal meeting accompanied by Mr Slater, a CWU representative.

53. At the appeal meeting:

53.1. Mr Slater made a number of points which, again, appeared to be questioning whether the ILM had been deliberately tampered with at all. In support of this argument, Mr Slater claimed to have spoken to Mr David Airey, the Fleet Trainer, who had allegedly told him that the tamper-proof paint could have cracked due to drying out. Mr Slater also queried whether the respondent could be certain that the ILM had ever been working.

53.2. The keys to the vehicle had been kept in an unsecured drawer at Mr Pitchford's request. It was possible that another driver could have tampered

with the ILM using the claimant's keys. The only example given was Mr Taylor's access to the vehicle on 4 and 5 December 2015.

53.3. The claimant was a good performing engineer and had no motive to tamper with the ILM.

53.4. The claimant stated that he had never received a safety check on his vehicle since 2014.

53.5. The claimant criticised the investigation, claiming that it had not been adequately carried out by Mr Pitchford.

53.6. It was not raised that the ILM must have been tampered with after 23 December.

53.7. There was no specific request for the Trimble data to be disclosed either to the claimant or to Mr Slater so that they could analyse the data themselves.

54. Following the appeal meeting, Mr Hogg made some further enquiries. He spoke to Mr Airey. According to Mr Airey, there were completed checklists that, on their face, indicated that safety checks had been carried out on the claimant's vehicle on six separate occasions. Mr Hogg did not follow up the point by enquiring into the precise method by which the checks had been recorded or indeed what checks had actually been carried out on those occasions. To his mind, it was sufficient that the checks were documented. Mr Airey also confirmed that it would not be possible for the security paint to crack unless someone had tampered with the ILM.

55. Mr Hogg did not view for himself the ILM data from Trimble.

56. Having conducted his further enquiries, Mr Hogg concluded that the dismissal should be upheld. He dealt with the points raised by Mr Slater during the appeal one by one and, in a written rationale, rejected them all. With regard to the possibility of another driver having taken the claimant's keys, Mr Hogg was satisfied that this was unlikely to have happened without the claimant's knowledge, because the ILM data intermittently restarted including on 23 December 2015.

57. Mr Hogg was quite sure that somebody had deliberately tampered with the ILM. He did not think that any further expert evidence was necessary in order to reach that conclusion. Mr Hogg was satisfied that the claimant was the person who had done the deed. Like Mr Hamer, he believed that the ILM had stopped transmitting on 23 November and restarted on 23 December 2015. On both dates the claimant had had exclusive use of the vehicle.

58. Mr Hogg did not take into account the suspicious data anomaly relating to 2 November 2015.

59. By letter dated 2 June 2016, the claimant was notified that his appeal was unsuccessful.

Relevant law

60. Section 98 of ERA provides, so far as is relevant:

(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 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…(b) relates to the conduct of the employee…

…

(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.

61. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

62. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

63. Where an employee has been dismissed by an organisation, section 98 is silent as to which individual within the organisation counts as the "employer", for the purpose of ascertaining the reason for dismissal and whether the employer acted reasonably or unreasonably. This question was settled by the majority of the Court of Appeal in the case of *Orr v. Milton Keynes Council* [2011] ICR 704. The tribunal should examine the reasoning of the person deputed by the employer to decide whether or not to terminate the employment.

64. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

65. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Conclusions

Reason for dismissal

66. I am satisfied that the respondent's reason for dismissing the claimant was the belief held by Mr Hamer and Mr Hogg that the claimant had dishonestly tampered

with the ILM in his vehicle. This was a reason that plainly related to the claimant's conduct. I must therefore decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

Reasonable investigation

67. Although I remind myself not to allow myself to be distracted from the statutory language and the need to consider all the substantial merits of the case, I devote most of this discussion to the question of whether the respondent carried out a reasonable investigation. This has been by far the most keenly contested point in this claim.

68. Before looking at the investigation in detail, I remind myself of the backdrop. is The respondent is a large organisation and should be expected to devote considerable resources to investigating .allegations of misconduct. I also bear in mind that this was a serious allegation, one of dishonestly that might make it difficult for the claimant to find work in this sector ever again. The investigation therefore had not just to look for evidence that would point to the claimant's guilt but also to chase up lines of enquiry that might point to his innocence.

