Case: 1800147/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr Lee Dixon**
Respondent: **Yorkshire Water Services Limited**
Heard at: **Leeds** **On: 24th May 2017**
Before: **Employment Judge Lancaster (Sitting Alone)**

Representation
Claimant: In person
Respondent: Mr J Boumphrey, counsel

JUDGMENT

1. The Claimant was unfairly and wrongfully dismissed.

2. Compensation will be assessed at a remedy hearing, if not agreed, and the parties are to notify the tribunal in writing not later than 23rd June 2017 whether such a further hearing is necessary and if so to provide proposed directions, a time estimate and any dates of unavailability.

WRITTEN REASONS

1. The case was adjourned after hearing the evidence and submissions and the decision was reserved. Written reasons are therefore provided.

2. The claim, presented on 30th January 2017, was for unfair dismissal, wrongful dismissal without notice, redundancy, holiday pay and arrears of pay. The claim for a redundancy payment has been dismissed on 10th March 2017, pursuant to rule 27 (1) Employment Tribunal Rules 2013, as it was clearly pleaded in error. There has in fact been no further reference at all in the course of this hearing to any claims for outstanding holiday pay or arrears of wages and they are not therefore covered in this decision on the basis that they have not been actively pursued.

The Law

3. It is, of course, for the Respondent to show the reason (or if more than one the principal reason) for dismissal: section 98 (1) Employment Rights Act 1996. As there is no dispute that the Claimant was dismissed for alleged gross misconduct (which is a potentially

fair reason) the real issue is to determine what was the set of facts relied upon by the Respondent.

4. As this is a conduct dismissal whether the dismissal was fair or unfair will involve consideration, in the light of the set of facts established to be the reason for termination, of whether the Respondent held an honest and genuine belief that this had occurred and that it amounted to misconduct; that it came to that conclusion upon reasonable grounds, and; that it had carried as much investigation as was necessary in the circumstances: BHS v Burchell [1980] ICR 310.

5. I remind myself that the sanction will be fair in all the circumstances (under section 98 (4)) if the Respondent acted, in respect of all aspects of the dismissal process, within the band of reasonable responses and that I must not substitute my own view for that of a reasonable employer.

6. The Respondent's investigation in this case involved tracking the private use of the Claimant's company vehicle outside of work time. Although the Claimant has therefore raised possible issues of data protection (which is not however material to this case) and breach of privacy (which may be relevant as engaging article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms) the objective fairness of the procedure is still appropriately dealt with by reference to the "band of reasonable responses" test: Turner v East Midlands Trains [2013] ICR 525 applying X v Y [2004] ICR 1634.

7. On the breach of contract claim (wrongful dismissal) it is for the Respondent to show that the Claimant actually committed misconduct of a kind which justified summary dismissal without notice.

The Facts

8. The Claimant worked as a Front Line Lubrication Technician. He also had the private use of the company van when not at work. This was not a standard benefit but it was a term and condition of his contract which had transferred when his employment passed from Carillion to the Respondent in 2010.

Medical History

9. The Claimant had a history of back problems and on 18th December 2015 he attended hospital with severe lower back pain. He was then off work continuously until 28th July 2017. For all of that period he was properly certified by his doctor as unfit to work.

10. The terms of the fit note dated 3rd June 2016 would have allowed the Claimant to go back to adjusted duties (possibly on a phased return) but, by agreement with his line manager, his return to work was deferred until after he had received a cortisone injection in his spine (epidural). That was on 23rd July 2016 and he resumed work on full duties shortly afterwards.

11. Throughout the period the Claimant underwent physiotherapy. He had 5 sessions arranged privately through work and missed one; after that he had treatment on the NHS on a weekly basis from the end of February to the end of June and occasionally that. He changed his physiotherapist when he found the sessions unhelpful.

12. The Claimant was also throughout this period agitating to secure the best and most appropriate treatment, culminating in the referral to a specialist for the successful injection in July.

