EMPLOYMENT TRIBUNALS

Claimant: Steven Dangerfield

Respondent: Red Bull Technology Limited

HEARD AT: Cambridge on 30 November 2018

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr Kevin Charles (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim to a redundancy payment is dismissed on withdrawal.

2. The Claimant was unfairly dismissed.

3. Having regard to the Claimant's conduct before the dismissal and/or his culpable or blameworthy conduct which contributed to the dismissal, his compensation is reduced by 50%.

4. The Respondent is ordered to pay the Claimant the sum of **£3,550.75**. (No recoupment provisions apply.)

5. The Claimant's unlawful deductions/breach of contract claim (non-payment of £6,000 bonus) is not well founded, and is dismissed.

REASONS

BACKGROUND

1. The Claimant was employed by the Respondent from 28 February 2006 until 14 February 2018 ("**EDT**"), when he was dismissed with a PILON for alleged misconduct. Following compliance with the Early Conciliation procedure, on 28 April 2018 he presented a claim alleging unfair dismissal, and non-payment of a £6,000 bonus and redundancy monies.

EVIDENCE

2. I heard oral evidence from the Claimant. On behalf of the Respondent, I heard from Mr Meade and Mr Hazelton. All witnesses did their best to give honest and full answers to questions. I was also referred to an agreed 200 page bundle of documents.

ISSUES

3. The issues were helpfully narrowed by the parties at the beginning of the hearing. Specifically:
    a. The Claimant accepted that his dismissal did not arise from a redundancy situation and that he was not redundant. Hence, he withdrew his claim to a redundancy payment.
    b. Remedy issues were simplified, in that the Claimant explained that after he received his 3 month payment in lieu of notice, he obtained work on a self-employment basis during his notice period and thereafter which has paid him net more than he was paid (including pension contributions etc) whilst at the Respondent. This, he accepted, was the case even taking into account the fact that as a self-employed individual he is no longer paid for holidays. So, he agreed, he had sustained no loss of earnings overall.

4. The issues for me to determine were therefore agreed and refined as follows:

Unfair dismissal

    a. What was the reason for dismissal? As to this, the Respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of ERA), alternatively, 'some other substantial reason' ("SOSR")- namely, a breakdown in trust and confidence. (This point of itself was not particularly contentious.)
    b. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
        i. Did the Respondent have reasonable grounds, founded on a reasonable investigation, for its belief that the Claimant was guilty of misconduct, or that trust and confidence was broken?
        ii. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?
    c. If the dismissal was unfair:
        i. Should any award be reduced (and if so, by how much) having regard s.122(2) and s.123(1) ERA and the principles set out in **Polkey v. AE Dayton Services Ltd**?
        ii. Should there be any 'just and equitable' deduction, or deduction for contributory fault, and if so, for how much ?

Unlawful deductions/breach of contract

    d. Was the Claimant entitled to payment of a £6,000 bonus, payable on or before the EDT?

FACTUAL FINDINGS

5. The Respondent is a technology and engineering company. Its principal function is to support its group company, Red Bull Racing Ltd, which operates a successful racing team in Formula 1. It employs some 1,000 staff, most of whom are involved in technical/engineering work

6. The Claimant worked for about 12 years in the car assembly team, which prepared and assembled cars for competition, development and testing.

7. He was subject to a disciplinary procedure which provides for a variety of disciplinary sanctions such as oral/written warnings. The procedure explains that it "may be implemented at any stage" if appropriate. This is a fairly standard provision, the usual route in such cases being for matters to be dealt with in an incremental way unless circumstances dictate otherwise.

8. The Claimant was subject to a discretionary bonus scheme, the terms of which provide that no bonus would be payable if (amongst other things) the employee was at the payment date (here, January 2018) "subject to ongoing disciplinary proceedings" or the recipient of "live disciplinary or capability warnings". If the material bonus was payable, it would have been worth £6,000.

