



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107018/2017

Held in Glasgow on 19 and 20 September 2018

Employment Judge: Michelle Sutherland (sitting alone)

5 **Richard Avery**

**Claimant
In Person**

10 **John Mitchell (Grangemouth) Limited**

**Respondent
Represented by
Ms K Graydon,
Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgement of the Tribunal is that the Claimant was not unfairly dismissed by the Respondent.

REASONS

Introduction

20 1. The Claimant presented a complaint of unfair dismissal. The Respondent admitted that the Claimant was dismissed but denied that his dismissal was unfair.

2. A final hearing was held on 19 and 20 September 2018.

25 3. The Respondent lodged a set of productions which included CCTV footage of the Claimant shown at the final hearing.

30 4. For the respondent, evidence was led from Sandy McGiven, Operations Manager ('Dismissing Officer') and Robert Rae, Director ('Appeal Officer'). The Claimant gave evidence on his own behalf.

5. The Claimant initially advised that he was seeking re-instatement or re-engagement with the Respondent. However part way through the final hearing he advised that he was seeking compensation only.

5 6. Both parties made closing submissions.

7. The Claimant in his ET1 asserts that his weekly earnings vary and that in 'week 23' he earned £698.41 gross. The Respondent in its ET3 neither accepts nor denies those earnings. The Claimant did not provide a Schedule of Losses as ordered. Neither party was able to provide evidence as to the Claimant's earnings with the Respondent. It was agreed with the parties that in the event of a finding of unfair dismissal parties will be called upon to provide documentary evidence and make written submissions regarding such earnings.

15 **Issues**

8. The issues to be determined by the Tribunal at this final hearing were confirmed with the parties at the start of the hearing to be as follows –

20 a. What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?

b. Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

25 c. Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the employee? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones*
30 *1983 ICR 17*

d. If the reason for dismissal relates to the conduct of the Claimant –

- 5
- i. Did the Respondent have a genuine belief in the Claimant's guilt?
 - ii. Did the Respondent have reasonable grounds for that belief?
 - iii. Had the Respondent conducted a reasonable investigation into that misconduct?

British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303

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- e. Did the Respondent comply with their own disciplinary procedure and/or the ACAS Code of Practice on Disciplinary and Grievance Procedures? Was there any unreasonable failure to comply with the ACAS Code?
 - f. If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd 1987 3 All ER 974.*
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 - g. Does the Claimant wish to be reinstated or re-engaged? Is it reasonably practicable? Did the Claimant cause or contribute to his dismissal?
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 - h. To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?
 - i. What loss has the claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to his dismissal? Has the Claimant taken reasonable steps to mitigate his losses?
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Findings of Fact

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9. The tribunal makes the following findings of fact –
10. The Respondent is one of Scotland's largest family owned haulage companies. The Claimant was employed by the Respondent from 4 October 2011 until 28 September 2017. The Claimant was employed by the

Respondent as an HGV driver. The Claimant enjoyed working there and had a good working relationship with both his colleagues and management including the Dismissing Officer and the Appeal Officer.

5 11. On 21 September 2017 BP (an employee of the Respondent) advised the Respondent that his car had been scratched whilst it had been parked in the Respondent's yard on 21 September 2017. The Respondent inspected the car and concluded that the rear off side had been scratched with a key or other sharp implement just above the wheel arch. No written record was made
10 of BP's statement. No photos were taken of the scratch until after the appeal hearing. The entire CCTV footage for that day was reviewed by the Respondent's Compliance Officer who found that only the Claimant had engaged in conduct consistent with the car being scratched. No written record was made of the Compliance Officer's findings.

15 12. On 22 September 2017 the Dismissing Officer met with the Claimant to advise him that it was suspected that he had scratched a colleague's car deliberately with a key whilst it had been parked in the Respondent's yard on 21 September 2017. The Claimant was not advised whose car was scratched.
20 The Dismissing Officer advised the Claimant that the entire CCTV footage for that day had been reviewed and that it appeared to show that the Claimant had scratched the car deliberately. The Dismissing Officer showed the Claimant the part of CCTV footage being relied upon. The Claimant was suspended at that meeting on full pay.

