EMPLOYMENT TRIBUNALS

Claimant: **Mr S Butler**

Respondent: **Driver and Vehicle Standards Agency**

Heard at: **Nottingham**

On: **Monday 11 (Reading in Day), Tuesday 12, Wednesday 13, Thursday 14 and Friday 15 March 2019**

Before: **Employment Judge P Britton (sitting alone)**

Representatives

Claimant: **In Person**
Respondent: **Dr A Gibson, Solicitor**

JUDGMENT

1. The claim of unfair dismissal is dismissed.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 8 December 2017. It is before me in the joint 2 volume bundle of documents at Bp (equals bundle page) commencing at 37. Set out was how the Claimant had been employed by the DVSA as a Traffic Examiner (TE) by the DVSA based at Watnall in Nottinghamshire. He set out how he had been employed by the Respondent between 6 May 2014 and his summary dismissal on 12 October 2017; the stated reason being one of gross misconduct. He set out extensively as to why he considered his dismissal to have been unfair commencing at Bp 49. In due course the response (ET3) was presented by the Respondent equally fully setting out as to why this was a fair dismissal (Bp67-71). In due course there was a Preliminary Hearing heard by Employment Judge Camp on 5 June 2018 specifically to deal with the Claimant's application that the response be struck out. The application was dismissed and the Judge gave case management orders, as to which I do not need to rehearse. He listed the case at the request of the parties for 5 days.

2. I first of all want to set out what is the legal framework for the purposes of an unfair dismissal. It is at Section 94 of the Employment Rights Act 1996. First the Respondent must satisfy me that it had a reason as set out therein for the dismissal, namely in this case conduct. It is essentially a set of beliefs that it had. It is normally not a particularly onerous test because by and large that the reason was genuinely held is not normally difficult for an employer to establish[1].

Issue one: not the true reason: the conspiracy allegation

3. But in this case it is said by the Claimant that the whole undertaking of this matter by the Respondent was based upon mal fides: what I will describe as the conspiracy issue. I am going to address that first. Before I do I have heard the following witnesses in this case. All were under oath. In each case their evidence in chief by way of a written witness statement. Thus first I heard from the investigating officer appointed by the Respondent in relation to the conduct issues which led to the Claimant's dismissal. He is Howard Forrester. At the time he was a Senior Examiner based in Stoke-on-Trent. He is a long serving Civil Servant with some 14 years under his belt with the DVSA. It is suggested, and it is a serious accusation by the Claimant, that he was motivated in this case to please in particular 3 senior managers in the relevant department who are Clive Taylor – Policy Specialist in the DVSA, David Wood an Enforcement Policy Manager and above them Gordon MacDonald who it appears is the Line Manager of David Wood. It was put by the Claimant in cross examination to Mr Forrester that he was motivated to please them in particular because if he did he would be promoted. Mr Forrester was affronted by this very suggestion making it plain that he was a Civil Servant of integrity and that they had no hand whatsoever in his subsequent promotion which was dealt with by independent assessors within the Civil Service, him having to go to an assessment centre for the competitive selection process. Stopping there, I wish to make it plain that I found Mr Forrester a witness of the utmost integrity and in particular that he was in no way whatsoever improperly motivated. The Claimant has nothing against him but a mere assertion[2]. I will factor in at this stage that I also had the statement of the Claimant who gave evidence and that of Craig Laidlaw who did not and as to which I will in due course comment.

4. The Claimant would have great difficulty in suggesting that the second witness whom I heard from was part of this conspiracy. He is Bill Harrison who heard the disciplinary in this matter. He is not in the same department. He was outside the loop and most important of all he was appointed in the context of as there was going to have to be an investigation he would stand back from that so to speak but thence hear the disciplinary, by a manager again outside the loop of the conspirators, if that's what they were, namely Del Evans. I placed considerable weight upon that Mr Evans in his e-mail to Mr Harrison of 30 March 2017 (Bp 145A), and which on the face of it had a deliberately restricted cc list, namely on that occasion only the Claimant's Line Manager Steven Brougham, who is not alleged to be a conspirator, and of course Mr Harrison; inter alia said about having to look into the by then stated concerns about the Claimant:

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[1] **Abernethy v Mott, Hay and Anderson (1974) IRLR 213 CA**. Note the burden of proof is on the claimant to show that the reason for dismissal was not the true reason He must produce some evidence, not just a mere assertion, that raises doubt as to the reason for dismissal. Once this evidential burden is discharged, the onus remains on the employer to prove the reason for the dismissal: **Maund v Penwith District Council (1984) IRLR 24 CA.**

[2] As to which see **Maund**.

"I don't want a witch hunt and ensure that if this is all innocent we don't demotivate what appears to be good highly technical staff who we rely upon. However there are questions that we need formal answers to."

5. As to Mr Harrison I again observe that he is long serving, now aged 63, having been 25 years with the DVSA and is based in Peterborough. I found him also to be a witness of the utmost integrity, consistent and compelling. I find no evidence whatsoever to suggest that he was in any way improperly motivated in going about his task. Again, it is no more than an unsubstantiated assertion advanced by the Claimant.