9. In 2015, the Respondent undertook a restructure, which in essence involved the allocation of a broader workload to members of staff, to avoid the creation of 'skills silos' -i.e. over-reliance on particular individuals to carry out particular tasks.

10. The Claimant was not happy at the changes, and made various derogatory comments about them from time to time.

11. At appraisals and review meetings, the Claimant's dissatisfaction with the new structure was discussed with his line manager. In his 12 January 2017 performance review, it is recorded by the Claimant's line manager, Mr Lamb (who was quite new to the post), that the Claimant "didn't always have the most positive outlook during 2016", and that "positivity and enthusiasm was lacking at times", albeit "at times input was positive and actually quite creative". The review concludes that "it is vital Steve's approach remains positive… improvements are being made in all areas".

12. Despite problems with his attitude, throughout the period 2015-2017, the Claimant's work was done adequately and professionally. Indeed, the ET3 describes the Claimant as "a valued member of the business with a keen appreciation for the technical requirements and standards of his role".

13. However, it appears that the Claimant's dissatisfaction with the changes brought about by the 2015 review continued along with his negativity, and that this was a concern to management.

14. In about May 2017, the Claimant's mother sadly died. Though Mr Lamb assured him he could take whatever compassionate leave he needed, he was only absent for a few days.

15. At a review meeting on 7 July 2017, the Claimant again expressed his misgivings about the new structure. Mr Lamb told the Claimant he was still troubled by the Claimant's "negative undertone to your attitude" and that "further improvement in this area" was needed. More specifically, he told the Claimant to "pull his weight" and complete his share of 'group jobs' that "no-one wants to do". He explained to the Claimant the standards and attitude he expected of him.

16. Mr Lamb followed up his discussion with a letter dated 24 July 2017. In that letter, he spelt out the above issues. He also said he would assist if the Claimant needed any guidance or coaching, and that the Claimant's performance and attitude would be monitored.

17. On about 20 October 2017, the Claimant was asked for assistance by a more junior colleague, Stuart Parker, who was working close at hand on a clutch and was worried it might be defective. Mr Parker was a transmission technician, so the clutch was not his area of expertise. The Claimant was more of a 'clutch expert'; however, he did not inspect the clutch in any detail in response to Mr Parker's query, and instead simply said it ought to be fine as it had "been through inspection".

18. The Claimant had no line management responsibilities for Mr Parker. However, he was more experienced than Mr Parker, and (in accordance with management instructions to have more team spirit) ought to have been helping colleagues where practicable.

19. In cross examination at tribunal, the Claimant accepted that he "should have gone and looked", and that had he done so he would have noticed a defect in the form of a sharp edge on the plate of the clutch.

20. The Claimant in questioning before me asserted -without challenge- that the clutch "wasn't going into a car". However, he said during his January 2018 disciplinary hearing that he did not actually know what the clutch was to be used for- albeit he thought it was going to be "assemble[d] for it to then go in a drawer in the workshop".

21. In fact, Mr Jamie Meades' 20 February 2018 letter, referred to below, records that the clutch "was due to go into the race parts pool and therefore was eventually destined to go on a car" (prior to which, other checks would have been carried out).

22. The defect in the clutch was discovered some weeks later, and an investigation took place in November 2017 into what had gone wrong.

23. At that stage, management spoke to another colleague, Chris Newton. Mr Newton said that the Claimant had made various snide comments whilst Mr Newton was assembling a gearbox earlier that month. Mr Newton was struggling to fit the differential, and the Claimant initially said out loud to other colleagues he would not help. He then did "begrudgingly" assist. He apparently did not explain to Mr Newton "what the problem was and what to look for" (though it is not clear if Mr Newton actually asked him to do so.).

24. Mr Newton asserted that the Claimant in the hearing of various colleagues then said he hoped the gearbox would fail. Mr Newton also reported that a lot of "juvenile comments" were directed at him, "not solely from [the Claimant] but from some of the others too".

