EMPLOYMENT TRIBUNALS

Claimant: Mr J Harrower

Respondent: DP Cold Planing Limited

Heard at: Manchester **On:** 27 September & 15 November 2019

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mrs J Ferrario (Counsel)
Respondent: Mr M Cameron (Consultant)

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant was unfairly dismissed by the respondent. The complaint of unfair dismissal is therefore upheld.

2. The respondent failed to comply with the ACAS code and it is just and equitable to increase any award by 10%.

3. It would be not be just and equitable to reduce any relevant award due to the principles outlined in *Polkey*.

4. The claimant has been paid for all pay due in relation to annual leave, and accordingly his claim for additional payments due on termination for annual leave is not upheld.

5. The respondent did not make any unlawful deduction from wages due to the claimant.

REASONS

Introduction

1. This case is primarily a case about whether the claimant was dismissed on 23 January 2019, or whether he resigned and, if he did so, whether it was constructive dismissal.

2. The claimant was employed by the respondent as an HGV driver. The claimant primarily worked as a driver of a low loader vehicle. He was first employed from July 2016 until 7 October 2016 when he was dismissed following some damage to one of the respondent's vehicles. He was re-employed from 23 January 2017. His employment ended on 23 January 2019 following a conversation between the claimant and Mr Anthony Prescott, the respondent's managing director.

3. The claimant contends that he was not paid sums that were due to him. He alleges that he was dismissed by Mr Prescott in the conversation on 23 January. If he was not dismissed he contends that the respondent fundamentally breached his contract by: not paying him sums due; or by the words that were used by Mr Prescott which he alleges amounted to a breach of the duty of trust and confidence.

The Issues

4. The issues were confirmed at the start of the hearing and, are as follows:

   (1) Was the claimant dismissed?

   (2) (If the claimant was not dismissed) whether the claimant resigned in circumstances which amounted to a dismissal in accordance with section 95(1)(c) of the Employment Rights Act 1996? That is: was there a fundamental breach of contract; whether the claimant affirmed the contract; and whether the claimant resigned in response.

   (3) Was the claimant dismissed for a fair reason? The respondent relies upon conduct and/or some other substantial reason.

   (4) If so, was the dismissal fair in all the circumstances?

   (5) Did the respondent fail to comply with the ACAS code, if the claimant was dismissed, and should that alter the remedy due?

   (6) Would the claimant have been dismissed in any event had a fair and reasonable procedure been followed, and should any award be reduced to reflect this possibility (*Polkey*)?

   (7) Did the respondent make unlawful deductions from wages paid to the claimant (and the amounts claimed were particularised at pages 35-36 of the bundle)?

(8) Did the respondent fail to pay the claimant the sum due in respect of accrued but untaken holiday? The respondent has paid the claimant for one day accrued but untaken, but denies a second day is due.

5. At the start of the hearing there had been an issue of whether the respondent had failed to provide written reasons for dismissal in response to a request made, however that claim was ultimately not pursued.

The Hearing

6. The claimant was represented by Mrs Ferrario, counsel, and the respondent was represented by Mr Cameron, a consultant.

7. The tribunal heard oral evidence from: the claimant; Mr Anthony Prescott the respondent's managing director; and Mr Gareth Watkins the respondent's general manager. The respondent had not provided the claimant with a statement for Mr Watkins when witness statements previously and only produced a witness statement on or about the first day of hearing. However, as Mr Watkins evidence was clearly relevant to the issues in the case, he was allowed to give evidence and the respondent was allowed to rely upon his statement.

8. A bundle was produced for the hearing (ultimately with 411 pages), including documents relevant to remedy. Many of these pages were extracts from the claimant's diaries, timesheets and tachograph records. In practice there were very few documents which were key to the case. When the case resumed hearing on the second day, the respondent produced additional pages which showed information about telephone calls made by Mr Prescott. The claimant objected to these documents being produced at such a late stage and without a formal application. The documents were admitted as they were relevant, but the claimant was recalled to give evidence in the light of the additional documents.

Findings of fact

2016 dismissal

9. The claimant was first dismissed by the respondent in October 2016 after damage was caused to a vehicle. The claimant's evidence was that he was called into the office by Mr Watkins and dismissed on the spot without notice. Mr Prescott's evidence was that the claimant was suspended and there was an investigation by Mr Watkins, following which he was dismissed. Mr Watkins denied that the claimant was dismissed as described. There was no documentation provided to the tribunal which evidenced any process having been followed in 2016. In answering questions about this, Mr Watkins claimed that the respondent had not realised that the documents were required for the hearing. Mr Watkins evidence was given on the second day of hearing and after the respondent had been allowed to produce additional documentation that morning as described.