6. The third witness that I heard from was the Appeals Officer who is Ms Karen Farr. She has been with the Civil Service for some 24 years. She is a senior Civil Servant at Grade 7, being a corporate senior leader with the DVSA. She is based at Livingston in Scotland. She was seized of the task of undertaking the Claimant's appeal because she was also undertaking that of Clark Laidlaw who is inextricably linked in the material events for reasons which I shall come to. Indeed, he was similarly dismissed for gross misconduct by Mr Harrison which decision was also upheld by Ms Farr. He brought a claim to Tribunal which was heard in Scotland. As to why there wasn't joinder of the two cases, which would have happened if they were both within the jurisdiction of the Tribunals of England and Wales, is because of course Mr Laidlaw was employed to work by the DVSA in Scotland and brought his claim within that separate jurisdiction. The matter was heard by an Employment Tribunal Judge in Edinburgh on 18 May 2018. His decision is at Bp 80-107. I do not intend to rehearse this judgment: suffice it to say that he found the dismissal to have been fair. But inter alia, and I suppose it could be said that it might go to consistency by me, he found that the proposition that Ms Farr was biased in her conduct of the proceedings by reason of association to which I shall come; and thus, that she shouldn't have heard the appeal, was essentially without foundation. What is the substance of the accusation against Ms Farr? It is twofold. First it is that she should never have heard the appeals because she is married to Mr MacDonald ie the alleged third conspirator. The only reason that the Claimant infers that Mr MacDonald was about improperly doing him down is because he was on the cc list in terms of the investigations prior to Mr Forrester which engages Mr Woods and Mr Taylor. There is no evidence in the e-mail trail before me that anything other than his being cc'd in ever happened. He certainly had no involvement in the Forrester investigation. It is to be noted that Mr Forrester never also involved or thus interviewed Wood or Taylor. So is it at least an appearance of bias for Ms Farr in her capacity as a senior Civil Servant to hear a case where there may be a tenuous link to her husband? I have no doubt that the answer to that question is no. Ms Farr was a very credible witness of the utmost integrity. It is not a breach of fair employment practices for a senior manager to undertake an appeal hearing simply because she is married to another Civil Servant. Finally, the point was never made in the statement which the Claimant submitted for his appeal (Bp 285-294) or at the appeal hearing heard on 31 October 2017 (see minutes at Bp271-284).

7. The second point the Claimant makes, but which he did not make in his appeal statement or at the appeal, is that she would have been biased because he had raised in a detailed letter (Bp 259-270) that he wrote to the Chief Executive of the DVSA, Mr Gareth Llewellyn on 14 October 2017, the potentiality for him bringing a law suit against the DVSA it seems in concert with Mr Laidlaw for some breach in one shape or form of intellectual property rights in relation to

what I shall call the TIC issue. But is it that just because that had happened that Ms Farr would go out of her way to not consider the appeal in a fair manner? She knew of the letter because the Claimant sent her a copy as he had not had a reply from the CExec. She in turn contacted his personal secretary and was informed a reply was in the process of being drafted. She did nothing further. So where is the evidence that she had this in her mind when conducting the appeal and that it biased her decision? The evidence is clear that she concentrated solely on the appeal issues. There is no evidence to the contrary. Yet again it is a bald assertion with no evidence to back it up and with the point not being raised by the Claimant at his appeal. And of course, any such claim viz intellectual property rights and potential litigation would in due course go through to the Government's legal department. I am with Dr Gibson. All these accusations are entirely tenuous without any foundation. It follows that I have no hesitation in rejecting the conspiracy theory.

Back to the fairness or otherwise of the dismissal

8. Engaged is s98(4), I say this because for reasons I shall come to I have no doubt that the Respondent held a genuine belief that the Claimant had committed an act of gross misconduct and thus passes the threshold at s98 (1) and (2). Thus s98(4):

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

9. I remind myself of the jurisprudence to the effect that I must not substitute my own view and whether I think the dismissal was objectively fair or unfair. The test is to:

> *" determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair".*[3]

10. This includes the procedure adopted in that:

> *" The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed."*[4]

11. So my focus is on whether or not the Respondent, which is of a substantial size, did act fairly within the range of reasonable responses. My approach is

[3] Iceland frozen Foods Ltd v Jones (1982) IRLR 439 EAT.
[4] Sainsburys Supermarkets ltd v Hitt (2003) IRLR 23 CA.

enshrined in the seminal judgment as to the approach to conduct dismissals namely **British Home Stores Limited and Burchell** [1978] IRLR 379 EAT. This was further elaborated upon by their Lordships in **W Weddel and Co Limited against Tepper** [1980] IRLR 96CA per Stephenson LJ:

> *"Employees suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions that it would be reasonable to postpone in all the circumstances until they had per* ***Burchell*** *"carried out as much investigation into the matter as was reasonable in all the circumstances". That means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably."*

12. I now want to add the following in a case where obviously the outcome for the Claimant was likely to mean the end of his professional career as a traffic inspector examiner. There is a line of authority best encapsulated in **A v B** [2003] IRLR 405 EAT:-

> *"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. Serious allegations of criminal misbehaviour where disputed must always be the subject of most careful and conscientious investigation and the investigator carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employers as on the evidence directed towards proving the charges."*

13. Subsequently it has been clarified that this approach encompasses not just allegations of criminal conduct: thus, **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 CA per Mr Justice Elias as he then was:

> *"It is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her own chosen field of employment is potentially apposite."*

14. This of course means in terms of a reasonable employer that evidence that might be exculpatory must be explored just as much as that which is incriminating.