13. The Claimant was referred to Occupational Health on five occasions. All of these consultations were by telephone with a nurse. The Claimant consented to the OH reports being sent directly to his line manager, Richard Haigh, which they were. The Reports were not however submitted to him for approval before being passed on the Mr Haigh. I also accept the Claimant's evidence that he did not in fact see these reports until they were disclosed to him in advance of the disciplinary hearing. That is because they were either not ever sent to him directly by OH or because if they were sent it was not to his preferred home email address but to a work email which he was either not able to access or did not think he should be logging on to during his absence. Arrangements were made for other work-related communications to be sent by post or to his personal email so that the Claimant would have n had no reason to expect OH Reports (if there were indeed ever sent) to be waiting in his work inbox.

14. The OH Reports are self-evidently brief summaries and are not intended to be accurately minuted or detailed records of all the replies the Claimant gave to questions.

15. The first telephone consultation with an OH nurse was on 22nd December 2015. It confirmed that the Claimant had seen his GP, that he had been placed on appropriate medication and that he had been referred for a scan. It is recorded that the Claimant was not able to perform all his own day to day activities because of the severity of the pain but there is no more detail: the Claimant was not asked specifically about his ability to drive at that time. The OH opinion was that the Claimant was not to work in any capacity and he was referred for physiotherapy.

16. There was apparently a further consultation on 12th January 2016 but no report was ever prepared as the OH nurse had left the business

17. The second OH Report (now from a new nurse) is dated 9th March 2016. It does not say when the telephone consultation took place. It confirmed the diagnosis that the Claimant had now received (a dehydrated bulging disc) and that this resulted in continuing reduced capability and pain consistent with and to be expected given that diagnosis. It reported the Claimant as saying that his ability to sit, stand or walk are all restricted as after ten minutes the pain becomes intolerable. The Claimant disputes that he would have actually said "intolerable" but accepts that he may well have used the word "unbearable" or "excruciating" . Apart from recounting that the Claimant cannot bend or lift heavy items and that his abilities to carry out this type of activity are limited to washing the dishes or taking the rubbish out there is no detail of the level incapacity. Again the Claimant does not appear to have been asked any questions specifically about his ability to drive. The OH opinion was still that the Claimant was unfit to work in any capacity and he was advised, as well as continuing with the physiotherapy, to seek a referral to a specialist musculo-skeletal specialist. A view was also expressed that the Claimant was likely to meet the definition of disability under the Equality Act.

18. The third OH Report is dated 16th June 2016. It is clear (as was in fact confirmed by him in the second disciplinary meeting on 7th September 2016) that by this stage Mr Haigh had received the fit note of 3rd June 2016 even if there may have been a slight delay in it finding its way to him. This referral to OH was therefore specifically to consider a possible

return to work on adjusted duties in the light of that doctor's note. However the Report also expressly records that management had nonetheless advised the Claimant that he should remain absent from work until after seeing the specialist on 3rd July 2016. Mr Haigh did not ever take any exception to the accuracy of this statement. It is reported that the Claimant's perception of his lower back pain remained unchanged and that he therefore was still restricted in his activities due to what is described as "fear avoidance". That is a perfectly proper expression of medical opinion which suggests possible psychological overlay in addition to the physical symptoms themselves and which in combination rendered the Claimant incapacitated. The conclusion is therefore that due to his current activity levels and perceived ability the Claimant was still unfit to return to work in any a capacity. Once again no detail was gone into and certainly nothing was asked about whether or not he could drive.

19. The fourth and final OH Report is dated 5th July 2016. This simply reported an anticipated return to normal duties following the cortisone injection that was to be given and the Claimant was discharged from OH.

Sickness Absence Review

20. The Claimant throughout this period also attended five sickness absence review meetings with Mr Haigh. The hand-written notes of these meetings were only disclosed the day before the hearing. These notes were not, therefore considered in the disciplinary hearings. Following each meting Mr Haigh did however send a letter to the Claimant summarising the discussion and these letters are largely in accord with the now-disclosed notes. The first three meetings were described as informal and the last two as formal meetings under the long term absence review policy. There is however no substantial difference in the purpose which is identified as "to discuss how you are feeling, the medical advice received, any support that we may be able to offer you and to discuss the next steps regarding your absence from work". These are never therefore intended to function as detailed assessments of the Claimant's capability. All meetings discuss in a general narrative the current situation with regard to medical appointments, medication, physiotherapy and future course of treatment.

