



EMPLOYMENT TRIBUNALS

Claimant: Mr D Thomas

Respondent: Delta Plus (U.K.) Limited

Heard at: Teesside Justice Centre **On:** 8 May 2018

Before: Employment Judge S A Shore

Representation:

Claimant: In person

Respondent: Mr J Anderson of Counsel

REASONS

- 1 I delivered an oral judgment in this case on 8 May 2018 dismissing the claimant's claims of unfair dismissal and breach of contract and ordering the claimant to pay the respondent a contribution to its legal fees of £350.
- 2 The claimant requested written reasons for my decision by letter dated 19 May 2018 and these are those reasons.
- 3 As I explained to the parties when I delivered my oral judgment, I had not been provided with a digital voice recorder upon which to record my decision on 8 May, so these reasons may contain some material differences from the oral decision that I gave.

Background

- 4 The claimant, David Thomas, was employed by the respondent, Delta Plus (U.K.) Limited as Area Sales Manager from 9 December 2011 until his summary dismissal on 5 April 2016. He brought claims to the Employment Tribunal which were struck out for non-payment of fees. Following the well-publicised judgment in the Unison case, the claimant's claim was reinstated and listed for a one-day hearing on 8 May 2018.

Claims

- 5 At the start of the hearing I discussed his claims with the claimant. In his ET1, he had indicated claims of unfair dismissal, failure to make a redundancy payment, breach of contract (failure to pay notice pay), failure to pay holiday pay and unauthorised deduction of wages.
- 6 The claimant accepted that his holiday pay and unauthorised deduction of wages claims were errors and withdrew them. I discussed with him his redundancy pay claim. He said he was making this claim because if he

had been made redundant, he would have received a redundancy payment. On the basis that he accepted that he was dismissed for misconduct and that redundancy was never an issue, he asked to withdraw this claim also. The withdrawal was noted on my judgment.

Issues

- 7 I then discussed the issues with the parties. In the unfair dismissal claim it was agreed that the claimant was an employee, had at least two years continuous service and had not lost the right to claim. There was a short discussion with Mr Anderson about the date that the ET1 was submitted, but it was accepted that the claim was in time.
- 8 The following issues were agreed:-
 - 8.1 What was the reason for dismissal? The burden for showing the reason for dismissal is on the respondent.
 - 8.2 Is the dismissal one of the five potentially fair reasons for dismissal? If not, the dismissal is automatically unfair.
 - 8.3 If the dismissal is for the reason of misconduct, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the respondent) will depend on 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 sufficient reason for dismissing the claimant and shall be determined in accordance with equity and the substantial merits of the case.
 - 8.4 In determining the fairness of the dismissal, the Tribunal will consider the rule in **British Home Stores Limited v Burchell [1978] IRLR 379:-**
 - 8.4.1 Did the respondent have a genuine belief in the claimant's guilt?
 - 8.4.2 Was that belief based on reasonable grounds; and
 - 8.4.3 Did those grounds follow a reasonable investigation?
 - 8.5 The Tribunal would also have to consider the rule in **Iceland Frozen Foods Limited v Jones [1983] ICR 17:-**
 - 8.5.1 I cannot substitute my decision for that of the respondent, and;
 - 8.5.2 The decision to dismiss has to fall within a band of reasonable responses.
 - 8.6 If I find in favour of the claimant on liability, should any reduction in compensation be awarded because of contributory conduct?
 - 8.7 If I find in favour of the claimant on liability, should any deduction be made following the principle in **Polkey v AE Dayton Services Limited [1987] UKHL8?**
 - 8.8 What amount of compensation is just and equitable?
- 9 In respect of the claim of breach of contract, the test is not the same as that for unfair dismissal. The issue that I would have to determine is whether the claimant committed an act of gross misconduct which justified summary dismissal.