Observations

15. I have heard the Claimant at length during this hearing. I hope he will agree with me that I have assisted him to conduct his case and to focus as he is somewhat loquacious. Thus I have asked questions of each witness in a neutral

way of course thereby to establish clearly and forensically the substance and indeed the detail of their evidence in a case that is obviously so important to the Claimant. He is a man of forceful opinion. He has a personality which is powerful. I don't find him aggressive but he does present his case in a way which is not only enthusiastic but on occasion very assertive. This may have upset Ms Farr's notetaker at the appeal or rather caused her to be "intimidated"[5] , but I don't hold that against him and it was never put to him when he was at the hearing before Ms Farr. However, I can see that there was difficulty at times in the interview on the 13 July 2017 (Bp 205-209) he had with Mr Forrester who struck me as a rather retiring gentleman, perhaps looking forward to the end of his career in due course and not at all from what I saw combatative. Mr Harrison again experienced the same at the disciplinary hearing on 6 October 2017 (Bp244-252) because the Claimant has a tendency to be strident and bulldozing in the way he wishes to present his case at times and which clearly exasperated Mr Harrison. But again, I don't hold that against the Claimant. And finally, this driving and combative approach to the advocacy of his case is self-evident from the minutes of the hearing before Ms Farr. But all I would therefore observe is that it may well be, and no more than that, that faced with the cocky, combative and assertive personality of the Claimant the front line "conspirators", that is to say Mr Taylor and Mr Wood, may have not been enamoured with him and so I am with the Claimant in that respect and thus that towards the end of 2016 they had been exploring issues where they were clearly looking for some sort of disciplinary investigation relating to the Claimant. A classic in this respect is at Bp 117, 21 November 2016. Some of that was still ongoing when Mr Forrester undertook his investigation; ie did the Claimant have an inappropriate close association to a business known as Imperial and was there something suspicious about the high level of the Claimant's enforcement activities and success rates. Suffice it to say that Mr Forrester, and which goes against him being biased towards the Claimant, ultimately concluded there was nothing in that and it never went further forward. But the tragedy perhaps for the Claimant is that even if there were those in management who were looking for a reason to get him, so to speak, if they could; it is folly of course to therefore provide them with legitimate ammunition, thus placing one's head in the proverbial noose. For reasons that I shall come to that is where this case very much focusses.

Findings of fact

16. The Claimant had a distinguished career in Her Majesty's Army, rising to a Senior NCO over some 10 years of service in the Royal Corps of Signals and thereby obviously becoming very much an expert in IT based counter surveillance and matters of that nature. Thus when he joined the DVSA he brought with him those skills.

17. He was clearly most conscientious in his work, which inter alia engaged acting against suspicious hauliers and their lorry drivers in terms of flouting the drivers' regulations as to such as rest breaks and driver's hours. In that respect he had an enthusiastic interest in seeking to enhance the counter manipulation measures that could be used such as being able to block or otherwise detect the use of manipulating devices on digital tachograph systems so as to hide the true level of hours being driven and breaks not being undertaken. I understand from this case that there is a significant problem in this respect in particular with hauliers from parts of Eastern Europe; the Balkans and Turkey. It follows that this is an important issue engaging in particular the safety of the public and the avoidance of such as fatal accidents particularly given the size and weight of an

[5] As per the evidence of Ms Farr.

HGV. Thus, something very much for the DVSA to be actively engaged in combating.

18. And so as the Claimant developed in his career with the DVSA he began to utilise his advanced IT skills to go about enhancing the equipment that was being used. And it seems that during the middle part of 2016 the Claimant perhaps in concert with Mr Laidlaw, who obviously also has these interests , had developed a first device which I shall call the yellow meter. One of the problems I think in this case, although it doesn't go against what happened for reasons I come to, is that there may have been a conservative old guard in the DVSA who rather resented this young pup so to speak coming into their midst with these ideas and maybe he ruffled feathers. May be there was also at senior level in the DVSA a slowness to take up this kind of technology. Nevertheless, I gather the yellow meter may have been used for a time but then it was superseded in terms of events by what I now come to. And that is by at latest 23 November 2016.Also there is no evidence that it was an issue of concern.

The Commercial Vehicles Allied Industries Award dinner

19. By that date the Claimant, again it seems in part with Mr Laidlaw although I think from the evidence that most of the credit would go to the Claimant, had developed a more advanced anti manipulation device which I shall refer to as the TIC. And maybe again it was naivety or over enthusiasm, but nevertheless the Claimant discussed this at a Commercial Vehicles Allied Industries award dinner on 23 November 2016 with Colin MacLean who is the Sales Director of Stoneridge. That business is a lead player in the development of this type of device. The Claimant was introduced to Mr Maclean as being Simon Butler from the DVSA. And I think that is where his over enthusiasm and naivety came into play. He was to tell those who investigated him that it was only a fleeting discussion, but I conclude that first Mr Forrester; then Mr Harrison and finally Ms Farr were entitled to conclude it was more than that; and that takes me to the first crucial document in this case which can be encompassed as being the Butler Laidlaw investigation number one which is at Bp150. This is corroborated by e-mails in the Forrester investigatory pack. Essentially Mr MacLean having been introduced to the Claimant as I have said at the trade dinner, was told by the latter how he had developed the TIC. I think that Mr Butler was probably very proud of his achievements and as I say he's not backward in coming forward. I conclude that this was an initial introductory marketing pitch whether he realised or not that it was. It becomes highly relevant in terms of the next chapter of material events.