21. The first meeting was on 28th January 2016. At this time the Claimant reported that he was "not able to do much at home" and that "five minutes of standing and has to stop". He said he was not able to drive. The notes record that he then said "However unsure if could drive on medication". This appears in the follow-up letter as his being unsure if he could drive on the current medication he was taking" and although the note is potentially ambiguous as it could mean that the Claimant was unsure whether he would be able to drive if he took painkillers the interpretation in the letter, in context, appears to be right.

22. The next meeting was on 3rd March 2016. The Claimant reported that he "has (sc. past) driven short way – not do lot" and in that immediate context records his medication (strong painkillers, ibuprofen and muscle relaxant). The letter says he "is able (sc. present and future) to drive short distances" which is not exactly what he said, but also specifically records that the Claimant had in fact driven to that appointment, an eight mile round trip.

24. The third and final informal meeting was on 12th April 2016. The Claimant advised that he felt the pain was worse that it had been before and that he had changed his physiotherapist and that he was going back to his GP to seek a referral to a specialist.

25. The next and the first formal meting was on 31st May 2016. The Claimant said generally that he feels he is improving but In respect to a possible return to work that he had

been "told pain not go away- from muscle point of view not feel safe do anything and also pain in lower back comes on after sitting for 10 minutes". The letter adds a reference to not only "sitting" but also "walking etc for 10 minutes". It is accepted that it was known that the Claimant had also driven to this appointment and that as this took place at Esholt, north of Bradford, this would in fact have entailed a three hour round trip from his home hear Featherstone. He was not asked anything about the specific effects of this drive nor about his ability to drive generally.

26. The last meeting was on 19th July 2016. The Claimant said that he was feeling more mobile and confirmed the date of the injection in four days time. He clearly envisaged a return to full duties and there was specific discussion about the van, a new one was on order and it was hoped this may minimise any future back problems that may have been caused by driving.

Private Mileage

27. The tracking records for the Claimant's works vehicle record his private usage during his sickness absence and up to 31st May 2106. From 22nd December 2015 until the end of the month he drove a total of 52 or 53 miles. In January he drove (according to Mr Haigh at the fact find) a total of 66 miles, though Mr Adam Ashman's spreadsheet prepared for the Disciplinary hearing only shows 55 miles (8 miles on 3rd;8 miles on 12th; 39 miles on 31st). Although it would be possible to identify from the core data whether these were single or multiple journeys on any particular day Mr Ashman did not carry out that specific analysis: although he will have had an impression from his examination of the original documents he did not ever rely on any precise breakdown of the driving times or distances. In February the Claimant drove a total of 97 miles (Mr Haigh said 96 but that very minor discrepancy appears to arise from the way figures for each day have been rounded up or down). That was on six days in that month (2 miles on 15th; 17 miles on 18th; 30 miles on 25th; 13 miles on 26th, 13 miles on 27th and 22 miles on 29th). Again there is no specific breakdown of individual journeys relied upon.

28. It is then accepted by the Claimant that there was a significant increase in the level and frequency of his driving. On Mr Haigh's figures that was 1068 miles in March, 894 miles in April and 727 miles in May. This does not, however, appear to correspond at all with Mr Ashmans' schedule – although the odometer readings at the beginning and end of the period are those also cited by Mr Haigh. In March Mr Ashman only records 571 miles (12 miles on 1st; 12 miles on 2nd; 34 miles on 3rd; 14 miles on 4th; 19 miles on 5th; 32 miles on 6th; 5 miles on 7th; 43 miles on 8th; 6 miles on 9th; 69 miles on 10th; 105 miles on 24th; 129 miles on 25th; 91 miles on 30th). The long journeys on 24th and 25th March were a trip to Centre Parcs and back. In April Mr Ashman only records 444 miles (17 miles on 8th; 58 miles on 9th; 61 miles on 10th; 16 miles on 11th; 26 miles on 12th; 27 miles on 13th; 51 miles on 15th; 30 miles on 16th; 9 miles on 17th; 20 miles on 18th; 62 miles on 25th; 67 miles on 28th). In May Mr Ashman only records 240 miles in total (28 miles on 3rd; 47 miles on 4th; 80 miles on 5th; 1 mile on 21st; 8 miles on 28th; 76 mile on 31st).