25. The Claimant was also questioned about the incident, in late November 2017. He admitted saying he hoped the gearbox would fail. He said the comment was meant "in jest". He also explained to the investigator that he could not understand "how someone less experienced is allowed to build gearboxes, especially working late on his own to get the gearbox built". He also said he felt undervalued as "no one asks him for his input with regard to gearbox assembly".

26. (So, in effect, his comment about hoping for failure was obviously meant as another complaint about the new work regime. A failure of the gearbox would -he thought- show he was right about the alleged inadequacy of new working arrangements, which meant staff members did tasks which they were -as the Claimant saw it- not fully equipped to do.)

27. As the Claimant explained to the tribunal without challenge in cross examination, the gearbox was a 'rig' or 'donkey' gearbox -i.e. used for testing, and not to be fitted into a car.

28. At tribunal, the Claimant accepted that the 'gearbox comment' was inappropriate, and that it merited him being given "a kick up the bum- a written warning, maybe".

29. On 29 November 2017, the Claimant underwent another performance review, with Mr Lamb. By this time, the investigatory process was already in train.

30. The Claimant described his year as 'up and down', but did not mention his mother's death or any impact it might have had on him. Mr Lamb was very critical. He said the year had been "very mixed and in some parts very difficult" for the Claimant. He observed that "despite some positive elements that were pleasing to see… continued dissatisfaction that Steve holds has affected his contribution". He stated that there were "far too many regular negative elements to his attitude, approach and general demeanour" and that "it will take a serious reset to see this reverse". The Claimant acknowledged the need to a "reset from myself", albeit he added -perhaps somewhat flippantly in context- that "it does take two to tango".

31. On 3 January 2018, the Claimant was invited by letter to a disciplinary hearing. The invitation set out the allegations against him, namely on-going negativity, lack of willingness to help colleagues - the "clutch issue" was given as an example- and failure to show improvement in attitude. No specific mention is made in the letter to the gearbox comment.

32. The disciplinary hearing took place on 5 January and 14 February 2017. It was chaired by Mr Meades.

33. (The Claimant asserts that the process was unduly prolonged. However, I reject this as a basis for saying that his dismissal was thereby unfair. The

delay was caused by work pressures, and the Claimant's own 2 weeks of sickness absence. In itself, it caused no real impact on 'fairness'.)

34. HR had prepared questions for Mr Meades to ask the Claimant. Though Mr Meades questioned the Claimant, he did not interview anyone else, or seek any corroboration or further information, relying instead on an investigator's short notes from previous meetings in November 2017.

35. Mr Meades asked the Claimant about what he described as the "shocking" gearbox comment. The Claimant said it was "a little bit of banter", with "nothing malicious meant by it", but that it "looked daft in hindsight" and was "a stupid remark". The Claimant acknowledged that senior management would not have been happy if they had overheard it. He also said he had been given "less and less gearbox work to do and that had upset him".

36. At the reconvened meeting on 14 February, Mr Meades stated that "whether intended as a joke or not", the gearbox comment was "unacceptable". He said that F1 was "about every single employee giving 100% all the time", and that the Claimant's negativity was detrimental to morale. He told the Claimant he would be dismissed on notice.

37. He confirmed his decision in writing on 20 February 2017. In his letter, he explained that the Claimant's gearbox comment did not accord with the Respondent's clear "mission statement" (e.g. "we earn each and every win").

38. Mr Meades' evidence before me was at times a little over emphatic and 'black and white'. He said that the gearbox and clutch were both to be fitted to cars. However, it seems this was not in fact the case. He said that the Claimant "was happy to watch someone put a faulty part on a car and not do anything about it". This had not happened. Mr Meades said the Claimant had refused to help a colleague (which was not wholly right, in that the Claimant did go on to assist Mr Newton). He said that the gearbox comment would have been "like gross misconduct in my team" (even though, as I have said, the comment does not feature in the invite letter, and even though such an assessment takes no account of the context of such a remark). He told me the Claimant "did not say anything positive" when he spoke to him. But he also said to me that the Claimant could not in fact have said or done anything at the meeting which would have caused him to decide not to sack the Claimant.