Housekeeping

- 10 I noted that a previous order had been made amending the name of the respondent. I noted that I had done a check on Companies House myself and noticed that the correct name of the respondent was Delta Plus (U.K.) Limited. Mr Anderson took instructions and it was agreed this was the correct legal name of the respondent, so I made an order amending the respondent's name.
- 11 The claimant and respondent have both produced bundles. Mr Anderson only had a copy of what he referred to as the agreed bundle (i.e. the respondent's bundle). I asked the claimant to check whether any of the documents in his bundle were not in the respondent's bundle. He checked and confirmed that he was happy that the documents he had sent in were all in the agreed bundle.
- 12 I noted that I had witness statements from Sam Hill, the Managing Director of the respondent and Jeanette Tuplin, the HR Manager of the respondent. The claimant had not produced a witness statement. He said that he had done a statement in his ET1. I explained to him that that was not a statement for our purposes and referred him to the standard case management order that had been sent out to the parties. I felt that that gave a clear indication of what was required.
- 13 The claimant said that all his statements were in his bundle, so I asked him at what pages in the bundle his statements appear. He said that they were at pages 46, 47, 48, 74, 75-77, 80 and 83 of the agreed bundle. I agreed to accept these documents as the claimant's witness evidence along with his statement of claim and his ET1.
- 14 Prior to the hearing, my clerk had handed me an envelope from the claimant. I asked him to explain what the contents of the envelope were. He said that he had received the respondent's witness statement late the previous week. Some of the evidence in the respondent's statements was inaccurate so he had produced documents that proved the inaccuracies in the statements. Mr Anderson said that his client had not received those documents.
- 15 There were three documents; an e-mail from Jon Hudson to the claimant dated 3 May 2018, the claimant's full year performance for 2014 and 2015 and the same document in respect of one of the claimant's colleagues, Andy Ponder. I gave these documents page numbers 109, 110 and 111 respectively.
- 16 I reminded the parties of the overriding objective of the Employment Tribunal to achieve a fair and just hearing and stressed to the claimant that although he was not represented, the requirement for the parties to be on an equal footing put an onus on me to ensure that he was not disadvantaged because he was not legally represented and that I should ensure that I explained the process of the Tribunal and the legal issues that the Tribunal operates by to him.
- 17 Mr Anderson submitted that I needed to make a decision regarding the claimant's witness evidence. His starting point was the order sent out with the notice of hearing dated 15 January 2018. That required the claimant and the respondent to prepare full written statements of the evidence they and their witnesses intended to give at the hearing. It warned that no additional witness evidence may be allowed at the hearing without

permission of the Tribunal.

- 18 The matter had come before Employment Judge Shepherd for a preliminary hearing on 21 February 2018 at which the claimant appeared in person and Ms Tuplin appeared on behalf of the respondent. Mr Anderson submitted that the same conversation regarding witness statements had happened at the preliminary hearing and Employment Judge Shepherd had affirmed the case management order of 15 January 2018. Mr Anderson said that the Employment Judge had been at pains to tell the claimant that reliance on the documents would be insufficient.
- 19 Mr Anderson said that there were a range of judicial options available to me. He acknowledged that the respondent has the burden of showing the reason for dismissal for unfair dismissal so he cannot make an application for strike out. However, he can make an application relating to a breach of the Tribunal's order and can make a decision on the extent to which the claimant is allowed to give evidence.
- 20 The substantive case concerns the alleged fraud of the claimant and all the pages referred to by the claimant as being his witness statement relate to collateral matters. Nowhere does the claimant comment on the allegation of fraud made against him.
- 21 Mr Anderson submitted that if I do allow the claimant to adduce evidence, he would wish to have some leeway because cross-examination would be without a witness statement to refer to.
- 22 I considered Mr Anderson's application and said that I would consider it with the documents that are listed above to be the claimant's witness statement. I would then read all the documents in the bundle and return to commence the hearing and give a determination on Mr Anderson's application.
- 23 On my return, I advised the parties that the overriding objective requires a fair hearing. I felt that it would be wrong to deny the claimant the opportunity to put his claim, even though it would be reasonable to deny him that opportunity, given the history of the matter.
- 24 The documents he had produced did not affect the issues in the case. It is irrelevant what the claimant was paid compared to his colleagues. The e-mail from John Hodson [109] is not relevant evidence. Neither were the performance figures of the Appellant and his colleague [110-111] I therefore was not going to allow those documents to be entered in evidence.
- 25 I decided I was going to give Mr Anderson latitude to ask questions as I found it implausible that the claimant would not have understood that a witness statement was required by the case management order of 15 January and the order of the Tribunal of 1 May 2018.
- 26 The claimant said that the real reason for his dismissal was not the alleged fraud. That was just a smokescreen to dismiss him. The respondent wanted to replace him and subjected him to psychological bullying and a trumped-up charge in order to replace him with someone that they had already approached.
- 27 I pointed out to the claimant that that was not put in any of the allegedly contemporaneous documents that he had produced as his witness statement or any of the other documents.