25 13. On 22 September 2017 the Dismissing Officer wrote to the Claimant confirming his suspension, noting the allegation of causing wilful damage to a colleague's vehicle in their yard on the morning of 21 September 2017, asking him to attend a disciplinary hearing on 25 September 2017 and
30 advising the Claimant that he would chair the meeting, that the Claimant had a right to be accompanied, and that the Claimant was at risk of dismissal. The Claimant was not provided with any evidence or a written summary of the evidence other than a statement "there is CCTV footage of the incident". The Claimant requested a postponement of the disciplinary hearing and on 25

September 2017 the Dismissing Officer wrote to the Claimant confirming that the disciplinary hearing had been postponed until 28 September 2017.

- 5 14. Minutes were taken of the disciplinary hearing on 28 September 2017 by Angela Martin, Administration Supervisor. The Claimant was not given a copy of the minutes or asked to approve their terms during the disciplinary process.
- 10 15. At the disciplinary hearing on 28 September 2017 the Claimant advised that he had been charged by the police in respect of the alleged incident and that his solicitor had advised him to make no comment (in exercise of his right to silence).
- 15 16. At the disciplinary hearing the Claimant was again shown the CCTV footage. The CCTV footage shows the Claimant arriving in the yard by car, him leaving his own car with his keys in his hand right hand and his bag in his left hand, him walking up to BP's car, him slowing down and holding his right hand up towards BP's car, and him walking closely alongside the rear offside of BP's car with his right hand extended to a height above the wheel arch. The CCTV
20 footage is insufficiently detailed to show whether the car was in fact scratched either by the actions of the Claimant or at all. At the disciplinary hearing the Dismissing Officer advised the Claimant that the CCTV footage appeared to show that the Claimant had deliberately scratched BP's car with his key. The Claimant advised that this assessment was "fair enough" but that had an alternative explanation which he felt unable to share. He did not expressly
25 admit or deny the allegations.
- 30 17. After a brief adjournment the Dismissing Officer returned to the meeting, noted that the Claimant had not confirmed or denied the allegations and advised the Claimant he was being dismissed for gross misconduct. The Dismissing Officer believed that the Claimant had wilfully caused damage to a colleague's vehicle. The dismissal and the reasons for the dismissal were confirmed by letter of 28 September 2017 and the Claimant was advised of his right of appeal. On 3 October 2017 the Claimant submitted his appeal on the grounds that the evidence produced was not sufficient to establish that he
35 is guilty of the offence and further that he strongly refutes the offence.

18. On 10 October 2017 the Dismissing Officer wrote to the Claimant asking him to attend an appeal hearing on 13 October 2017 and advising him that the Appeal Officer would chair the meeting and he had a right to be accompanied.
5 The Claimant was provided with a copy of the CCTV footage. The Claimant was not provided with any other evidence, a written summary of the evidence, or minutes of the disciplinary hearing.
19. Minutes were taken of the appeal hearing on 13 October 2017 by Angela
10 Martin, Administration Supervisor. The Claimant was not given a copy of the minutes or asked to approve their terms during the disciplinary process.
20. At the appeal hearing the Claimant said that the CCTV footage does not show
15 him damaging the car, that he did not damage the car, that he had a very good relationship with BP and that he had no reason to do this. The Claimant also took issue with the fact that his own car had been deliberately damaged at work but there had been no evidence available as to who had caused the damage.
- 20 21. At the appeal hearing the Appeal Officer said that the evidence showed that he had deliberately scratched the car. On 17 October 2017 the Appeal Officer wrote to the Claimant advising that he had considered all of the facts and that he was upholding the decision to dismiss by reason of gross misconduct. The Appeal Officer believed that the Claimant had wilfully caused damage to a
25 colleague's vehicle.
22. The Claimant had previously been disciplined but this was not taken into consideration in reaching the decision to dismiss.
- 30 23. The criminal trial was abandoned in April 2018 for want of evidence.
24. Immediately after his dismissal the Claimant made contact with a number of haulage companies and HGV driver agencies by telephone. It is not unusual to make initial enquiries by telephone. There is a shortage of HGV drivers but
35 the Claimant had difficulty securing alternative employment because of his age. HGV drivers over the age of 65 have higher insurance premiums, are