The Hotel Mercure

20. As to the decision to have the investigation, which is as I say was more so far on the front to do with Imperial, hence the Claimant attending a tachograph course on 13 March 2017 which turned out to be completely legitimate, I bring into the equation the Mercure hotel issue on 21 March and which starts off with the first core evidence of Spencer Miller at Bp 158A. Put at its simplest the Claimant was then in Bristol at somewhat short notice to attend a week long course for the purposes of his work. He had with him, and again I encapsulate the evidence much of which is not in dispute, exhibits for work that he was undertaking in the course of his enforcement duties. By now he was working with the approval of the DVSA from the beginning of 2017 with Nottinghamshire Police's Enforcement Team. Again, I think he had become very enthusiastic. He refers to himself in many of the documents I have seen as "an expert witness". I

will leave aside what that actually means in law in that he was in fact a witness for the prosecution. And I have no doubt that over the period before he got dismissed he was involved in assisting in many investigations and indeed continued to give evidence for the CPS in prosecutions into this year. What happened is that another TE, Lynne James, complained to Mr Miller very shortly after what she had seen as occurring and it was in the following terms and again not really in dispute. She had observed the Claimant in the foyer of the Mercure Hotel in Bristol. He had with him what she thought looked to be exhibits ie items taken off lorries in the course of investigations and matters of that nature, and he was talking to one or more other TE's; and she thought it was (a) concerning that he should have exhibits in a public place and (b) she didn't think he should have been talking in the way that he was in any event. Now the Claimant seizes upon that Mr Forrester in due course couldn't get a statement from her. She wanted to remain anonymous. But she repeated what she had seen in fact to Mr Forrester which he openly put in his published investigation report and appendices and second he had got the evidence of Mr Miller.

21. In due course the Claimant was to be interviewed about all of this; and Ms Farr has it aright in that the Claimant never denied that he had the exhibits with him. Certainly, the gist of his evidence before Mr Forrester and then Mr Harrison was that he was working on 6 or 8 cases for the Police or the CPS. And because he was away from the base at Nottingham he had yet to get round to writing up the necessary Police statements for the prosecutions, and so he had not left the exhibits in the exhibits office at Nottingham DVSA and had them with him. And he had taken all out of his car boot and thence from his hotel room when he went across to the foyer at the Mercure. And that because he already knew that David Copely, another TE, was very interested to learn more about what the Claimant was doing he had therefore decided that he would discuss things with Mr Copely in the foyer and show him the exhibits. Whether that also included the TIC is not clear. The inference is that he may well have done. But the point is as to whether or not he should have had the exhibits there in the first place. I have been taken to the policies of the DVSA on evidence preservation and I have heard the evidence of the three witnesses for the Respondent and I have heard the Claimant's explanation.

22. The thrust of what the Claimant said, and as encapsulated in the appeal hearing before Ms Farr commencing at Bp 271, was that these items were not the property of the DVSA. They had been obtained in the course of his work for the Police. Thus, it was not a matter for the DVSA and what he was doing was with the knowledge of the Police Force. The counter proposition of the Respondent's witnesses was consistently that he was employed by the DVSA not the Police; and inter alia the fact that he might be prepared to work the long hours the Police were working in Nottinghamshire and in particular on these investigations was not permitted. It had been made clear to him as Ms Farr put it, that he was subject to the Working Time Regulations because the DVSA does not need or wish to depart from the same; and that he should not be carting about the country exhibits for the purposes of prosecutions whether by the DVSA or the Police because of the risk to the integrity of those exhibits. In that respect this Judge is acutely aware from his previous experience of the importance of the preservation of the continuity and thus integrity of exhibits for prosecutions. So the core issue that was to be determined in that respect by Mr Harrison at the disciplinary hearing on 6 October 2017 and thence Ms Farr at the appeal was as to whether the Claimant was in serious breach of the DVSA's relevant provisions which I have seen for the purposes of the preservation of exhibits for under investigation cases. The Claimant seeks to invoke before me a section of the

Road Traffic Act. I consider that for the purposes of the point before me in terms of employment law, it is irrelevant. He had a contractual duty because he was bound by the policies, all of which were on the intranet, to ensure the safety and integrity of exhibits. Suffice it to say the Respondent was entitled to thus reasonably conclude that he should not have those items in the foyer and he should not be showing them, even if it was to another TE, because by its very nature the hotel foyer was a public place.

23. So that leaves that issue as to whether given the Claimant had a previous good disciplinary record as to whether his actions at the Mercure hotel in themselves warranted dismissal. But then it is clear to me having listened to Mr Harrison and particularly Ms Farr on this topic that in itself it wouldn't; but their big concern is that the Claimant failed to understand the importance of the breach, accept ownership, and be willing to learn and move on. And that is an inescapable conclusion from all the documentation that I have read vis the investigation by Mr Forrester and in particular his interview of the Claimant, and thence following through with the disciplinary hearing and thence the appeal hearing. So, it is an important factor in the reasoning of the Respondent as to dismissing the Claimant.

Back to the TIC and inter alia Stonebridge

24. I pick this up where I left off with that the Claimant had mentioned to Mr MacLean on 23 November that he had developed this device.

25. This brings me to events on 2 December 2016; and into the picture comes again the Claimant's Line Manager Steven Brougham who was interviewed by Mr Forrester on 23 June 2017 as part of his disciplinary investigation (see Bp 189). And I link it to the e-mails that Ms Farr obtained for the purposes of considering issues that arose in the appeal hearing and which has now been disclosed in the compass of this hearing before me and which start at Bp 211A.