- 28 The first witness for the respondent was Jeanette Tuplin, who has been employed by the respondent as HR Manager since February 2007. Part of her responsibilities is to prepare the staff handbook policies and ensure that they are communicated to employees. One of these policies is the business expenses policy that appeared at page 106 of the bundle. She distributed this to the sales team (including the claimant) on 3 October 2013 [44].
- 29 In February 2016, Ms Tuplin was approached by the respondent's Finance Manager Veelas Vekria to explain that she had some concerns regarding a number of anomalies with the claimant's fuel purchase and mileage records for January 2016.
- 30 The practice at the respondent was for relevant members of staff to forward a business expense form to the Finance Manager monthly together with supporting receipts and mileage record form. These were then checked for mistakes and inaccuracies.
- 31 The agreement that the respondent had with relevant employees was that private mileage was deducted at an agreed rate from employees on a monthly basis. Therefore, the lower the private mileage that the employee recorded, less money would be deducted from their salary. The corollary of that situation is that the higher the business mileage that was recorded, the lower the private mileage (and hence the deduction) would be.
- 32 In response to the concerns of the Finance Manager, Ms Tuplin decided to look into matters and conduct an initial investigation. She was provided with a bundle of documents concerning the claimant's expenses claims for 2016 that included his business expense form, his mileage record forms [68], fuel receipts and activity reports from the respondent's customer relationship management (CRM) system [69].
- 33 Members in the respondent's sales team were required to enter details of customers and prospects that they had visited on the CRM system.
- 34 Each Area Sales Manager (the role undertaken by the claimant) was provided with a company credit card used to purchase fuel. Employees were required to record all mileage travel visiting clients on the mileage record form. In addition to this, the employee must submit details of personal mileage travelled each month. The personal mileage is deducted at a rate of 15p per mile from the employee's monthly salary.
- 35 Ms Tuplin initially cross-referenced the claimant's mileage record form with the CRM system and found that no visits had been mis-reported. The trips and destinations in both documents matched.
- 36 Ms Tuplin then used the postcodes that appeared on the CRM system to calculate the mileage each journey would have involved using Google maps. She discovered that the distance travelled on a number of the trips recorded had been grossly inflated.
- 37 She created the document that appears at page 70 of the bundle that shows the exaggerated mileage claims. She then created a summary sheet that appears at page 71 of the bundle that calculates that the claimant had overclaimed mileage for January 2016 by 267 miles.
- 38 Ms Tuplin then compared this travel to the fuel purchased by the claimant that month, details of which were recorded at page 71 of the bundle. By Ms Tuplin's calculation, the claimant had travelled 666 miles on £55 of

petrol. She considered that to be an unlikely statistic. Ms Tuplin then carried out the same exercise for the months of October, November and December 2015. Those documents appeared at pages 51-60 and 61-67 of the bundle. Ms Tuplin found that a significant amount of business mileage had been overclaimed. None of the journeys recorded by the claimant had been underestimated. She calculated that the claimant had overclaimed 234.5 miles in October 2015 [54], 842.5 miles in November 2015 [60] and 655.5 miles in December 2015 [67]. She came to the conclusion that the claimant was attempting to disguise personal mileage as business mileage to therefore avoid deduction of 15p per mile from his salary payment. Ms Tuplin calculated that if she recorded his business mileage correctly, then he would have incurred significantly more personal mileage. She calculated that he would have had additional deductions of £35.18 for October 2015, £126.38 for November 2015, £98.33 for December 2015 and £40.05 for January 2016. The total under-reported personal mileage cost was therefore £299.94.

