EMPLOYMENT TRIBUNALS

Claimant: Mr. P E St-Hilaire

Respondent: Keltbray Ltd

Heard at: Croydon **On:** 14 August 2019

Before: Employment Judge Nash

Representation
Claimant: Ms. Forsyth, lay representative
Respondent: Mr. Dobbin, solicitor

Judgment having been sent to the parties on 19 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following dismissal on 14 September 2018 and an ACAS early conciliation period from 3 December 2018 to 17 January 2019, the Claimant presented his claim to the Employment Tribunal on 17 February 2019.

2. The Tribunal sent out a notice of claim and hearing on 27 March 2019 and received an ET3 from the Respondent on 18 April 2019.

3. At this hearing the Tribunal heard from the Claimant on his own behalf. From the Respondent it heard from Mr Good, its Haulage Manager, who made the decision to dismiss.

4. The Tribunal had sight of an agreed bundle and all references are to this bundle unless otherwise stated.

The Claims

5. The only claim before the Tribunal was for unfair dismissal under section 98 Employment Rights Act.

6. A claim for holiday pay had been settled prior to this hearing.

The Issues

7. It was agreed that the Respondent's reason for dismissal was, pursuant to s98(2)(d) Employment Rights Act 1996, a "statutory ban". The reason was that the Claimant did not have an HGV driving licence. For the Claimant to work as an HGV driver without this licence would be against the law.

8. The issues for the Tribunal were accordingly as follows: -

   i. Did the Respondent follow a fair procedure? The Claimant's primary argument was that there had been no disciplinary hearing and that he had not had a chance to put his case before he was dismissed.

   ii. If the Tribunal agreed that the dismissal was unfair, could and would the Respondent have dismissed lawfully in the circumstances? This is often referred to as a Polkey deduction.

   iii. Did the decision to dismiss come within a range of reasonable decisions available to the employer in the circumstances, i.e., the issue of sanction

   iv. To what, if any, extent did the Claimant contribute to any unfair dismissal?

The Facts

<u>Background</u>

9. The employer is a large construction and civil engineering company employing about 2000 staff, of who about 50 are employed at the Claimant's former place of work. It had about twenty sites at the date of the events material to the claim.

10. The Claimant started work for the Respondent as an HGV driver on 4 February 2008. There was no suggestion before the Tribunal that he had, prior to the events material to this claim, anything other than an unblemished record.

11. The Respondent maintains a fleet of about fifty HGVs. The Respondent gave unchallenged evidence that these are very expensive vehicles to maintain and to keep on the road. Mr Good, the Haulage Manager, has a target of keeping no more than two off-road at any one time. The rationale is that the HGVs in effect lose money for the respondent if they are off road. Apart from maintenance, it is unusual for a vehicle to be off road for more than a few days.

12. HGVs are in general allocated to an individual driver. In addition, the Respondent has about four "float" drivers covering for holiday, sickness and other problems. The Claimant had an allocated vehicle.

Events Material to the Claim

13. The Claimant stopped attending work, and hence using his allocated vehicle, at the beginning of May 2017 on the stated grounds that he had a wrist injury. He said that he had suffered this injury about six months before and, although he had continued to work, it flared up later. He provided the respondent with a sick note dated 5 May 2017 for sixteen days on the basis of muscular -skeletal problems. He subsequently provided sick notes that were more precise - referring to an inflamed wrist - on a roughly monthly basis.

14. The Respondent was, at this time, unaware that following a court appearance on 1 May 2017, the Claimant had received a nine-month drink-driving ban on 2 May 2017 running to 1 February 2018.

15. The Claimant stated in his ET1 that he did not tell the Respondent of the ban because he thought that the ban would be over before his wrist had healed. However, this statement was inconsistent with the fact that none of the sick notes were for longer than about a month.

16. The Tribunal found that the reason the Claimant did not tell the Respondent about the ban was that he was, as he admitted, ashamed of what had happened and he did not want to lose his job.

17. The Respondent found out, in effect, "on the grapevine" that the Claimant had been banned for driving. The respondent telephoned the Claimant who admitted what had happened.

18. The Claimant continued to provide sick notes but there was a dispute between the parties as to when this stopped. The Tribunal had sight of a final sick note on 4 December 2017 but it was unclear if this was received by the respondent.