39. I asked Mr Meades why he chose not to give the Claimant a warning, and why he dismissed him instead. He told me that the Claimant "could have gone and failed a gearbox"; that he would not take the risk that the Claimant "could be putting a car together and not giving it his all", and that there was "a pattern and theme I was not comfortable with". However, I think this somewhat overstates the position. See para 12 above.

40. I have no doubt Mr Meades is passionate about his job, and believes that working for the Respondent was (as he put it) "not just a job but a way of life". But such an approach can amount to unyielding (and potentially unfair) 'zero tolerance'- and a lack of consideration of the finer points and context in such a case.

41. The Claimant appealed his dismissal. His appeal was heard by Mr Mark Hazelton (Chief Security Officer), and dealt with by way of a rehearing.

42. Mr Hazelton presented to me as a bright and considered witness. He rightly took care to speak to various individuals over 6 days, including various managers and colleagues of the Claimant.

43. Mr Dave Boys (manager) confirmed to Mr Hazleton that the Claimant had "always been vocal", and (as regards the gearbox comment) appeared not to "think that anyone else should be making gearboxes". He explained that Mr Lamb was a "new manager". He opined that the Claimant "had only realised the seriousness [of the fact he had not changed his attitude] when it got to disciplinary".

44. Mr Hazleton also spoke with Mr Lamb, who confirmed that the Claimant "was never lacking in vocal discontent". Also, that he had given the Claimant due opportunity for compassionate leave on the death of his mother. Mr Lamb was not asked and did not say if he had ever expressly said to the Claimant that a failure to change his attitude might lead to disciplinary proceedings/dismissal.

45. Mr Hazleton spoke with Mr Meades, who said that the Claimant had not shown "any remorse or understanding of what he had done wrong which could have given a route to work on improvement in the longer term" (although cf his evidence to me, noted above, to the effect that nothing the Claimant could have said to him would have made any difference to his decision.)

46. Mr Hazleton spoke to a long-standing colleague, John West, who was due to retire. Mr West was supportive of the Claimant. He opined that the Claimant was being "hauled over the coals for not showing an interest", and that "everyone is big enough to know not to listen" to the Claimant's "banter". He said he thought the Claimant "had been treated badly" and that "he made too much noise".

47. He spoke with Rob Furn, a college of the Claimant's, who said that the Claimant had "never been positive" in the 2 years he had known him, and that various colleagues had (metaphorically) "pinned the Claimant up against a truck and told him to sort himself out".

48. He spoke with Stuart Parker, who said the Claimant was negative. This "didn't ever affect the quality of [the Claimant's] work but… he was very stuck in his ways".

49. He spoke with Mr Newton, who asserted that the Claimant's attitude was "awful", "created a bad atmosphere" and "brought people down".

50. Finally, he spoke with the Claimant. The Claimant explained that the clutch did not fail as it never in fact left the workshop; also, that it would need to "go to the dyno before it went to the car" (so would be checked again). He agreed with Mr Hazleton's own suggestion that his begrudging approach towards Mr Newton was meant as "a bit of tough love", because "that was

the way he had learnt". He also said "sometimes people had to learn … you watch and oversee but let them have a go".

51. The Claimant said to Mr Hazleton that he was "gob smacked" to be in the position he now found himself; that "someone has it in for him", and that the 'gearbox comment' was "a normal workshop comment".

52. Mr Hazleton agreed when I asked him if he thought the context of the "gearbox" remark mattered. He said it could have been made "in the heat of the moment" or in "a light moment". This was not a "heat of the moment" case. But Mr Hazleton nevertheless told me that the comment also needed to be viewed in the light of the Claimant's "lack of support for colleagues". The only two specific instances of 'lack of support' he gave were the gearbox and clutch incidents described above.