- 39 Ms Tuplin also compared the mileage claims to the fuel purchased and found a huge anomaly between the amount of fuel purchased and the miles recorded on the fuel purchased.
- 40 Ms Tuplin prepared a summary document that appears at page 72 in the bundle and informed the Managing Director of the respondent, Sam Hill, that a disciplinary matter should be convened.
- 41 The claimant was sent a disciplinary invite letter on 11 March 2016 [78]. She next heard from the claimant when he e-mailed her on 18 March 2016 to advise that he had submitted a grievance to Herve Zippel, the respondent's European Director, in relation to Sam Hill's conduct.
- 42 Mr Zippel asked Ms Tuplin to conduct an investigation into the grievance. She acknowledged the grievance on 21 March 2015 [84] and spoke to Sam Hill and Helen Crompton, who had brought the customer complaint that was part of the claimant's grievance to the attention of Mr Hill.
- 43 She looked at the company's payroll records to determine whether the claimant was paid disproportionately compared to colleagues. Her investigation revealed that the claimant was paid in line with the other members of the sales team and there was no evidence of disproportionate treatment.
- 44 She fed all the information back to Mr Zippel verbally and via e-mail. The claimant was invited to a grievance hearing on 24 March 2016. The grievance investigation hearing took place on 30 March 2016 but no copy of the notes has been retained. Mr Zippel heard the claimant's grievance and rejected it. The claimant did not appeal the decision to reject his grievance. Ms Tuplin attended the disciplinary hearing but did not provide any evidence of what happened there.
- 45 The claimant asked Ms Tuplin a number of questions upon cross-examination. She confirmed that she was notified in February 2016 of a discrepancy in the claimant's mileage claims. She also confirmed that the main issue was an alleged excess claim of 842 miles in November 2015. Ms Tuplin did not know what the claimant's average monthly private mileage was for 2014. He said it was 200 miles per month. She was not aware of this.
- 46 He asked if she was aware of his average private mileage in 2015 but she

again said that she did not. It was put to her that it was 245 miles. He put to Ms Tuplin that she had said he had done 842 private miles in November. He had done approximately 200 on average, so he would have had to travel to London and back every weekend. Ms Tuplin referred to page 58 of the bundle where personal mileage was recorded as 134 miles.

- 47 The claimant took Ms Tuplin to pages 62 and 68 of the bundle which were his December mileage submitted on 17 December 2015 and his January mileage submitted on 8 January 2016. He said he could not put all his mileage on the CRM report.
- 48 Ms Tuplin referred back to page 60, the claimant's mileage claim for November 2015 that showed excess mileage of 842.5 miles. She said that when questioned, the claimant had no explanation for this at the time.
- 49 I asked Ms Tuplin if the CRM system did not allow you to make new entries. She said she did not believe so.
- 50 The second witness for the respondent was Sam Hill, its Managing Director, who said that he has been in the role since February 2010. He manages the respondent's workforce in the UK, which comprises of over 20 employees, five of whom were sales employees. He was surprised to be the subject of a grievance by the claimant as he believed he had a great working relationship with him prior to that. He referred to encouraging and friendly e-mails, at pages 49 and 50 of the bundle, that he had sent the claimant. They had attended music events together and had purchased a football shirt signed by a Liverpool FC player for him.
- 51 He had reviewed the documents at pages 46, 47, 48, 75, 80 and 83 of the bundle and effectively rejected allegations that were made by the claimant therein. The grievance raised by the claimant had been rejected. The claimant did not appeal, so the disciplinary process continued. A disciplinary meeting was convened for 5 April 2016 [87] and the minutes of the meeting appear at page 91 of the bundle. During the disciplinary hearing, the claimant was taken through each of the inaccuracies in the mileage claims set out above and asked for comment. Mr Hill said the claimant made a number of generalised excuses such as the distances on Google Map being inaccurate but when compared to other Sales Managers, the discrepancies in the mileage claimed by the claimant were significantly higher. A specific instance was pointed out to the claimant that on 6 and 9 October 2015 [53] he made the same journey between Middlesbrough and Blackburn which Google Maps calculated to be 91 miles. The claimant had claimed 167 miles. The return journey was calculated as being 122 miles. The claimant had claimed 171 miles. Mr Hill said the claimant could not offer any explanation for discrepancies other than he must have deviated from his route. He was not able to detail where he went. The claimant had explained an excess of 62 miles claimed on 26 October 2016 as additional miles because he had been prospecting for business.
- 52 The excess mileage claimed in November as detailed on page 60 was not explained by the claimant who vaguely referred to being in hotels and admitted that he was guilty of not completing the forms correctly.
- 53 The claimant said that he kept all his prospecting information in his head so there was no way of evidencing what work he had carried out. Mr Hill recalled that the claimant's trade union representative stated that the

figures produced by the claimant looked irregular.