19. There was also some dispute about how much contact there was between the claimant and respondent at this time. The claimant said that he rang Mr Good on a number of occasions to ask about work; the respondent told him that there was no work available. However, Mr Good said that it was him who chased the claimant. In the bundle the Tribunal only saw messages from Mr Good to the claimant and not the other way around.

20. The claimant's driving disqualification came to an end in February 2018. However, he did not re-apply for a licence, either beforehand or when the ban expired. The reason he gave was that he was still not fit enough to resume driving because of his wrist injury. In addition, the respondent had told him that there was no work for him, in that is there was no vehicle available for him to drive.

21. According to a document from the DVLA that the Claimant did not dispute, a banned driver may re-apply for his licence fifty-six days before his ban expires. Therefore, the Claimant could have re-applied, all things being equal, in late 2017, so as to have his licence ready when his ban expired, or at least very soon after.

22. In fact, the Claimant applied for his licence in April 2018. To do so, he was required to submit a medical report. This was due to his age, and was nothing to do with his wrist.

23. The claimant received his new licence on 11 May 2018. It was agreed that the Claimant contacted the Respondent after 11 May and was told that there was no work available. Then the Respondent contacted the Claimant in August to say a vehicle was available. It was arranged for the Claimant to attend the Respondent on 31 August 2018 in order to start work.

24. However, the Respondent checked the Claimant's new licence and found that the HGV component was not included. Unfortunately, the claimant had failed to notice that the new licence did not include the necessary HGV component and, accordingly, this licence would not permit him to work for the Respondent - or anyone else - as an HGV driver. The Claimant had no car so the HGV component was the sole reason to get the licence.

25. The Respondent gave the Claimant two weeks to remedy this and to obtain a valid licence.

26. The Claimant duly contacted the DVLA. The claimant said that the DVLA denied having any record of the medical report that he said he had sent to them in April.

27. Mr Good said that he was aware of this problem with the medical report on 31 August. The Tribunal was unsure that this was right, as the Claimant's evidence was that he himself was not aware of the medical report problem until he contacted the DVLA following the meeting on 31 August.

28. In order to obtain a further medical report, the claimant had an appointment with his GP on 3 September. He then made the application for the HGV component of the driving licence on 10 September 2018. That day he emailed the Respondent to say that he could prove that he had sent the medical report with the original application and that he had re-applied on 5 September. It was accordingly not clear to the Tribunal whether the re-application was made on 5 September or 10 September.

29. In any event, upon the expiry of the Respondent's two weeks deadline, the Claimant had not received an HGV licence. Mr Good, in his own words, was "sore" that the Claimant had not been open with the respondent that he had been disqualified, and now, in the view of Mr Good, had not made reasonable efforts to get his licence back.

30. Mr Good assumed that the failure over the licence in May might be due to the medical requirement because of the Claimant's age. Mr Good said that he had never had any employee lose their licence for drink driving in his fourteen years employment with the Respondent.

The Dismissal

31. After consulting with Human Resources, Mr Good decided that, in his own words, "enough was enough" and he terminated the Claimant's employment without a hearing on 15 September 2018.

The Appeal

32. The Claimant appealed against his dismissal. There was an appeal hearing before the Managing Director on 15 October 2018. It was unchallenged evidence that this hearing was brief - no more than fifteen minutes - and this was consistent with the unchallenged minutes of the appeal hearing.

33. At the appeal hearing, the Claimant said that he had not told Mr Good about the drink-driving ban originally because he was off sick at the time. However, he gave an otherwise accurate history of what had happened, including how he and Mr Good discovered the problem with the licence on 31 August.

34. He told the appeal that he was still waiting for an HGV licence from the DVLA. After a brief adjournment, the claimant was informed that the decision to dismiss was upheld.

35. The Claimant obtained his HGV licence on 4 November 2018.

The Applicable Law

36. The applicable law is found at section 98 of the Employment Rights Act 1996 as follows

> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
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> (a)the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2)A reason falls within this subsection if it—
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> …
>
> (d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> …
>
> (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.

Submissions

37. Mr Dobbin for the Respondent had prepared a written skeleton argument to which he spoke briefly before the Tribunal. Ms Forsyth for the Claimant made a brief oral submission.