69. It is also helpful, before examining the claimant's particular criticisms of the investigation, to take an overview of it. There was a fact-finding meeting, with some imperfections. The claimant had the chance to make a written statement. There was a disciplinary meeting where the claimant and his union representative had a full opportunity to put forward their version of events. There was also an appeal at which the claimant was again represented. Following both the disciplinary and appeal meetings, the relevant manager undertook further enquiries before reaching a decision.

70. I turn now to the specific criticism the claimant has made of the investigation. I start with the five points that Mr Francis put to Mr Hogg during the course of his cross-examination:

    70.1. *Inaccurate minutes of the fact-find meeting*. Mr Pitchford's notes of the fact-find meeting were inaccurate, in the sense that they omitted the joint visit to the vehicle and the claimant's request for fingerprinting. This, in my view, was an entirely technical error. Mr Hamer knew that the claimant and Mr Pitchford had been to look at the vehicle together and that the claimant had requested fingerprinting, which Mr Pitchford had refused. The shortcomings in the notes had no impact on the dismissal. It was not suggested that any inaccurate statement in the meeting notes had influenced Mr Hamer's decision, or that there was anything missing from the notes that could have changed his decision.

    70.2. *No fingerprint evidence*. It was reasonable in my view for the respondent to take the view that finger print investigation was unnecessary. It is open to even a large organisation to treat a disciplinary investigation differently from a criminal investigation. The respondent would not have the expertise to conduct fingerprint analysis of its own. It would be excessive to involve the police. Even if a suitable contractor could be found, a fingerprint analysis would not necessarily be conclusive. If the claimant's fingerprints were on the ILM, he could have blamed earlier ILM issues. If his fingerprints

were not on the ILM, the absence of prints could be explained by the claimant wearing gloves or using tools.

70.3. *Mr McGee's e-mail.* The third criticism is the inclusion of Mr McGee's e-mail in the disciplinary pack. In my view this had no impact on the fairness of the decision to dismiss. Mr Hamer discounted it as irrelevant. The question of whether Mr Pitchford breached the claimant's confidentiality does not affect whether it was reasonable for Mr Hamer and Mr Hogg to conclude that the claimant had tampered with the ILM. The requirement for a reasonable investigation did not go as far as obliging Mr Hamer to enquire into possible breaches of confidentiality. This general point is, in my view, sufficient to dispose of the argument. But there is an added reason why Mr Hamer cannot be blamed for not taking the issue further. At the time of the disciplinary meeting, the claimant's argument about Mr McGee was not one of confidentiality, but of relevance. His point was that Mr McGee's e-mail related to an entirely different vehicle. Mr Hamer agreed and discounted the e-mail.

70.4. *The manner of obtaining the email from Mr Taylor*. It would have been better if Mr Pitchford had sought Human Resources advice before Mr Taylor sent his e-mail of 13 January 2016. There should have been a clearer audit trail explaining what had prompted Mr Taylor to e-mail Mr Pitchford. I am satisfied, however, that these shortcomings did not adversely affect Mr Hamer's decision. It was not, and could not have been expected to be, obvious to Mr Hamer that Mr Taylor's email might have been the product of Mr Pitchford having told Mr Taylor what to say. Mr Francis did not put to Mr Hamer in cross examination that this possibility should have occurred to him.

70.5. *No CWU companion at the fact-find meeting.* Mr Pitchford did not seek Human Resources advice before refusing the claimant the opportunity to bring a companion to the fact-find meeting. This was a breach of procedure. In my view, the breach was relatively minor. The claimant had no right to a companion at a fact-finding meeting, either in law or under the respondent's internal policies. In practice, investigation meetings commonly take place without the employee being accompanied. Mr Pitchford would have been entitled to refuse the claimant's request having taken advice. Moreover, it is hard to see what impact the absence of a companion had on the final decision to dismiss. The claimant did not try to argue either to Mr Hamer or to Mr Hogg that the absence of a companion had caused the evidence to be unreliable. It is possible to imagine scenarios in which fairness might have been affected. For example, at the fact-finding interview, the claimant might have made an admission or omitted to say something on which he later relied. If Mr Hamer had held the claimant's admission, or omission, against him, without taking into account the claimant's lack of a companion, it might be open to a tribunal to say that Mr Hamer had acted unreasonably. But that is a far cry from what happened here.