- 54 Mr Hill turned to the issue of the discrepancies in fuel purchased and consumed and could not understand how the figures were arrived at. He asked the claimant for mitigating factors in response to which the claimant simply acknowledged that the figures looked odd and irregular. Mr Hill adjourned the meeting and took some time to consider the evidence he had heard. He concluded there was no further reasonable investigative steps that could be taken and decided that the claimant had not been able to provide a reasonable explanation for the significant discrepancies in the mileage claimed for a number of months. The fuel consumption figures simply did not stack up. As a result, Mr Hill found that the claimant had committed the alleged misconduct. Under the respondent's disciplinary procedure, theft and failure to follow policies amount to gross misconduct, so the decision was to dismiss summarily. The claimant was informed of his right of appeal but did not lodge an appeal.
- 55 Mr Hill has been involved in the dismissal of two other employees over the years for also falsifying mileage, fuel allowance and expenses claims.
- 56 In cross-examination, the claimant put to Mr Hill that he had admitted to the claimant that he could get rid of anyone on 19 June 2015 [46]. Mr Hill denied that. The claimant's record in which Mr Hill referred to instruction from Mr Zipper on 22 September 2015 [47] were denied. Mr Hill said that Mr Zipper was not that involved. He is a Sales Director of a £235 million turnover company with responsibility for Europe and the USA. He has 400 people doing the same job as the claimant did, so he would not have tried to micromanage the claimant as alleged. Mr Hill denied saying the words that the claimant had recorded. Mr Zipper had not said the words to him. Mr Hill denied telling the claimant about other peoples' earnings. Specifically, he denied telling the claimant what Jon Hodson was earning. The claimant and Mr Hodson were good friends and they may have discussed it between them. Mr Hodson had a different role within the company. He was Mr Hill's second in command and had 20 years' continuous service. The claimant then showed Mr Hill page 109 of the bundle. I intervened as I had already found that that new document showed nothing of relevance to the issues. Mr Hill confirmed that no bonus had been paid to the claimant because his performance had not warranted it. It was put to Mr Hill that at paragraph 38 of his witness statement Mr Hill had admitted that he had praised the claimant's performance. Mr Hill accepted this but the performance parameters for bonus payments were in black and white. They are signed off against agreed KPIs. The claimant did not earn a bonus because he did not achieve the financial or non-financial indications. The bonus is contractual. Everyone knows whether they will hit it or not.
- 57 The claimant put some bonus figures to Mr Hill. Mr Hill said that staff had given the claimant false information. The claimant then said that he wanted to see payslips and P60s but they were never forthcoming. I said that this had been argued before Employment Judge Garnon and the claimant's application for specific disclosure of documents had been rejected.
- 58 The claimant then put to Mr Hill that Andy Ponder had been paid a bonus. Mr Hill accepted this but said that the bonus was for non-financial indicators. Mr Hill did not know if Mr Ponder had received 1.79% bonus

but accepted that the claimant did not receive a pay rise and that he had been paid in line with market rates.