29. These differences between the two sets of figures were never adverted to in the course of the hearing. I was taken equally by the Respondent to both Mr Haigh's summary and to Mr Ashman's spreadsheets. The Claimant accepted that he does not dispute what is actually shown on the tracker records.

30. In the event I do not consider that anything turns on this discrepancy. That is because Mr Ashman did not refer at any stage of the disciplinary hearing to total cumulative monthly

mileage figures as Mr Haigh had during the fact-finding interview. He completed his spreadsheet during the second meeting on 7th September 2016 and projected it onto a screen. A hard copy may also then have been provided. The only instances of driving that were therefore brought to the Claimant's express attention as being relied upon were those identified on the spreadsheet. It is clear from the minutes of the disciplinary hearing that in particular Mr Ashman only referred to 28th January, 25th February, 3rd March, 24th March, 30th March, 8th April, 28th April and 31st May.

The Disciplinary Procedure

31. On 31st May the Claimant in the company vehicle drove a number of other people, including his uncle, to an address at 8 Westbourne Road , Pontefract. His uncle's own vehicle had broken down and had been parked on the road outside that address for some six weeks. The Claimant attended on this occasion, shortly before the vehicle was eventually to be towed away, in order to recover some of his personal property, step ladders, which had been stored in his uncle's van. The occupiers at number 8 had objected to the van being parked outside and alleged that they had been spoken to in an abusive fashion when they protested on 31st May.

32. The householders then made a complaint to the Respondent, identifying the Claimant's vehicle. Although this is described as a "customer complaint" that is only because incidentally the Respondent was the water supplier in that area: it has nothing to do with the provision of utility services.

33. The Claimant was called to a fact-finding interview to investigate this complaint, but not until 11th August 2016. The invitation to the fact-fined (dated 5th August) referred to an allegation of "receipt of a complaint in relation to your company vehicle in terms of its activity whilst you were absent from work due t long-term sickness". No details of the actual complaint were however given to the Claimant by Mr Haigh until the actual meeting. It was not until 12th August 2016 that Mr Haigh obtained confirmation from HR that, exceptionally, the Claimant was in fact contractually entitled to use the van for all private purposes and was taxed accordingly for the receipt of that benefit.

34. The Claimant was extensively questioned at the fact-find about the circumstances of 31st May and previous visits to the location in Westborne Grove and about whether he was in fact engaged in any business with his uncle. In the event no charges were pursued either in respect of anything the Claimant himself had done or said on 31st May (he in fact appears to have been trying to defuse the situation and suggested that if they wished the householders should call the police) nor any inappropriate outside working whilst off sick. The Claimant was not questioned about this incident in the actual disciplinary meetings. It is conceded in Mr Boumphrey's skeleton argument that the Respondent does not rely upon any substantial findings from this incident to justify dismissal.

35. On 1st June 2016 Mr Haigh had obtained consent from HR to examine the tracker records for the Claimant's private use of his vehicle from 22nd December 2015 until the date of the alleged incident on 31st May 2016.

36. The fact-find then also asked the Claimant about the pattern of driving disclosed on the tracker records and whether this was inconsistent with the level of incapacity reported to Mr Haigh in the course of the sickness absence review process, and whether it contradicted the assertions that the Claimant was not in fact fit to return to work until 28th July 2016..

37. The Claimant at one point when being asked about the 31st May said "he wasn't fit and didn't drive for 3 months before this as he couldn't". He clarified this alter as saying that he started to drive again "around 3 month in (sc. from December 2015)" but that "he didn't know the exact date". The Claimant consistently asserted that he had not lied about his inability to work, that he drove when he could but that it hurt and that from the point he began doing more driving "trying to be as normal as possible" he "had been all over" and agreed that there would have been a "lot of mileage" because he "used it as normal for private use". The Claimant said in relation to the disclosed mileage driven by him on 24th March given that three weeks earlier he had observed that he had only driven short distances that "he knew how it looked but only did what he could do at the time". He also explained that he often sat in the van listening to match commentaries on Leeds games on the radio.