Applying the Law to the Facts

38. It was not in dispute that the statutory ban existed. It was not disputed that the Claimant was not able to work as an HGV driver without the necessary HGV component on his licence. Neither was it disputed that the Respondent had dismissed the Claimant for the potentially fair reason that the claimant could not continue to work in the position that he held without contravention of a duty or restriction imposed by or under an enactment.

39. The Tribunal firstly considered whether the Respondent had followed a fair procedure. The question for a Tribunal when making this determination is not whether the Tribunal itself thinks is a fair procedure. A Tribunal may not substitute its view of what constitutes a fair procedure for that of the employer. What a Tribunal must do is ask itself is whether the procedure adopted by this employer in these circumstances comes within a range of procedures available to a reasonable employer.

40. The Claimant's case was put in a straightforward manner - this was an unfair procedure because there was no dismissal meeting. The employee had no opportunity to make any representations before the decision to dismiss was made.

41. The Tribunal agreed with the Claimant that the case law on section 98(2)(d) makes clear that, simply because a statutory ban is made out on the facts, this does not in itself render any dismissal fair. It depends on the circumstances.

42. Accordingly, the Tribunal finds that dismissing an employee due to a statutory ban without a hearing at which he had an opportunity to save his job renders the dismissal procedurally unfair.

43. The Tribunal went onto consider whether this unfairness may have been cured upon appeal. This can be a difficult matter to judge because, once a dismissal decision has been made, the appeal necessarily takes place in a context where an employee has already been dismissed, rather than the context before any decision, when the context should be neutral. To put it another way, the "momentum" is with dismissal, rather than some other course of action.

44. This appeal, according to the unchallenged minutes, did not concentrate on other sources of work or re-deploying the Claimant. The Claimant did not make this case at the appeal. However, it is difficult to know how the claimant would have acted in a dismissal meeting when he was trying to save his job, as opposed to arguing about the fairness of a decision to dismiss which had already been implemented.

45. The appeal hearing was brief and it did not consider all the potentially relevant circumstances. In the opinion of the Tribunal the appeal did not "cure" the flaw in the procedure – that there was no dismissal meeting. Accordingly, the procedure adopted by the respondent fell outside of the range of procedures available to a reasonable employer in the circumstances and the dismissal was procedurally unfair.

46. The Tribunal went on to consider whether it should make a deduction to any award pursuant to the House of Lords decision in *Polkey v AE Dayton Services Ltd 1988 ICR 142.* The question for the Tribunal is that, had the Respondent carried out a fair procedure, would it and could it have lawfully dismissed the Claimant at the time.

47. The Tribunal applied the guidance of Elias P (as he then was) in In *Software 2000 Ltd v Andrews and ors 2007 ICR 825*. When considering a Polkey deduction, in seeking to determine what might have been, a tribunal must have regard to all relevant evidence: -

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

48. The Tribunal finds that Mr Good would have dismissed the Claimant had there been a meeting for the following reasons. His evidence was clear and unambiguous. He was frustrated and, in his own words, "sore" that the Claimant had not originally admitted to the disqualification and then things had only got worse when he had failed to notice that he had not obtained the correct licence. As he said "enough was enough". Any dismissal hearing would have been implemented almost immediately.

49. So, the Tribunal goes on to consider whether Mr Good could have dismissed the Claimant lawfully if there had been a dismissal hearing.

50. This takes the Tribunal to the question of sanction. The legal test is one of "reasonable responses". A Tribunal must decide whether the decision to dismiss the Claimant would have come within a range of decisions available to a reasonable

employer in the circumstances. Again, a Tribunal must not substitute its view of what it would have done in these circumstances.

51. There was no suggestion that the Claimant could satisfactorily carry out his duties without a driving licence. The Tribunal finds that driving was an essential part of his job.

52. Secondly, the Tribunal considered whether retaining the Claimant in employment would result in dislocation and inconvenience and if so for how long. The disqualification from driving was for nine months. However, by the time of the dismissal, the Claimant had been away from work for over fifteen months. Some of that time was due to the respondent's not having a vehicle free for the claimant and some was due to the claimant's delay.

53. The tribunal saw the context of the situation as relevant. Primarily due to the claimant's disqualification, the respondent had lost a driver, without notice, in May 2017. The respondent did not know how much longer it would have to wait from 31 August before the claimant could return. We know with hindsight that it took a further two months, but no one knew that at the time.