53. Mr Hazleton dismissed the appeal. In his 29 March 2018 decision letter, he states (amongst other things):
    a. "The investigation has… taken into account your general attitude, demonstrated over a number of years".
    b. The clutch incident is only one contributing item that has led to this process. The general attitude over time is corroborated by a number of your colleagues".
    c. "Mr Meades… was hoping for evidence of acceptance that change was required and a willingness to adopt change be displayed- this was not forthcoming. The apparent escalation from disciplinary to dismissal is reasonable."
    d. "…your attitude has been construed as negative and disruptive over the years, but you do not appear to recognise the need for change… have demonstrated little or no remorse and I therefore believe it is extremely unlikely that you would have ever changed your attitude".

54. The Claimant has since found other work. In the interim, he did not receive any relevant state benefits.

THE LAW

55. The following principles are material:

    a. The ACAS Code of Practice emphasises the importance of warnings as the normal sanction to impose for acts of misconduct. It provides at para 19 of the Code (at S [8]): 'Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning'.
    b. Warnings give the employee an opportunity to change and improve. Lord Denning recognised their importance in **Retarded Children's Aid Society v Day** [1978] IRLR 128 at 130, [1978] ICR 437 at 442. There, Mr Day was employed in the appellants' home for adults with learning disabilities. Contrary to the established rules, he punished one of the residents by requiring him to scrub floors at a time when the resident was normally free. When this came to the attention of

the management, they discussed it with Mr Day at a staff meeting. But he refused to accept that he had acted incorrectly. This led to his dismissal which was found to be fair. Lord Denning held:

> *" It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance. You should warn him that, if it happens again, it would be an offence for which he could be dismissed. … But nevertheless that is not a rule which has to be applied in every case. In some cases it may be proper and reasonable to dismiss at once, especially with a man who is determined to go on in his own way. This is what the Tribunal said: 'His reaction at the staff meeting showed that he remained out of sympathy with the Society's methods in fundamental respects and so presented the risk of further transgression'. So they thought, 'It is no good this young man staying there because he thought he knew better than anyone else, and if he goes on he will be breaking the rules again'. That is how the Industrial Tribunal decided the matter, and they dismissed the complaint.*

c. It is implied in the Code that relatively minor offences should be dealt with informally but that more serious offences should involve formal action and written warnings. However, the courts have tended to be relatively unconcerned about the particular form which a warning has taken, provided it has achieved its purpose of clearly communicating to the employee that his job is in jeopardy.
d. When considering whether or not a dismissal was fair for s.98(4) purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small** [2009] IRLR 563, CA, para 43 *per* Mummery LJ.
e. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt.** [2003] IRLR 23, CA.
f. As regards that process:
    i. It is incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as information which points towards guilt.
    ii. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94.
g. The theoretical ability for an employer to rely on 'breach of the implied term of trust and confidence' ought not to be seen as some form of a "solvent of obligations". It is no such thing. See **McFarlane v Relate Avon Ltd [2010' ICR 507.**

h. 'Personality' cannot of itself amount to a misconduct reason for dismissal, but -if sufficiently extreme- can manifest itself in such a way as to amount to a fair reason for dismissal. However, it is still necessary for the employer to prove the facts necessary to show this was the case. It is unlikely that vague generalisations will be enough to satisfy the relevant test. Cf **Perkin v St George's Healthcare NHS Trust** [2005] EWCA Civ 1174.
i. Defects in the original disciplinary process may be remedied on appeal. **Taylor v. OSC Group Ltd** [2006] ICR 1602.
j. In the event of a finding of unfair dismissal:
    i. If the dismissal was 'procedurally unfair' but the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.
    ii. If the tribunal finds that a Claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.
    iii. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

APPLICATION TO THE FACTS

Unfair dismissal

Liability

56. I am in no doubt that the Respondent has made out its case that the Claimant was dismissed for a potentially fair reason, namely misconduct or, alternatively, for 'SOSR', namely a perceived loss of trust and confidence.