71. I now address some other points that were raised by Mr Francis during the course of cross-examining the respondent's witnesses:

71.1. *No written statement from the claimant.* Mr Pitchford did not fully implement the HR Guidance relating to the claimant's written statement. In reality, the claimant would be unlikely to know of his opportunity to submit a

written statement within 24 hours of the fact-find meeting unless he was informed of that fact by Mr Pitchford. I am satisfied, however, that this omission did not cause any unfairness. When the claimant was reminded two days later of his opportunity to make a written statement, he did not supply one.

71.2. *No expert report from Trimble (1).* There were two areas in which Trimble might have been able to contribute to the fact-finding exercise. One was to supply an expert opinion on the question of whether there had been physical tampering with the ILM device. The claimant himself now accepts that somebody must have disconnected the ILM deliberately. At the time of the disciplinary hearing, that concession did not appear to have been made. It might potentially have been relevant to obtain an expert's report. Nevertheless, a reasonable employer would have been quite justified in declining to take that step. There was an abundance of evidence that somebody had physically tampered with the vehicle. Mr Hogg specifically investigated possible causes accidental disconnection and reasonably discounted them. The respondent did not need an expert to tell it that the ILM had been deliberately disconnected.

71.3. *No expert report from Trimble (2).* The other area on which expert opinion might have been of assistance would be to establish whether or not the absence of data in the Day Minus One reports meant that the ILM must have stopped transmitting. Had it wished to do so, the respondent could have asked for an opinion from Trimble on that question. I have to decide whether the respondent's omission to obtain this evidence took the investigation outside the reasonable range. In my view, such a conclusion would be unduly harsh. This point was not raised by the claimant during the disciplinary or appeal meetings. Messrs Hamer and Hogg did not have – as we have had – the advantage of Mr Francis' very clear explanation of the difference between transmission from the ILM to Trimble on the one hand, and onward transmission from Trimble to the respondent on the other. It was not suggested that the breakdown in communication had happened between Trimble and the respondent. Nor was it made clear that, if the ILM device was recording data, it must have been connected to the vehicle's power supply. Had those points been put forward clearly during the disciplinary process it is possible that a reasonable employer might have been expected to obtain an expert report from Trimble.

71.4. Accreditation. Mr Pitchford's lack of accreditation and Mr Hamer's arguably lapsed accreditation did not in my view affect their ability to conduct a reasonable investigation. The code may have been supplanted by another one. Even if it was still in force at the time of this investigation, it did not seek to prescribe who could do disciplinary investigations and who could not.

71.5. Non-disclosure of the Trimble data. The Trimble data were not disclosed to the claimant and his representative. In my view, this omission fell short of best practice. Many employers, on receiving the data, would have thought to themselves that the fairest course would be to allow the employee and his representative to study them. I have asked myself whether the respondent's failure to do this meant that, overall, the investigation was outside the reasonable range. My view is that it was not. Neither the claimant nor his representative asked to be provided with the data

for themselves. They did not ask for the opportunity to conduct their own analysis.

72. Having listened to the various arguments on the quality of the investigation, it occurred to me that there were other possible shortcomings in the investigation.

73. One further line of enquiry would have been for the respondent to obtain the Trimble data for the period 23 December 2015 to 19 January 2016. The presence or absence of Trimble data for this period would have tended to show whether or not the ILM was capable of recording data whilst disconnected from the vehicle battery. This step could have assisted both parties:

    73.1. It could have strengthened the evidence against the claimant. It was certain that the ILM had been disconnected for a period including 12 January 2015. Had the Trimble data shown vehicle movement data during the days up to and including 12 January 2015, the ILM must have been recording. Once it was established that the ILM could record data without an external power supply, Mr Hamer would have had a solid explanation for the existence of Trimble data between 23 November and 23 December 2015 that was consistent with the ILM having been disconnected from the vehicle battery during that period.

    73.2. Conversely, the claimant might have benefited if Trimble showed no vehicle movement data for the period 23 December 2015 onwards. If it could be demonstrated that the vehicle had been driven up to 12 January 2015 and that no data had been captured by the ILM, the claimant would have been able to press his case more strongly that the ILM was transmitting data in real time between 23 November and 23 December 2015 and therefore had not been disconnected.