26. Summarised Mr Brougham, and I suspect everybody else in the TE structure who came into contact with the Claimant, knew his enthusiasm for developing devices. By now Mr Brougham knew that he was broadcasting that he had created the TIC and so Mr Brougham saw him about this on 2 December. By now the Claimant had been actively pursuing with the DVSA as to whether or not they would like to purchase the TIC and develop it. The issue becomes as to whether or not the Claimant made it plain in his meeting with Mr Brougham that his plan was also to sell it to "other enforcement agencies". Mr Forrester for the purposes of his investigation had obtained from Mr Brougham a handwritten note he took of the meeting and which is at Bp 303. It was attached to his investigatory report which he published having completed his investigation on 28 July 2017. In that respect and in passing his conclusions commence at Bp 216. What did Mr Brougham discuss with the Claimant? What is the significance of the reference to "other enforcement agencies" in the note at Bp 303? The best evidence that I have is encapsulated in the detailed e-mail that Mr Brougham wrote on 2 December (Bp 211A) to Juliet Gibson and others at HQ. Encompassed was that he had discussed with the Claimant the TIC. The Claimant was hoping that the DVSA would purchase the said device and that together with the Claimant they could then develop a training package which he could then deliver to inter alia "other enforcement agencies". The implication of course being that the DVSA might then be able to sell the TIC to those participating in the training for their subsequent use. Nowhere in the e-mail did Mr Brougham say that the Claimant was proposing that if the DVSA didn't want to

buy the TIC, then he would wish to otherwise exploit the device by selling it elsewhere ie to a manufacturer under a licensing agreement. And so it follows that the advice that came back from Sharon Meredith, Head of Procurement and contract management, based in Bristol, and Sophie Williams, a Deputy Director Government Legal Department Group, Litigation and Advice for Government, based in London, which Julie copied to Mr Brougham on 17 February 2016 (Bp 139A-B) confined itself to only 2 issues. The first one was who owned the intellectual property? This was an issue which by now seemed to have been circulated, in particular by Messrs Taylor and Wood, as to whether the Claimant had improperly developed this device by using knowledge gained at work. Now that is a charge which initially was upheld as part of the decision making of Mr Harrison, but it disappeared before Ms Farr because she reasonably concluded that the Claimant by combining his undoubted IT and digital skills with the identification of a potential improvement in terms of the DVSA's work and thus the development of the TIC, was not a breach of his employment contract. And that would fit with the conclusion of Ms Meredith backed by Ms Williams that he was probably entitled to the intellectual property in the said device. The selling issue that they raised in the context of a legitimate understanding that this would be via the DVSA as part of the training package, was the procurement problem. Suffice it to say that they couldn't just let the Claimant develop this device and in that way then let it be sold via the DVSA, because of the health and safety implications if it was not developed via an established manufacturer and thus inter alia Kite Marked. As it is the DVSA decided not to put up the investment.

27. The Claimant is right to say that Mr Brougham should have informed him of the outcome. It doesn't seem he did: certainly, in a meeting. But on the other hand the Claimant has honestly told this Tribunal, and indeed made plain or rather never denied in the internal process, that he nevertheless knew that this was the outcome circa that time.

28. And that therefore fits in with the next part of the equation because in early March 2017 Graeme Mays or Mr Maclean of Stonebridge, I am not sure which but it doesn't matter because again the conversation is not in dispute, telephoned the Claimant following up on the conversation that had taken place back on 23 November. The Claimant knew by now that the DVSA was not taking up his product. Essentially Stoneridge was saying that they would like to have a more detailed discussion to consider the viability of taking on the product. The Claimant, because he was otherwise busy and was anyway working closely on this with Mr Laidlaw and also because the latter is in Scotland as is Stoneridge, proposed that Mr Laidlaw be the one who would take it further forward in that respect: and this happened. This brings in the Tribunal case in Scotland but also another aspect of the disciplinary charges against the Claimant. It brings me back to Bp150 and which is the written statement, so to speak, of Mr Maclean and which deals with all the involvement of Stonebridge starting with the trade dinner. It is corroborated by the e-mails. Thus, on 9 March 2017 Clark Laidlaw visited the Stoneridge HQ in Dundee. He was wearing his DVSA top. They discussed over an hour or so the product. He mentioned Simon Butler. Stonebridge were told how they had developed this product and that they in the course of patenting the same. Summarised the discussion focussed on the prospect of a licensing deal. Stoneridge with its resources could develop the product. It would have a royalty based licensing agreement with the Claimant and Mr Laidlaw who would own the intellectual property. This got back to the Respondent; hence Bp 150 which is why we get the initial Taylor report of 5 April 2017. It then of course would legitimately fuel the concerns already raised by the Mercure Hotel incident, which was by now on the radar, and all of which in

turn then led to the appointment of Mr Forrrester on 2 May.