subject to annual medical checks, and are likely to offer shorter periods of service. The Claimant eventually secured temporary employment with a friend starting end June 2018. The earnings from that employment are largely consistent with his employment with the Respondent. The Claimant will be advised by end September 2018 whether or not this employment is being made permanent. If he is not made permanent he will retire. Prior to the disciplinary issue arising the Claimant had made the decision to retire from HGV driving at age 71 (i.e. by February 2019).

Observations on the Evidence

- 10 25. The Claimant asserted that he did not know whose car was scratched until after the disciplinary hearing and that he would have no motive to scratch a random car. The Respondent asserted that he did know that it was BP's car albeit it understood that he had a good relationship with BP. This issue is not of material relevance since the allegation was that he deliberately scratched a colleague's car rather than BP's car specifically and further it was unnecessary for the Respondent to establish motive.
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26. The Claimant asserted that there was inconsistency regarding the number of panels affected by the scratch. Any such inconsistency was not material and further the allegation did not reference a specific number of panels merely that rear off side was scratched.
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27. The Claimant asserts that he put his own car keys into his own bag before he approached BP's car. It is understood that this is the explanation to which he alluded but did not share at disciplinary hearing and further the CCTV footage is inconsistent with this assertion (at no point does he make any motion consistent with putting or throwing his keys into his bag).
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28. The Claimant asserted that his chosen companion was put under pressure by the Respondent not to accompany the Claimant to the disciplinary hearing. However there was no evidence to this effect other than the Claimant's assertion and given that the request to be accompanied was only made the
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night before the hearing there appears to have been no opportunity to effect that pressure.

5 29. The Claimant asserts that the Dismissing Officer and Appeal Officer had both made up their minds as to his guilt in advance of the disciplinary and appeal hearings respectively. There is however no evidence to this effect and it appears that the Claimant's perspective was coloured by the known reactions of some other staff who saw the CCTV footage and immediately concluded he was guilty.

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30. Minutes were taken of the disciplinary hearing on 28 September 2017, and of the appeal hearing on 13 October 2017, by Angela Martin, Administration Supervisor. The Dismissing Officer and the Appeal Officer asserted that these are an accurate record of the relevant meeting but the Claimant was not given
15 a copy of the minutes or asked to approve their terms during the disciplinary process and this weakens their evidentiary value.

31. The Claimant advised that even if he had felt able to comment fully (rather than exercise his right to silence in the face of criminal proceedings) he would
20 have been unable to offer any explanation for the evidence other than to assert that he threw his keys in his bag.

Relevant law

32. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.
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33. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

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34. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources

of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At this second stage of enquiry the onus of proof is neutral.

5 35. If the reason for the Claimant's dismissal relates to the conduct of the employee, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).

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36. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)*).

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37. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 2017, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that –

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- a. *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- b. *Employers and employees should act consistently*
- c. *Employers should carry out any necessary investigations, to establish the facts of the case.*

- d. *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- e. *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- f. *Employers should allow an employee to appeal against any formal decision made*