- 59 The claimant put it to Mr Hill that not every single journey was inaccurate on Google Maps. Mr Hill pointed to page 72 and confirmed that every single journey was overclaimed. I asked Mr Hill about the CRM system and he confirmed that you could select a new prospect on the system and enter the date and time of the visit. That had always been the case.
- 60 The claimant put a number of questions to Mr Hill about prospecting visits but Mr Hill said that in order to qualify for non-financial KPIs, it was about end user business not distributive business. The claimant then asked how long it had taken the business to replace members of the sales team who had left. Mr Hill was unsure about Jeff Crowe and it was put to him that it was six to nine months. Mr Hill was not sure. It was put to Mr Hill that Peter Fenton was dismissed for mileage abuse and it took six to nine months to replace him. Mr Hill said that his replacement was very quick; within four weeks. The claimant asked Mr Hill how long it had taken to replace him. Mr Hill said it was six weeks. The claimant put it to him that it was seven weeks. Mr Hill said that the candidate only had a week's notice and worked for one of their customers. It was put to Mr Hill that his replacement had already been identified and they were looking to get rid of him in order to accommodate his replacement. Mr Hill denied this and said that they had no accounts in Yorkshire, where the replacement was based.
- 61 The claimant gave evidence by adopting the documents at pages 8, 46, 47, 48, 74,75-77, 80 and 83. These were largely concerning his grievances with Mr Hill and did not address the matters that were determined at the disciplinary hearing. In cross-examination, the claimant admitted that he used a company credit card to purchase fuel and that he was required to record mileage of trips to and from customers. He was also required to record all personal mileage. He was shown the business expenses policy at page 107 and the procedure at page 106 and agreed that the business and personal mileage policy at 107 applied to everyone. The claimant accepted that the personal mileage of employees was deducted at 15p a mile from salary. He also agreed that if personal mileage was not recorded and therefore not deducted from salary, that would be flawed. The claimant did not accept this and said that it was about putting wrong information in. The claimant accepted that the CRM data was cross-checked with the mileage data and agreed that Google Maps search produced different results to the mileage recorded by him. He said this was because he did not include cold calls and the CRM could not deal with the calls to companies he had not dealt with previously. The claimant was taken to page 53 which showed Sunderland Council on the CRM system; Sunderland Council was not a customer. He said that Sunderland Council was a named user and had gone through a period of name change. It was put to him that Mr Hill had given evidence that prospects could be put into the system but the claimant said this was only after the fact. The claimant's journey on 5 January 2016 was put to him, (page 11 of Ms Tuplin's witness statement [70]) and it was noted there was a difference of 63 miles on the journey. The claimant said that this was an example of Google Maps being wrong. He went round the long way not via the Transporter Bridge, which Google Maps had used to calculate his mileage.

- 62 He was then taken to page 71 and the calculation that he had overcharged for 267 in the month. That was not explainable by the bridge in the month of January 2016. Did he agree? The claimant said that “that was according to the paperwork”.
- 63 Mr Anderson then asked the claimant to compare the record with the fuel purchased that seemingly he had done 666 miles on a £55 tank of petrol. The claimant said he had filled up twice so had done an extra 238 miles after he had filled up as it stated on page 71.
- 64 I put it to the claimant that the respondent’s case is that 900 miles were claimed in respect of fill ups on 5 January 2016 and 8 January 2016. The claimant said he had filled up twice and done 234 miles on 8 January 2016. Mr Anderson said that he needed to take instructions on this new information and we broke for him to do this.
- 65 When we restarted, Mr Anderson took the claimant to paragraph 16 of Ms Tuplin’s witness statement relating to overclaims of 234.5 miles in October, 842.5 miles in November and 655 miles in December. He asked the claimant if he accepted that this was a correct arithmetical calculation. The claimant agreed that it was. The claimant was then asked about December 2015 and taken to page 67. The claimant confirmed that he had bought £54.77 of fuel and travelled about 216 miles on that day. He agreed he had travelled 178 miles on 17 December 2015 and had put £45.64 of fuel in the car on 18 December 2015 but had only done 178 miles. The claimant said that the records did not show what he had done on 19, 20, 21 and 22 December. Mr Anderson said it was not on that record but the claimant said he did personal mileage to cover it. Mr Anderson said that the personal mileage for the claimant for December was 49 miles. The claimant said this private mileage would have gone in his January claim. We then had a long discussion between Mr Anderson and the claimant about the dates of claims and amounts of mileage claimed. It was then put to the claimant that his only mitigating circumstances were that the figures were odd and irregular. The claimant said he agreed if that was what was in the minutes. It was put to him that he had claimed that he had been prospecting, accepted that the figures were odd and irregular, and said that he had not made fraudulent claims. The claimant again accepted that that was what the minutes had said. It was put to the claimant that he could not possibly have genuinely done 1,500 miles of prospecting. He said that it was possible and it depended where he was. It was put to him then at page 95 he was recorded as saying that he could not give specific information and that he would not give detail. He accepted that he should have put down every inch of mileage that he had done. It was put to him again that he was unable to give any detail and said that he had compliments slips and business cards at home to evidence the prospecting visits he had made. It was put to him that the details that he now says he has would have enabled his employer to check up his alleged prospecting and he accepted that they probably would. The claimant said the whole thing was a shambles. It was put to him that his account was not credible and his response was that it sounded a bit “uncredible.” The claimant accepted that the was given the right of appeal but did not appeal. He blamed his union representative who said that the union would take the appeal on. He said the union had let him down badly. It was put to the claimant that he never previously complained that his union failed to appeal. He accepted this. It was put to