29. The Claimant said internally and was always to say before me that: "we weren't interested in making a profit but we wanted to advance the cause of road safety". But that then brings me to the relevant Civil Service policy; but before I do the following further factors emerged which were established in the Forrester investigation, and essentially not denied by the Claimant in the Harrison hearing and the Farr appeal and which in any event are so clear from the relevant documents in the bundle. Already by circa this time the Claimant was through a Belgian Traffic Enforcement Officer, a friend of his Fred Marten, about exploiting the product and I use that term in the loose commercial sense of the word. A WhatsApp forum was set up by the Claimant, Mr Laidlaw, Mr Marten and which in due course inter alia included a Police Sergeant from Nottingham. Out of it came the sale, albeit of only a few at that stage, of the TICs which Mr Butler made in his workshop. One of those TIC's was bought by Hampshire Police, (see Bp 160A and PC Diamond) and two were bought by Belgian Police Officers. This only came to light initially through the next part of the evidence of Spencer Miller, because circa 15-18 May 2017, (see Bp 185; his interview with Mr Forrester), he happened to be attending the TISPOL meeting in Brussels. TISPOL is a European forum for the exchange of information inter alia regarding developments in traffic enforcement. Whilst there he learnt through a Dutch Police Officer approaching him that the TIC device was being sold. In fact the Dutch Police Officer actually thought it was being sold under the auspices of the DVSA, and his force was interested in buying one and wanted to know the DVSA's VAT status. Then out on a roadside check with two Belgian Police Officers/TE's he realised that they were using this device but he, that is Mr Miller, did not understand how this had happened as he was unaware of any development/introduction of the same by DVSA. Hence he reported it back. So this led to the third strand of the Forrester investigation.

30. It led through the usual kind of intelligence leads back to the Hampshire Police who as I have already said then confirmed as at 7 June 2017 their involvement (Bp 160A). Sgnt Paul Diamond had been shown the TIC device by the Claimant "SI Butler" and had then got authority to purchase one as a pilot. They tested it in "the field" and PC Dave Blake, who was going to be the tester, was invited to participate in what was described as "a closed WhatsApp group". That is of course the group that the Claimant with Clark Laidlaw and Fred Marten in particular had formed. Sgnt Diamond went on to describe how there was information in terms of the group inter alia "using it to post pictures and manipulations. Most of these were not in the UK…". The Police were canny. They weren't sure what the rules of engagement were. And so they played possum in terms of their own intelligence but harvested that which they learnt through the WhatsApp from the Claimant and his colleagues.

31. The last point to make in terms of that the Claimant must have known the significance of what was now happening is a text exchange between him and Mr Marten on the 5th May 2017 (Bp 116B). This was obviously in the context of a presentation one or the other was about to give. In the process of this hearing and for reasons which are now self-evident, I tabbed it up as "crucial" it reads as follows:

FM[6] *"Do you want talk about them?"*
SB "Mention them by all means… Just don't say they are anything to do with the DVSA, they aren't, and no one has ever said they are. Just say developed in

[6] The initials have been added by me.

the UK and leave it at that…

FM: *OK*
What a shit for you and Clark at the moment."

32. So obviously the Claimant knew that this product should not be associated with the DVSA.

33. That is the totality of the evidence that the Respondent had and which has been rehearsed before me on the issue of the TIC. As can be seen it interfaces into the WhatsApp issue. On the face of it the evidence is that in part the WhatsApp was a process by which the TIC could be marketed in the sense of that it existed, what it could do and that it was for sale. That it may have only been for sale at cost is neither here nor there; and in any event as Dr Gibson put it to the Claimant the "loss leader" so to speak in terms of the first run of a product is a well-known marketing ploy.

34. That therefore brings me to the conclusions that the employer reached and in doing so I will now deal with weaknesses insofar as the Claimant has understandably put them:-

The decision making process included the investigation

35. Mr Forrester interviewed Clark Laidlaw on 13 July 2017 (Bp 205-209) as part of his investigation and in particular as to why he was wearing a DVSA shirt, which obviously would give a symbol of authority/authenticity, when seeing Stoneridge. Also inter alia came up what was on the WhatsApp. Mr Laidlaw volunteered his phone to Mr Forrester who scanned through it. He said in his investigation report that he found a significant number of postings which inter alia divulged sensitive information about such as lorries. In his statement Clark Laidlaw disputes this. But he has not given evidence before me. It follows that it carries little weight. As to what Mr Forrester saw and otherwise established on the WhatsApp front, this of course goes to this WhatsApp being used without the approval of the DVSA. But it engages actually inter alia the Respondent's IT policy which is at Bp 458 in bundle 2 and particularly Bp 461. It says inter alia:

> *"you may view social media for work purposes but should you wish to post a work related comment or respond to a question on behalf of the DVSA you must obtain prior approval from the Communications Team.*

36. And then further down the page:

> *"if you want to use social media for business purposes to enhance your work, you must speak with the Communications Team first. They will be able to advise you on the appropriate channel to use or whether using social media will meet your business objectives. If access is granted then we can provide you with guidance on using it safely whilst keeping it within the privacy rules".*

37. Cross reference in the context of this case to the Civil Service Code which is to be found commencing at Bp 400 and thence the guide commencing at Bp476. What is beyond doubt as per Bp402 is as follows:

> "*You must not:-*

- *Misuse your official position for example by using information acquired in the course of your official duties to further your private interests of those of others…"*

38. Now the Claimant says before me "*well there was a second WhatsApp forum running under the auspices of TISPOL on which were several DVSA Officers. Why haven't they been taken to task?* But that came up before Mr Harrison and then Ms Farr and as they confirmed in their evidence to me they were previously unaware of this point and the Claimant hadn't flagged it up to Mr Forrester. Both incepted by way of passing it up line that this should be looked into. As to where it has gone and in terms whether there has been any inconsistency of treatment, I don't know. But I think the Claimant misses the core fundamental point which is that the employer was entitled to conclude that the WhatsApp that the Claimant and Mr Laidlaw and Mr Marten in particular had set up would as per that definition in the Civil Service Code inter alia be a private interest. After all it enabled them to use it as a forum for marketing and selling the TIC. Devices had obviously already being sold. There were clear plans to sell it further and there had been an overture already made to Stonebridge. I am entirely with Dr Gibson that it points to more than just an esoteric desire to improve road safety and that the Respondent could reasonably reach that conclusion which is the fundamental. The second point is that even if others had started to participate in another What's App forum it doesn't detract from that the Claimant would need, as I have already referred to in terms of the IT policy, to get permission and the focus in this case is upon him. Finally, he has never suggested that DVSA TEs participating in the other What's App forum had been marketing products such as the TIC.