74. There could also have been further investigation into whether there had been any real-time transmission of ILM data from Trimble to the respondent after 23 December 2015. Again, this might have either strengthened or weakened the disciplinary case against the claimant. If the respondent had been receiving ILM data after 23 December 2015, somebody must have disconnected the ILM between 23 December 2015 and 12 January 2015. Since the claimant was on leave at that time, he would have been exonerated. By the same token, a lack of real-time transmission of ILM data after 23 December 2015 would have lent further support to Mr Hamer's belief that the ILM had been disconnected before 23 December 2015.

75. I do not know how easy or difficult an exercise this would have been. The claimant's Day Minus One reports would not have assisted, because ILM data would only show up if the claimant had been logged into Task Force at the time. Since he was on leave, he could not have been logged in. Day Minus One reports for another operative might have shown the claimant's vehicle's ILM data, but only if the claimant's vehicle had been entered into Task Force against the name of that operative. None of the respondent's witnesses was asked about how they might go about obtaining such information. It was not suggested as a line of enquiry during the disciplinary process.

76. Overall, I do not think that these omissions took the investigation outside the reasonable range. My main reason for coming to that conclusion is that the claimant and his representatives did not ask for these steps to be taken or

explain why they were important. They did not put forward the specific defence that the ILM had been disconnected after 23 December 2015.

Reasonable grounds for belief

77. I turn now to the question of whether there were reasonable grounds for the respondent's belief that the claimant had tampered with the ILM. I start from the perspective that any reasonable employer would realise that it would be unusual for a person to want to put a career of 30 years at risk by tampering with a device which they must know would amount to gross misconduct. The respondent would need strong evidence to establish that that was what had occurred.

78. In my view the evidence was sufficiently strong. Here are my reasons.

79. There was no doubt that somebody had deliberately disconnected the ILM. The claimant described in his own words the attempts by his union representative to argue to the contrary as being "cringeworthy". I would not necessarily go that far, but the evidence in support of deliberate tampering was overwhelming. The question for the respondent was, therefore, whether the claimant was the most likely person to have done it.

80. There were reasonable grounds for concluding that whoever had disconnected the ILM had done the deed between 23 November and 23 December 2015. The respondent's systems had stopped acquiring ILM data between those dates. Independently, between those dates, Mr Pitchford had heard Mr Taylor saying that the ILM had been disconnected.

81. The main user of the claimant's vehicle between 23 November and 23 December 2015 was the claimant. The two dates corresponded, respectively, with the claimant's first and last days at work. He was driving that vehicle on both days.

82. Mr Francis' arguments to the tribunal do not, in my view, undermine the respondent's reasonable grounds for belief. There was a reasonable basis for concluding, not just that the respondent's servers had stopped *acquiring* the ILM data between 23 November and 23 December, but also that the ILM had stopped *transmitting* the data during that time. For me to reach this view I do not have to make a finding as to whether the ILM contained a lithium battery or not. Even if Mr Hamer's belief in the existence of a battery was technically incorrect (and for all I know it might have been correct), it would be harsh to criticise Mr Hamer for holding that belief. This is for two reasons:

    82.1. The claimant did not argue in the disciplinary meeting that the error had occurred in transmission between Trimble and the respondent. Nor did he argue that the ILM must have been disconnected after 23 December 2015.

    82.2. The likelihood of a transmission error had to be seen alongside the coincidence between the dates and the independent evidence of what Mr Taylor had found. If the claimant's theory of post-23 December tampering were correct, Mr Taylor's version would have to be completely wrong. He could not have noticed any cracked security paint on 4 or 5 December 2015 if the ILM had been disconnected for the first time after 23 December. It is hard to see why Mr Taylor would have made up such a story at the time if the ILM connection had been intact.

83. I should add that, during the course of his oral evidence, the claimant offered an explanation of his whereabouts on 2 November 2015. I did not find it necessary

to decide whether to believe him or not. The discrepancies in the vehicle movement data from that day, whilst suspicious, did not actually have any effect on the decision to dismiss the claimant. Mr Hamer had already communicated his dismissal decision by the time he looked into what happened on 2 November 2015. Mr Hogg did not take account of it.

84. Despite Mr Francis' very able arguments to the contrary, my view is that the respondent was reasonably entitled to believe that the claimant had tampered with the ILM. Having concluded that he had done so they must have been driven to the conclusion that he had done it for dishonest reasons. Since it is not argued that the sanction of dismissal was outside the range of reasonable responses in the light of that belief, I must therefore find the dismissal was fair.

Employment Judge Horne

9 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 June 2017

FOR THE TRIBUNAL OFFICE