38. Mr Haigh concluded that "the information from c-track contradicted the information the Claimant had provided to himself at the long term absence review meetings in terms of not being able to drive or sit for more than 10 minutes". There was no further fact-find meeting

38. On Mr Haigh's recommendation that the matter then proceed to a disciplinary hearing the Claimant received a letter dated 12th August 2016. This set out the charges as follows:

- Excessive use of your company vehicle (which we acknowledge you have personal use of) whilst you were absent from work due to long-term sickness between December 2015 to July 2016.
- Dishonesty in relation to information you shared during the long-term absence process.
- Fraudulently claiming sick pay.
- Breach of trust

39. The Claimant was advised that a possible outcome could be dismissal.

40. The Respondent has never provided particulars of the allegations beyond the bullet points. There has never been any attempt to define or explain how the Claimant's private mileage is said to have been "excessive". Nor has there ever been any attempt to identify what the Claimant said that was dishonest or a deliberate lie.

42. In Mr Haigh's management summary prepared for disciplinary hearing there is some elaboration of his purported reasoning for progressing to a hearing on the charges identified in the bullet points. This still does not however assist in further particularising those charges. I am satisfied that the summary is for the most part a subjective statement of opinion and that it is not, as the investigation ought to be under the Respondent's policy, properly impartial.

43. I am satisfied that the summary does not fairly reflect what the Claimant actually said either in the sickness review meetings or in the fact-find. The Claimant did not say as is alleged that he was unable to drive for 3 months to 22nd March 2016 and that for this period he could not even get in his van. He said that there was a time when he could not and did not drive at all, but he did not say how long this incapability lasted, and he was not specific about when he started to use the van more normally for personal use Nor on a fair reading of the minutes of the meeting can it be said that the Claimant avoided directly answering most of the questions if he thought what he had said contradicted the activity/events that had taken place". What he actually said was, as I have already found, that from the point he began doing more driving "trying to be as normal as possible" he "had been all over" and he agreed

that there would have been a “lot of mileage” because he “used it as normal for private use” and that “he knew how it looked but only did what he could do at the time”. He consistently refuted the suggestion that his level of driving activity contradicted his reported levels of incapacity. Nor on a fair reading of the minutes does the Claimant in any material respect actually “contradict himself on a number of occasions” . As I have again already found, he in fact consistently asserted that he had not lied about his inability to work, but said that he drove when he could but that it hurt and that from the point he began doing more driving “trying to be as normal as possible” he “had been all over”. Also although it was not reflected in any actual charge in coming to his conclusion Mr Haigh, despite accepting that the Claimant did not in fact appear to have been abusive to the householder on 31st May, still for some reason relied upon the fact that he was “part of the party that resulted in a public complaint”. I also accept however that , as he asserted in evidence, Mr Ashman did not merely follow Mr Haigh’s lead but sought to carry out his own evaluation of the circumstances.

43 The disciplinary hearing was conducted by Mr Ashman. There were three meetings. The first was on 25th August 2016. This was then adjourned because Mr Ashman required the Claimant to confirm the dates of his holidays and of his physiotherapy and medical appointments. This he did and Mr Ashman at the adjourned hearing on 7th September 2106 added this information to his spreadsheet with a view to correlating the dates with the recorded driving activity. It was only after the second meeting that Mr Ashman in fact satisfied himself that the Claimant was entitled to drive the vehicle for unrestricted personal use outside of work. At the end of the second meting this was expressed as Mr Ashman “re-opening” the fact find “to consider the personal use of the vehicle”. The final part of the hearing was on 5th October 2106. At the conclusion of that meeting Mr Ashman announced the decision summarily to dismiss, reading from a prepared written script. The decision announced at the time therefore corresponds exactly with the reasons for termination stated in the confirmatory letter dated 11th October 2016.

44. In the course of the disciplinary hearings the Claimant was required to answer questions about his private life, what he had done on holiday and why he had been driving at night on 8th April, which he explained was because he had fallen out with his girlfriend and was driving about. It was not explained to him how the level of driving was said to be excessive. No specific allegation was ever put to him that something which he had said was a lie. He answered questions about his impairment and confirmed that he did drive but that he took pain killers to stop the pain. He also said that when he d said he had not driven for a period after the onset of back pain he was referring to what he regarded as “normal driving” and that when he said in the fact-find that he could not drive it was an off the cuff comment but that he was honest and had no reason to lie. He consistently repeated that he had not considered that he was fit to work, even when he had, to an extent, been able to drive.