39.The second issue is the Andrew Wallace point which goes to the Mercure Hotel issue. Yes, it is true that when Mr Wallace came to the disciplinary hearing on behalf of the Claimant he volunteered that he also kept exhibits in the same way as the Claimant. Indeed Mr Harrison and I gather Ms Farr have also taken steps to address that issue in terms of future adherence to the DVSA policies by Mr Wallace and indeed others who may also be sloppy but again it misses the point. It was never suggested that Mr Wallace was also in the habit of taking his exhibits into a hotel foyer or that he had ever therein discussed or shown them to another TE. That is the distinction.

40. Third is the Lynn James issue: that she wanted to remain anonymous and thus should she not have been forced to give her evidence or in the alternative that it should have been ignored. That would have mattered if the Claimant denied the core events but he never did. It follows that Ms James's evidence would add nothing significant to the Respondent's investigation and therefore is not something in its usage that is a significant failure undermining the overall fairness of the procedure.

41. It follows that none of these issues fundamentally undermine the fairness of the process or the conclusions reached.

Otherwise on the fairness of the process

42. That brings me back to **Burchell** cross referenced to the ACAS Code of Practice on Disciplinary & Grievance Procedures (2015). The following is now obvious:-

42.1 The Claimant was made aware that there was an investigation against him. Yes, it did change in the sense that the accusations relating

to Imperial went because Mr Forrester found no case to answer.

42.2 Yes, it developed from where it started because of the intelligence that came from Mr Miller including his visit to Brussels.

42.3 As to the process thereafter, the major witnesses were all interviewed with the absence of Linda James, or they provided by e-mail exchange their evidence ie the Hampshire Police Force or Stoneridge.

42.4 The Claimant was interviewed with the right to be accompanied by a work colleague and which he was: John Rayner.

42.5 He received an ACAS CP step 1 compliant letter for the purposes of inviting him to the disciplinary hearing. He received the Forrester investigation pack. He knew the case that he had to meet. He acquitted himself well at that hearing. Stopping there, originally the disciplinary hearing was going to take place on 25 August 2017. The Claimant sought an adjournment because he had made an SAR and he wanted the information before he proceeded. Mr Harrison granted that request. He waited some weeks; heard nothing from the Claimant. He took the issue up with Mr Ruggles, who was the HR advisor, as to whether or not he was entitled to now proceed. The advice (Bp236) was that yes he could, but that he should watch as to whether or not the Claimant raised issues in relation to not having had replies to the SAR during the course of the Disciplinary hearing and if necessary then stop and investigate the specific information that he requested and which appeared to be relevant to the disciplinary hearing. As it is it wasn't an issue. More important perhaps is that it wasn't an issue at the appeal.at the appeal. Indeed, the Claimant did not challenge when Ms Farr made plain that she understood that he had received the SAR disclosure by the time of the appeal. Finally, as none of it has been deployed before me I can conclude that it adds nothing to the issues.

42.6 So it was proposed by Mr Harrison to the Claimant on the 21 September 2017 (Bp 238) that the disciplinary hearing would proceed on 6 October. There is then an e-mail trail on this matter thereafter commencing at Bp 237. The Claimant did not want to go ahead because he wanted to wait on his SAR request. I can gather from this that he had at that stage yet to have a reply. Then he followed that up a few days later with that in any event he couldn't proceed, and which became his principle point, because Mr Rayner would not be available on 6 October as he was on leave. He requested the13th. Mr Harrison replied that he couldn't do that because he would be on pre-booked leave. Thus, it must proceed on the 6th. He also was expecting to thereafter have to undergo extensive medical treatment albeit he didn't disclose this confidential information to the Claimant. As it is it seems, but later after the 6th, that this was put back. So, the disciplinary hearing went ahead on the 6th. It seems that the Claimant thought maybe that Mr Wallace was going to be his companion or maybe decided not to have anybody and do his own best. I say that because Mr Wallace came into that disciplinary hearing, gave evidence on the exhibits point and then left. In the sense of was the Claimant disadvantaged in his disciplinary hearing the answer is no. For the reasons I have already given he acquitted himself very well: indeed, much better than many a lay representative would have done.

43. This brings in as to whether or not the employer is in breach in that respect of Section 10 of the Employment Relations Act 1999 which is headed "right to be accompanied" . The Claimant says that it is. The following specifics apply:

> **10. Right to be accompanied**
>
> (*1) This section applies where a worker –*
>
> *(a) is required or invited by his employer to attend a disciplinary.. hearing and*
>
> *(b) reasonably requests to be accompanied at the hearing".*

44. Well of course he did. Then moving down to paragraph section 4 which is therefore next engaged:

> *"(4) If –*
>
> *(a) the worker has a right under this section to be accompanied at a hearing,*
>
> *(b) his chosen companion will not be available at the time proposed for the hearing by the employer' and*
>
> *(c) the worker proposes an alternative time which satisfies subsection (5),*
> *the employer must postpone the hearing to the time proposed by the worker.*
>
> *(5) An alternative time must –*
>
> *(a) be reasonable,*
>
> *(b) fall before the end of the period of 5 working days beginning with the first working day after the day proposed by the employer".*

45. Well the day proposed is the thirteenth so it falls within the 5 working days after the 6th. But the objective test is engaged: is it reasonable? Mr Harrison can't do the 13th because he is on leave. No other date is therefore available within the 5 day slot. It follows that Section 10 is therefore not breached.