Respondent's Submissions

38. The Respondent's oral submissions were in summary as follows: -

- a. The reason for the Claimant's dismissal was that he had caused wilful damage to a colleague's vehicle whilst at work. That reason was potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996. The dismissal was fair having regard to Section 98(4) of the Employment Rights Act 1996. The procedure adopted and the decision to dismiss fell within the 'range of reasonable responses' open to a reasonable employer (Iceland Frozen Foods)
- b. The Dismissing Officer and the Appeal Officer both had a genuine belief in the Claimant's guilt and had reasonable grounds for their belief. The Respondent conducted a reasonable investigation upon which to sustain that belief. The evidence of the CCTV footage was conclusive and the Claimant had failed to deny the allegations or provide an alternative explanation.
- c. The Respondent had complied with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures.
- d. If the Respondent did not adopt a reasonable procedure and the Claimant would have been dismissed in any event (Polkey).
- e. The Claimant engaged in conduct which would justify a 100% reduction to the basic and compensatory award.

f. The Claimant has failed to take reasonable steps to mitigate his losses and given the shortage of HGV drivers he should have secured alternative employment immediately.

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g. In the event of a conflict between the evidence of the Respondent witnesses and the Claimant, the evidence of the Respondent witnesses should be preferred both of whom were honest, reliable, and credible in contrast to the Claimant whose evidence was inconsistent, changing and unsupported.

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The Claimant's Submissions

39. The Claimant's submissions were in summary as follows –

a. He did not cause damage to the vehicle either wilfully or accidentally.

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b. The CCTV footage does not show him causing damage to the vehicle.

c. The issue ought to have been dealt with informally rather than under the disciplinary procedure.

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d. The Dismissing and Appeal Officers had decided upon his guilt prior to the hearing.

e. He had been advised to make "no comment" and the Respondent ought not to have drawn a negative inference from his failure to deny the allegations or offer an alternative explanation for the evidence.

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Discussion and decision

40. The allegation could not reasonably be described as a minor matter and it was therefore not unreasonable for the matter to be dealt with under the disciplinary procedure rather than informally.

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41. The Dismissing Officer's stated reason for the Claimant's dismissal was that the Claimant had caused wilful damage to a colleague's vehicle whilst at work. There was no evidence of an alternative motive for his dismissal and the

tribunal therefore concludes that the reason for dismissal was as stated. This reason related to his conduct and that is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

5 42. The Dismissing Officer appeared entirely genuine and sincere in his belief that the Claimant had caused wilful damage to a colleague's vehicle whilst at work. There was no evidence that his belief was not genuine and the tribunal therefore concludes that the Dismissing Officer held a genuine belief in the claimant's misconduct.

10 43. The Respondent did not prepare a written record of the investigation undertaken by them either by way of an investigation report or otherwise. The Claimant was however advised of the steps taken to investigate the allegations albeit only on an informal verbal basis at the suspension meeting.

15 44. BP gave evidence to the Respondent that his car had been scratched whilst it had been parked in the Respondent's yard on 21 September 2017. The Respondent did not record this discussion with BP by way of a witness statement or otherwise and the Claimant was not provided with a written
20 summary of this evidence. The Claimant was simply advised as a matter of fact that the car had been damaged whilst at work.

25 45. The Respondent inspected the car and concluded that the rear off side had been scratched with a key or other sharp implement just above the wheel arch. The Claimant was not shown either the scratched vehicle or photographs of it. The Claimant was not advised in writing of the nature of the damage prior to the disciplinary hearing. The extent of the damage was described to the Claimant at the suspension meeting and again at the disciplinary hearing.

30 46. The entire CCTV footage for 21 September 2017 was reviewed by the Respondent's Compliance Officer who found that only the Claimant had engaged in conduct consistent with the car being scratched. The Respondent did not record these findings by way of a witness statement or otherwise and

this exercise and these findings were only described to the Claimant at the suspension meeting.