45. The reasons for dismissal are said to have been:

(1) “Evidence available shows that use of your van significantly increased from March 2016 onwards whilst you remained absent from work due to sickness. In considering this, I must make it clear to you that excessive use of your company vehicle includes both idle time, and time spent in your van driving.

Occupational Health reports detail that the pain you were experiencing would restrict your movement and on balance, your driving for any period of 10 minutes or more. The van usage that you have undertaken does not align with this information and in my belief, does not

demonstrate the restrictions that you identified as the reason you were unable to undertake any duties as you were not safe to do so.

In conclusion, I consider this usage to have been excessive."

(2) "I have deliberated your mitigation and I do appreciate that you have suffered with back pain and have taken proactive steps to resolve your pain symptoms and obtain treatment to aid your recovery.

However considering the content of the long term absence review meetings held, the van use that was disclosed to your line manager Richard does not appear to be consistent with van use as demonstrated by the time line shared and C-track report information. By your omissions I believe that you have misled the business and your line manager.

I therefore uphold the allegation of dishonesty in relation to information shared during the long term absence process."

46. The allegation of fraudulently claiming sick pay was not upheld. No explanation was given for this finding but it is clear that there was never any proper basis for this charge as the Claimant was correctly certified as medically unfit to work. At the appeal stage Mr Ashman confirmed that this charge was not upheld because there were fit notes covering the entire period.

47. Mr Ashman also concluded that notwithstanding that there had been no fraudulent claim of sick pay "it is my belief that there has been fundamental breakdown of trust in relation to you and your line manager, and ultimately the relationship that you hold with Yorkshire Water".

48. The Claimant appealed. The appeal was heard by Mr Mark Hammond on 11th November 2106 and was dismissed. The reason for dismissing the apparel is frankly stated in evidence by Mr Hammond to have been that he did not believe the Claimant had properly engaged in discussions about a possible earlier return to work. The outcome letter does not address the question of what is in fact meant by excessive use of the vehicle nor whether dismissal on that ground was excessive. The purported reason for rejecting this ground of appeal simply asserts a genuine belief that he had misrepresented his condition which does not actually deal with the issue. In dealing specifically with the charge of dishonesty Mr Hammond then expresses the view that the Claimant had deliberately exaggerated his symptoms in order to claim sick pay recovery of which the Respondent would still continue to seek to pursue, notwithstanding the express dismissal of the charge of fraud.

Conclusion

The Reason For Dismissal

49. The essential set of facts known to the Respondent was simply that during the first five months of a seven month period of properly certified sickness absence the Claimant's personal – but still largely intermittent - use of his van increased although he maintained that he was not fit to return to work.

50. On 3rd January 2016 the Claimant had returned from a holiday in Slovenia, undertaken in the full knowledge of the Respondent and which had been booked before the start of his sickness absence. Thereafter until the end of the month Mr Ashman had identified him driving

on only three occasions, a total of 55 miles.. He did not drive at all between 12th and 31st January. On 31st January he did drive a total of 39 miles but immediately after that Mr Ashman identified that he stopped driving altogether for a period of more than two weeks during which time he must have made alternative arrangements to attend doctor's appointments and physiotherapy sessions. On 15th February he drove 2 miles and then on 5 further dates in that month, 97 miles in total.

51. As at 28th January 2016 the Claimant had said that he was not able to drive but that he was unsure if he could drive on medication. On the evidence available to him Mr Ashman will have been aware that that information was in fact entirely consistent with the tracking records which show that he was indeed not actually driving at all at this point, that he did so shortly after but that he then apparently was not able to try again until two weeks later

52. On 1st and 2nd March 2016 Mr Ashman had identified that the Claimant drove 12 miles on each day and on 3rd March he then drove a total of 34 miles, including attending a sickness review meeting in the middle of that day.