54. Essentially the respondent, when making a decision at a dismissal hearing mid-September 2018, would have considered an employee who had been unable to work for over fifteen months (not all of it his own doing) and would remain unable to work for at least one month - and possibly more.

55. This was in the context of having a vehicle set aside for the claimant that, in effect, needed a driver. The tribunal finds that the respondent had a reasonable degree of flexibility because of the scale of its operation and indeed had spare drivers. However, having allocated a vehicle to the claimant it was going to have to find another driver to step in, or to take on a new employee (of whom there was a ready supply).

56. The Respondent had, in effect, made arrangements to get the Claimant back to work and then, as Mr Good saw it, the Claimant had let them down.

57. Thirdly, the Tribunal considered whether there was another job to which the employee could be re-deployed. The parties did not provide a great deal of evidence on this. The Claimant said that other drivers had been re-deployed but could not point to any examples. Mr Good said that there was a possibility of a traffic marshalling course but the Respondent was not prepared to spend the money on this, as it was a three-day course. There were no other vacancies.

58. In determining if the decision to dismiss comes within a reasonable range, the Tribunal viewed all the evidence holistically.

59. In the view of the Tribunal, the factors in favour of the dismissal coming within a reasonable range were that the Claimant was ultimately responsible for situation. He had committed a criminal offence. The tribunal noted that the fact that he was guilty of a criminal offence is not in itself determinative of the fairness of the dismissal, as this was not the reason for dismissal.

60. Secondly, the Claimant had been, if not dishonest with the respondent, at least deeply disingenuous about why he had to stop working in May 2017. This had an inevitable impact on the relationship of trust between employer and employee.

61. Further, he did not re-apply for his driving licence in good time so as to be available for work once the ban came to an end. In fact, he did not re-apply until several months after the ban came to the end. He did not provide any satisfactory explanation for the delay.

62. Further, when he did obtain his licence, it did not permit him to start work. The Tribunal does not know where the fault lay for this. However, had the respondent not checked (as it was required to do), the claimant could have been committed a further criminal offence by driving a HGV. This resulted in further delay.

63. Finally the claimant could not be re-deployed and driving was essential to his work.

64. In the view of the tribunal, the respondent could have chosen to wait for the claimant to obtain a licence, and then wait for a vehicle to come free. At the time of a dismissal meeting in early September, the respondent knew that it was very likely that the claimant would in due course be able to return to work. The Respondent knew what the problem was - the medical report - and it had no reason to believe that he would not get the licence in due course.

65. The Respondent did not give the Claimant a long time to resolve the situation. It was not disputed that he was a long-standing employee with a previously unblemished record.

66. The decision to dismiss was arguably harsh. However, the Tribunal is not permitted to substitute its view for that of the Respondent, it can only decide if the Respondent's decision came out with a range of reasonable responses. In the view of the Tribunal, the decision to dismiss comes within a range of reasonable responses.

67. Accordingly, had the Respondent followed a fair procedure and held a procedurally fair disciplinary meeting with the Claimant, it could have dismissed the Claimant lawfully. To find otherwise would be to substitute – impermissibly - the opinion of the Tribunal for that of the employer.

68. Accordingly, the tribunal makes a Polkey deduction of 100% to the compensatory award to reflect the fact that, had the respondent carried out a fair procedure when dismissing the claimant, it could and would have dismissed him lawfully in any event.

69. The final issue was that of contribution. This was otiose in the case of the compensatory award.

70. The Tribunal considered whether the claimant's conduct before dismissal made a reduction to the basic award just and equitable pursuant to section 122(2) Employment Rights Act as follows-

> (2) Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

71. The Tribunal applied the approach under section 122(2) set out by the Employment Appeal Tribunal in *Steen v ASP Packaging Ltd 2014 ICR 56, EAT*.

72. The Tribunal found that the following conduct (as set out in more detail above) was blameworthy – the Claimant's having committed a serious criminal offence, his not being honest and straightforward with the respondent in May 2017, his failure to re-apply for his driving licence in good time, and his failure to check the licence when it arrived.

73. In the view of the Tribunal, this did amount to significant blameworthy conduct and it was just and equitable to make a 75% reduction to the basic award in the circumstances.

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Employment Judge Nash
Dated: 3 October 2019