the claimant that if he knew he had evidence of his innocence he should have put it and agreed with this. The claimant said that he was only guilty of not recording every single mile he drove in the car.

- 66 Mr Anderson then switched to the claimant's relationship with Mr Hill. The claimant reluctantly agreed that he had a great working relationship with Mr Hill up to June 2015 and it was put to him that Mr Hill's evidence was not the action of a man out to get him. The claimant was then taken to the notes that he said were contemporaneous. He said he had written page 25 on Thursday, 10 March and then changed his account to say that he had written it either on the Friday or the Saturday when he had got home. It was put to him therefore that he was writing it in full knowledge of the disciplinary proceedings that had started. He said he had already written most of it when he got the disciplinary notice on 12 March and then added the last two lines. It was put to the claimant that he had submitted false mileage. He denied this. It was put to him that when he was asked for an explanation at the time he gave no explanation or no adequate explanation. His response to this was that that was according to the notes. He asked him what he meant. He said that he did not give any explanation.
- 67 The claimant said that he had proof that the notes that he had made were contemporaneous because he had sent copies of them to himself via recorded delivery. I asked him where the recorded delivery proofs of posting were and he said that he did not have them. He said that he wanted to surprise the respondent with the evidence at the hearing. I was therefore somewhat surprised that he had not brought the evidence with him.
- 68 In closing, the claimant said that he felt that he was unfairly dismissed on trumped up charges. Mr Hill had admitted that he used to dismiss other people for the thing that he was dismissed for. He was incredibly upset that he had been dismissed. His dismissal was nothing to do with business mileage. It was an easy way to get people out. Mr Hill had admitted that it was a charge dreamt up to falsify business mileage.
- 69 Mr Anderson submitted that the reason for dismissal had been discussed at the preliminary hearing before Employment Judge Garnon and that reference had been made to **ASLEF v Brady**. The reason for dismissal is a set of facts known to the employer. The Employment Tribunal would have to make a series of findings that Mr Hill used subterfuge to get rid of the claimant.
- 70 Ms Tuplin was approached by the Finance Manager. She investigated and referred the matter to Mr Hill. Mr Hill was not the genesis of the disciplinary process and that is why I can make a finding that the matter relates to conduct. The respondent was entitled to form a view, the subterfuge argument lacks cogency compared with Mr Hill's and Mr Tuplin's cogent and consistent evidence. The documents provided by the claimant only deal with the grievance and the grievance was only raised after the disciplinary process had started. The contemporaneous documents show a good relationship between Mr Hill and the claimant. There is no corroboration of the claimant's claim that the documents he produced were created contemporaneously. In considering the case of **Burchell**, the investigation is thorough. Mileage records were cross-referenced using postcodes and checked on Google Maps. Information

was checked against the claimant's own information. The claimant benefits if personal mileage was recorded as business mileage. The claimant only produced two explanations. The first is that he was prospecting for business, which is not accepted because his mileage discrepancy was more than 1,500 miles. The second explanation was in the minutes of the meeting at page 95. He had stated he could not give specific information and needed to see his records. If he had made a mistake and failed to bring evidence, he could have appealed. He failed to do so. The evidence that he was talking about in the disciplinary hearing was never produced for this Tribunal hearing either.