53. As at 3rd March 2016 the Claimant was recorded as having said to Mr Haigh that "he is able to drive short distances". On the evidence available to him Mr Ashman will have been aware that that information was in fact entirely consistent with the tracking records which show that he had since 15th February been driving with increased regularity but on no one day doing more than 30 miles in total . As Mr Ashman did not specifically rely on any continuous course of driving in this period it is safe to assume that these were a succession of short journeys. Mr Ashman did refer specifically to 3rd March in the course of the disciplinary hearing and on that date he will therefore have been aware that the Claimant had in fact undertaken 8 separate journeys, the longest of which was 11 miles, to make up that total of 34 miles.

54. Between 4th and 9th March 2016 the Claimant was identified by Mr Ashman as having driven on each of those six days, with the highest total daily mileage being 43 miles.

55. As at around 9th March 2016 the Claimant was recorded as saying that his ability to sit, stand or walk were all restricted as after ten minutes the pain becomes intolerable but he was not asked about his driving. At the date of this referral to OH the Respondent knew at least that the Claimant was now driving "short distances" but OH were not apparently asked to comment specifically on this aspect and the Claimant was not asked any questions about it. Mr Ashman knew therefore that as at 9th March although there was a telephone appointment with the OH nurse the specific issue of the Claimant's driving was not in fact discussed with him at all at that time.

56. From 10th March to 12th April 2016 Mr Ashman had identified the Claimant driving on nine further occasions. The total distances are greater and include the long trips to and from Centre Parcs. However from 10th March (when the total daily mileage was 69 miles) until driving to Cetre Parcs there is no recorded usage of the vehicle at all. After returning from Centre Parcs on 25th March there is only one further day's driving in the two weeks until 8th April; that was on 30th March where the total distance was 91 miles and when asked about this date the Claimant said he could not remember what he was doing. The 8th April was the night the Claimant had an argument with his girlfriend and drove around to get out of the house. The Claimant then also drove on the next four consecutive days, 9th to 12th April 2016.

57. As at 12th April 2016 when the Claimant advised that he felt the pain was worse that it had been before and that he had changed his physiotherapist and that he was going back to his GP to seek a referral to a specialist there is nothing inconsistent with the recent pattern of sporadic motoring with sustained periods of respite from driving following on from long journeys.

58. From 13th April to 31st May 2016 Mr Ashman identified only 13 further occasions when the Claimant had driven, though for a week he was on holiday and two of the dates (21st and 28rth May) are immediately either side of that journey to the airport to fly to Mallorca. On six of these occasions the total daily mileage is in excess of 45 miles.

59. As at 31st May 2106 Mr Ashman knew that the Claimant, although still declaring unfit to work, had undertaken a 3 hour round trip to drive to a sickness review meeting. He also knew that shortly after that, on 3rd June, the Claimant obtained a fit note from his doctor which would have enabled a return to adjusted duties, and that although referred to OH to explore this possibility that did not in fact, by agreement in fact take place until after the epidural.

60. It is not at all obvious how the two charges as constructed, and said to have been found proved, in fact correspond to this factual matrix as it was known to the Respondent.

61. The allegation of excessive use of the vehicle is still wholly unclear. The Respondent's case is either that the usage was excessive because it was greater than that which he should have been undertaking given his level of incapacity so that he was medically unfit, unsafe to drive and reckless in doing so or, alternatively, that he was in fact fit to drive but was therefore not being honest in recounting his impairments. These positions are mutually exclusive. It is only in the first case that the word "excessive" might be appropriate: this is how the charge is now explained in Mr Boumphrey's skeleton argument. The allegation in these terms was never, however, put to the Claimant.

62. In actual fact the stated reason for dismissal is the alternative way of putting the case. That is that it is put on the basis that OH had "on balance" (that is as Mr Ashman accepts an acknowledgement that there is nothing in any OH report to actually say this) detailed a level of pain in driving that which in his opinion would be inconsistent with the mileage actually undertaken. This also appears to be the rationale for the finding that the Claimant should not even have been sitting in his vehicle over a sustained period, even if not driving: part of the stated reason for dismissal is therefore that the Claimant had on occasions sat in his van listening to local radio.. That is therefore not a finding of "excessive vehicle usage" at all but merely an alternative way of saying that the Claimant was exaggerating his symptoms. If that is what was intended it should however have been made clear and put to the Claimant.