57. I acknowledge I must avoid adopting a 'substitution mindsight' as per para 55(d) above. Nevertheless, with that in mind, in my judgment the decision to dismiss the Claimant fell outside the band of reasonable responses open to this employer and in these circumstances. In particular:
    a. The Claimant did not deliberately cause either the clutch or the gearbox to go unfixed.
    b. The Claimant had worked without any disciplinary sanction (oral or written) at the Respondent or nearly 12 years.
    c. His technical performance was not the subject of criticism. See para 12 above.
    d. A dismissal founded on allegations of 'negativity', without specificity, is problematic. See e.g. para 55(h) above. In any event, the Claimant had not previously been warned that his continued expression of 'negativity', whether "over a number of years" or regarding the changes implemented in 2015, might cause him to be disciplined or dismissed. This, notwithstanding the Respondent's

own disciplinary process, and HR resources (which were there to ensure such processes were followed).

e. For this reason and in any event, it seems to be accepted that the Claimant did not appreciate what the outcome might be if he did not 'buck up'. See e.g. para 43 and the last sentence of para 44 above.
f. Mr Lamb himself, in the context of the November 2017 appraisal, stressed the need for a "serious reset", and the Claimant acknowledged as much, too. But the Claimant was not then given the chance to "reset".
g. Mr Hazleton did not, for example, ask the Claimant if he recognised the "need for change", or (as this was also apparently material to Mr Hazleton) whether or not the Claimant felt any remorse. Nor did Mr Keane. This, despite the need to look for 'exculpatory' evidence.
h. In my judgment, the appropriate way for this Respondent to try to achieve a "reset" was a formal warning -and anything up to a final written warning would have been legitimate in that context. But dismissal was beyond the range of responses which were reasonably open to the Respondent on all the facts of the case.

58. I therefore consider the dismissal was unfair for the purposes of s.98(4) of ERA.

59. That said, I do have sympathy with the dissatisfaction felt by management towards the Claimant, and the concern -which might well have proven to be correct- that the Claimant would still not make the necessary 'step change' to improve his attitude, even if the consequences had been spelt out to him.

60. Counsel for the Respondent urged me to make a 100% deduction for contributory fault, if I found the dismissal was unfair. I do not go that far. However, I do consider that the Claimant was substantially to blame for his dismissal. He himself accepted that a warning was appropriate for the "gearbox" comment. His attitude in relation to the clutch also deserved criticism, and his general pervading negativity was of concern. He ought to have 'pulled himself together' in the light of the various appraisals to which I have referred above, and the more informal critiques from his colleagues. He did not do so. He bears some of the blame for losing his job. I consider that a 50% deduction is appropriate in his case.

Remedy

61. As noted above, there is no loss of earnings claim to be taken into account in the light of the Claimant's post-termination work (which means that he mitigated such losses in full). No benefits need to be deducted.

62. The Claimant gave no evidence to support the claim in his Schedule of £200 "expenses". Hence what remains of his claim (ignoring bonus, discussed below) is:
    a. An agreed figure of £6,601.50 for a basic award.
    b. A figure for loss of statutory rights, (The Claimant seeks £4,401. I consider the more conventional and appropriate figure of £500 is apt).

    So, £6,601.50 + £500 = £7,101.50 x 50% yields **£3,550.75.**

Bonus claim

63. The Claimant was undergoing a disciplinary process at the material time. In accordance with the terms of the bonus arrangements set out in his contract, he was not entitled to any payment. See para 8 above. Hence this part of his claim must fail.

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Employment Judge Michell, Cambridge

Dated: 20 December 2018

JUDGMENT SENT TO THE PARTIES ON

.....20 December 2018....

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FOR THE SECRETARY TO THE TRIBUNALS