- 71 On the second leg of the **Burchell** test Mr Anderson invites me to accept the answer to the cross-examination question that where the claimant said that he could see why the respondent dismissed him. The claimant does not admit anything in the minutes but does not offer any explanation. I need to assess the respondent's position at the time of the decision to dismiss, at which point no or no adequate explanation was offered.
- 72 The claimant had caused a £350 loss to the respondent and therefore destroyed the trust that the respondent had in the claimant.
- 73 It was obvious that the claimant had reasonable grounds.
- 74 It was also submitted that notice pay claims should fail because there was evidence of gross misconduct. Every mileage claim was incorrect. They are not only wrong but fraudulent.
- 75 I retired to consider my decision.
- 76 In general terms, I found the evidence of Ms Tuplin and Mr Hill to be largely credible and that they can rely on the accuracy of the documents that they provided.
- 77 I found the claimant to be an unreliable witness and find that he did not meet the required standard of proof to show that the documents he produced as being contemporaneous were such.
- 78 Unfortunately, the claimant appears to have got hold of the wrong end of the stick with this case. He alleged some form of conspiracy or subterfuge on the part of Mr Hill to remove him from his job and replace him with someone else. None of that allegation was proven so I have no hesitation in finding that the respondent has discharged the burden of proof to show the reason for dismissal and that the reason for dismissal was misconduct.
- 79 I find that the respondent has a genuine belief in the claimant's guilt. This was obvious from the evidence of Ms Tuplin and Mr Hill. I find that the decision to dismiss was based upon reasonable grounds because of the evidence of Ms Tuplin and Mr Hill. I also find that the documents provided by Ms Tuplin were evidence of her investigation into the claimant's mileage records and can be relied upon and demonstrate that the four months for which she undertook an investigation showed that the claimant had overclaimed business mileage by more than 1,500 miles at a cost to the respondent of over £350. He offered no explanation or no adequate explanation for the figures at the disciplinary. He said that he had more information at the disciplinary but failed to appeal and failed to produce that information at this hearing. I find that Ms Tuplin's investigation was adequate for the purposes and that dismissal was in a band of reasonable responses.

- 80 The claimant's claim of unfair dismissal therefore fails.
- 81 I find that the claimant committed gross misconduct and that the respondent was justified in dismissing him summarily and without payment of notice. His breach of contract claim therefore fails.
- 82 On delivering my decision, Mr Anderson made an application for a contribution towards the respondent's costs from the claimant in the sum of £1,250 (his brief fee, ex-VAT).
- 83 The application was submitted on the grounds that the Claimant's case had no reasonable prospect and he asked me to look at the cross-examination, particularly the claimant's answer to the last question when he admitted that he could see why the respondent thought he had committed gross misconduct.
- 84 Secondly that the application was based on the claimant's unreasonable conduct and he asked me to look at the cases of **Yerrakalva v Barnsley Borough Council**. The claimant would have known what his own case was and knew what his own problems were regarding the fraud case. He passed the threshold for unreasonable conduct.
- 85 The claimant knew the requirement to file a witness statement and failed to do it.
- 86 I took details of the claimant's current income from him. He earned £31,000 a year which is £800 per month net. From that he had outgoings of £500 per month rent, £135 council tax, bills of £150 per month, broadband at £80 per month, food of £300 or £400 a month and other expenses of £54 per month. He had no savings.
- 87 I considered this case carefully and felt that given the claimant's answer to the final question asked of him by Mr Anderson, I could not see how even he thought his claim had a reasonable prospect of success. If he thought it was reasonable for his employer to think that he had committed an act of gross misconduct, I cannot see how he could possibly think that his claim had reasonable prospects of success. The allegation by the claimant that he was the victim of some form of subterfuge or conspiracy was not backed up by any evidence other than his assertion. The documents that he wished to rely upon I found not to be contemporaneous and not to be reliable. The witness evidence of the claimant himself was vague, inconsistent and unreliable. I therefore find that the claimant's claim had no reasonable prospect of success from the outset.
- 88 On the issue of his unreasonable conduct, I gave the claimant the benefit of the doubt.
- 89 Given a brief analysis of the claimant's means, I find that the appropriate amount for him to contribute towards the respondent's costs is £350.

Employment Judge S A Shore

Date 18 June 2018

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