- 5 47. The CCTV footage of the Claimant shows him engaged in conduct which was consistent with the car being scratched deliberately. The Claimant was shown a copy of the CCTV footage prior to and at the disciplinary hearing and was provided an electronic copy for the appeal hearing.
- 10 48. The Claimant was unable to suggest any additional steps the Respondent ought to have taken in conducting the investigation. The Respondent did not fail to take a step that no employer acting reasonably would have failed to take. The steps taken by the Respondent fell within the range of reasonable responses.
- 15 49. At times during the disciplinary process the Respondent proceeded as if the CCTV footage of the Claimant amounted to the entirety of the relevant evidence. Yet the CCTV footage *in isolation* was insufficient to show that the car was scratched by the Claimant or otherwise. The CCTV footage required to be considered in context of the wider circumstantial evidence that the car
20 was scratched whilst at work on 21 September, that the scratch was on the near off side just above the wheel arch, that the entire CCTV footage for that day had been viewed, and that only the Claimant engaged in conduct consistent with the car being scratched in that way.
- 25 50. The ACAS Code provides that: "At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered" (para 12). The Respondent failed to provide a written summary of all relevant evidence including the circumstantial evidence and failed to explain the logic of their conclusions based upon that circumstantial
30 evidence. Instead they tended to focus only on the CCTV footage of the Claimant and this was likely to have prompted the Claimant's first ground of appeal namely that "the evidence produced was not sufficient to establish that I am guilty of the offence". The Claimant's position was that since the CCTV footage didn't show him actually scratching the car, there was no evidence
35 that he did it. The Respondent failed to explicitly narrate that their belief in his

5 guilt was based not simply upon the CCTV footage in isolation but upon the wider circumstantial evidence that the near off side of the car was scratched whilst parked in the yard on 21 September, that the entire CCTV footage for that day had been viewed, and that only the Claimant engaged in conduct consistent with the car being scratched in that way.

10 51. Whilst the Respondent's failure to produce a written summary of all relevant evidence, and to explain the logic of their conclusions, fell short of best practice, this did not fall out with the range of reasonable responses (it cannot be said that all reasonable employers would have produced such a summary and explanation in these circumstances). The Claimant was aware of the specific allegations and the supporting evidence and was sufficiently well placed to respond to those allegations and challenge that evidence.

15 52. There was no unreasonable failure by the Respondent to comply with their own Disciplinary Procedure or the ACAS Code which rendered the dismissal unfair. There was no unreasonable or prejudicial delay. There was no evidence of inconsistent treatment. The relevant facts were established. The Claimant was informed of the basis of the problem and given an opportunity to put his case. The Claimant was accompanied by his trade union rep. The Claimant was afforded a right of appeal.

20 53. In reaching his conclusions the Dismissing Officer referred to and drew negative inference from the Claimant's failure to expressly deny the allegations or provide an alternative explanation for the evidence. It was unreasonable to draw any such inference given he was under legal advice to make no comment in the face of ongoing criminal proceedings. However the Dismissing Officer's conclusions were based principally upon the totality of the evidence and these conclusions were not significantly tainted by the failure to deny or explain. The tribunal therefore concludes that the Dismissing Officer had reasonable grounds upon which to sustain his genuine belief in the claimant's misconduct and that he reached that conclusion on those reasonable grounds in satisfaction of the *Burchell* test.

54. Whilst the allegation did not fall within one of the express examples of gross misconduct the Claimant readily accepted that deliberate damage to a colleague's vehicle parked at work amounted to gross misconduct meriting dismissal. The Claimant's service at nearly 6 years was not extensive. The
5 Claimant had previously been disciplined but this was not taken into consideration in reaching the decision to dismiss. There was no evidence of any mitigating circumstances. The Respondent acted reasonably in treating his conduct as a sufficient reason for dismissing him. It cannot be said that no employer acting reasonably would have dismissed the Claimant in the
10 circumstances. The tribunal concludes that the decision to dismiss fell within the range of reasonable responses and was accordingly fair.

55. The tribunal therefore concludes that the Claimant was not unfairly dismissed.

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Employment Judge: Michelle Sutherland
Date of Judgment: 26 September 2018
Entered in register: 29 September 2018
and copied to parties

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