The decision of Mr Harrison to dismiss.

46. Essentially, he found all 3 charges proved[7] and taken together collectively considered that this was so serious that the only outcome could be summary dismissal. His decision dated 12 October 2017 is at Bp253-5. For all the reasons I have now given that decision was not outwith the range of reasonable responses. These were serious breaches of the DVSA's polices and the Civil Service Code and which I have now addressed.

[7] 1. Hotel Mercure

2. Whats App.

3. Marketing and selling the TIC.

The decision of Ms Farr

47. That brings me back finally to Ms Farr's appeal hearing heard as I have already said on 31 October. The Claimant submitted a detailed written statement, so this was on top of the very detailed letter that he had sent to Mr Llewellyn the Chief Executive. The statement commences at Bp285. In the appeal hearing he went through all of it. He was insistent and thus it was not a dialogue. Very few questions were raised by Ms Farr because of the Claimant's approach which essentially brooked no intervention. Having said that, when she did ask questions they were absolutely pertinent to the core issues that there were before her. The Claimant proffered no new evidence. I stop there. Assume for a moment that for the purposes of the process there should have been more exploration on the WhatsApp issue. Mr Forrester looked as I have said at the related e-mail traffic on Clark Laidlaw's phone. He didn't take copies or forward them to say his own device or rather ask Mr Laidlaw to do so. But this is a very experienced senior traffic examiner and his evidence was very clear as to what he saw. Did Mr Forrester ask the Claimant if he would divulge his WhatsApp e-mail traffic to him? There is no record of this in the disciplinary hearing. In his statement before me Mr Forrester said he did and was refused. When questioned on this issue he wasn't to me quite so convinced. It was more along the lines of as far as he could remember. I will say this, and I repeat that I think that Mr Forrester is an honest man, that it is a matter of such significance that it is more likely than not that the request and the refusal would have been noted in the interview. It wasn't. So, I am not persuaded that he did so ask.

48. As to Mr Harrison he accepts he didn't ask. He went on what Mr Forrester had recorded. However if the Claimant was about seeking to argue, as he did, that that which was on the TIC WhatsApp forum was innocuous stuff that was already in the public domain as such and as on the One Show, thus he wasn't breaching any protocol, why not show the WhatsApp to prove the point? The point becomes that although Mr Harrison didn't say to him "well show me what's on the WhatsApp", the Claimant never proffered it. I bear in mind that a disciplinary hearing is not a prosecution as per a criminal case where it is for the crown to prove the case and a defendant does not have to do anything other than say "let them prove it beyond all reasonable doubt"; that is not the test for an employment forum and an internal process. Indeed, the burden of proof is neutral before me as to the unfairness of the dismissal or otherwise. Thus it is a two-way traffic. This Claimant didn't help himself. That he did not proffer anything to contradict Mr Forrester's understanding from the other evidence on this topic such as Hampshire Police or what Mr Forrester had recorded that he had seen on Clark Laidlaw's phone would have reasonably left Mr Harrison with the reinforced belief that what Mr Forrester had found was true. And that leads me to the final point on WhatsApp. Why didn't the Claimant ask Ms Farr to stop the appeal so that she should retrieve his DVSA phone which had by now been taken off him following his dismissal and investigate thereon the contents of the WhatsApp e-mails and texts? If they were so innocuous why didn't the Claimant make this proposal? Of course, given the text exchange between the Claimant and Frank M on 5th May 2017 at Bp116B the inference to be drawn is that they would further incriminate the Claimant. Ms Farr made this point in the questioning of her before me.

49. So, the short comings are squared off in that way.

Conclusions

50. I repeat that this Judge does not substitute his own view. I can see how Mr Butler thinks this was very harsh outcome to dismiss him given his enthusiasm and commitment.

51. On the other hand, the Respondent had established in the internal proceedings on a balance of probabilities[8] by way of a reasonable investigation, taken collectively serious shortcomings. The most serious of which one might think is the marketing and selling of the TIC in clear breach of the Respondent's policies and overarchingly the Civil Service Code of Practice and linking to the utilisation in that respect of the WhatsApp site set up for that purpose. Obviously Mr Harrison and then Ms Farr had in their minds uppermost the importance of maintaining the integrity of the Civil Service.

52. Thus they concluded this was serious misconduct such as to mean that the Respondent could no longer continue the employment, trust and confidence having been fundamentally undermined. Thus, outweighing any mitigatory issues. And the obvious final point to make in that respect is that the Claimant really wasn't raising any mitigatory issues. As far as he was concerned he had done nothing wrong. Hence Ms Farr's conclusion that this showed lack of insight/ownership that might otherwise have given her some restored trust for the future.

53. Accordingly for all those reasons the dismissal was fair and thus the claim fails and is dismissed.

_____

Employment Judge P Britton

Date: 9 April 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

[8] The test employed by it as per its disciplinary conduct to determine whether misconduct is found proven.