63. On the second charge of dishonesty Mr Ashman changed his mind in the course of his evidence as to what he in fact understood to be the offence committed. His final position is that the Claimant was lying in relating exaggerated symptoms to Mr Haigh. This allegation was never put to the Claimant at the disciplinary hearing , though it is clearly what Mr Hammond though during the appeal.

64. In the stated reasons for dismissal however no actual lie is identified. Rather the Claimant is alleged to have misled Mr Haigh by omission. That is that because he did not tell him expressly how much driving he had done at various stages this was dishonest. In the reasons for dismissal the conclusion is limited to those alleged non-disclosures as to the

extent of the van use and Mr Ashman does not make any finding that the Claimant was dishonest in describing the extent of his symptoms.

65. The reason for dismissal therefore, although it does not correlate to the charges as framed, was, I find, that the Claimant had failed voluntarily to disclose information about how much driving he was actually able to undertake at various times which in the Respondent's opinion suggested that he should have returned to adjusted duties sooner than he actually did.

Fairness

66. The Respondent had no medical evidence whatsoever to back up this opinion that the Claimant could have returned to work sooner.

67. In actual fact he was duly certified unfit to work for the whole period yet at no point was he driving against doctor's orders. The medical evidence was therefore that his decision to drive as and when he could was entirely consistent with a continued unfitness actually to return to work. As his trade union representative put it forcibly at the appeal hearing "it is stretching it that someone could make up having an epidural".

68. It is not fair to have dismissed the Claimant on the basis of an untested and unsubstantiated personal opinion as to his actual capabilities which ran contrary to all the available medical evidence.

68. Even if the Respondent, in the person of Mr Ashman, genuinely believed that there was some mismatch between the driving activity and the fact that he consistently asserted that he was nonetheless unfit to return to his duties that was never tied to a specific allegation of misconduct which he properly considered and found proved on the facts.

69. Where there is an allegation of dishonesty and fraud and where the investigation also impinges upon the employees right to a private life without interrogation of what he does in his own time there will have to be robust examination by the tribunal of whether or not the Respondent's actions were objectively reasonable. Applying the test with the appropriate rigour to these facts I have no hesitation in concluding that this decision falls outside the band of reasonable response open to a reasonable employer.

70. There is no reasonable basis on these facts, in their proper context, for concluding that the Claimant drove excessively (whatever that might mean) or that he deliberately and dishonestly withheld information about the extent of his private driving - let alone that he lied about his symptoms – with a view to delaying his return to work so as to maximise the period for which he received sick pay.

71. Nor, as this is a conduct dismissal, has the Respondent established an alternative reasonable basis for dismissal on the grounds that the Claimnt had, without reasonable or proper cause, actually conducted himself in a manner calculated or likely to destroy or to seriously undermine the relationship of trust and confidence. The assertion that there had been a fundamental breakdown in trust and confidence does not therefore add anything in these circumstances.

72. The disciplinary process was undeniably long and drawn out. It nonetheless still failed to identify a properly formulated charge which corresponded to the facts that emerged over the three hearings. The decision to dismiss was not, in the terms in which it was framed,

based on any reasonable grounds and nor, absent any medical evidence whatsoever to support such a conclusion, was there adequate investigation of what was the real reason for the decision. The Claimant was in all the circumstances and on the substantial merits of the case unfairly dismissed

73. The Respondent has certainly not proved that the Claimant in fact committed any misconduct which would have justified his summary dismissal. He did not do anything which by ordinary standards would be considered dishonest. No lie or falsification of information has been shown. Nor for the same reason is there any basis to reduce the amount of any compensatory award for unfair dismissal on the grounds of contributory conduct. The Claimant has not been proved to have actually done anything which would make it just and equitable that his compensation be reduced.

74. The Claimant is therefore entitled to a basic award for unfair dismissal without any reduction. This will fall to be calculated on the basis of his full period of nine years continuous employment and not merely the six years since the TUPE transfer to the Respondent. Applying the statutory cap, nine weeks pay at £479.00 would give an award of £4,311.00.

75. The Claimant is also entitled to nine weeks' net pay in lieu of notice as damages for his wrongful dismissal which he assesses at £3,321.00.

76. Further compensation for unfair dismissal will have to be assessed at a remedy hearing if not agreed.

Employment Judge Lancaster

Date: 1 June 2017