10. The 2016 dismissal had limited relevance to the proceedings. It was contended by the claimant that it demonstrated that the respondent did not follow procedures. However (for reasons explained below) it is relevant to the tribunal's

consideration of Mr Prescott's evidence. The tribunal finds that the 2016 dismissal did not follow an investigation or a full procedure. Had there been documents which recorded an investigation and a process, they would have been included in the bundle. The 2016 dismissal was detailed in the respondent's grounds of resistance, so it is clear that the respondent did consider it relevant to the issues in the claim. If documents existed and had been omitted from the bundle in error, the respondent could have produced them prior to or at the second day of hearing, as they did with other documents. As they did not do so, the tribunal finds that no such process was followed.

Terms and conditions of employment

11. Terms and conditions of employment (and related documents) were included in the bundle, which had been signed by the claimant on 23 January 2017 when he was re-employed by the respondent (pages 44-57). They stated that: the claimant was contracted to work a 50 hour week; the respondent could require the claimant to work reasonable overtime hours; and any additional hours were to be paid at time and a half. The statement includes a standard section detailing the respondent's disciplinary and grievance procedures.

12. The claimant's representative placed some emphasis on a statement in the terms and conditions (at page 47) which said that the claimant "*will carry out general duties for the efficient running of the works, as may be directed by management and not limited to a particular task or skill*". It was submitted that this required the claimant to undertake tasks and overtime which he identified as being for the efficient operation of the respondent's business (even where he had not been asked to or authorised to do so), and therefore the respondent was obliged to pay the claimant for overtime undertaken when doing so. The tribunal does not find that the inclusion of these words in the contract does obligate the respondent to pay the claimant for any time spent on tasks which he identified and undertook, where there was no request, approval or authorisation for him to did so.

13. In respect of holidays, the terms and conditions confirm that: the holiday year is the calendar year; and the claimant is entitled to 20 days plus 8 statutory holidays each year.

14. In a separate declaration signed by the claimant on 23 January 2017 (page 56), upon which the respondent placed reliance, the claimant confirmed that he was not currently engaged in any work outside his commitments to the respondent and that he undertook to inform it immediately if this situation changed at any point within his employment. This declaration was linked to the respondent's calculation of working time under the road transport working time regulations.

Complaints and issues

15. In his statement Mr Prescott made reference to there being many complaints from other members of staff about the claimant's conduct and attitude. There was no documentation whatsoever in the bundle which corroborated this part of Mr Prescott's statement. When questioned, Mr Watkins accepted that the claimant was a good employee. He described, when asked about the claimant's maintenance of

his vehicle, that it was very well kept and that you could eat your dinner off it. The claimant was also given a good rating in his appraisal (on the scale poor, fair, good, excellent - when only one employee of the respondent was given an excellent rating) which is not consistent with Mr Prescott's statement. When Mr Prescott was asked about this, his answers were evasive and he spent some time referring to a text when there was no text (or other document) identified in the bundle which supported this evidence. The tribunal finds that there were no issues about the claimant's conduct or attitude, as described.

16. What is not in dispute is that the claimant did contend on a number of occasions that he had not been paid for the hours that he worked. He was also unhappy with the pay rise which would have resulted from his good appraisal. In April 2018 the claimant started looking for other work and discussed leaving the respondent's employment.

Change to payment

17. From 3 April 2018 the respondent changed the way that drivers were paid. The claimant's evidence was that he was informed about this in May 2018. This resulted in a pay increase for all drivers including the claimant. Mr Prescott met with representatives of the drivers and introduced a new pay scheme. The rates which applied were contained in a document at page 62. The respondent moved from paying based on actual hours worked, to paying basic pay for shifts undertaken irrespective of how long the shift actually lasted. Overtime was still paid where the time worked exceeded the usual shift length. This change was partly introduced as a response to unhappiness with the review process (and meant that the proposed pay rise following that review was never implemented). The changed pay rates meant that the claimant's earnings potential went up significantly and he was happy to stay. Mr Watkins' evidence was that, after the change, the claimant was the only person who raised issues regarding pay. He accepted that this was a factor in Mr Prescott's response to the claimant in January 2019.

The claimant's wages

18. The claimant did challenge the pay which he received following the change. Prior to the change he had each week rung into the office to tell them what hours had been worked, and it appeared from the evidence that he had always been paid based upon the hours he provided. The claimant's evidence was that this had included occasions when he had undertaken weekend work of his own volition and without prior authorisation, when he was paid for the hours claimed. If this occurred, the respondent appeared not to have been aware that this is what the claimant was claiming.

19. In the bundle was an exchange of emails between the claimant and Mr Prescott (pages 78-80). The claimant's evidence was that he raised the issue in April 2018, but it was only addressed by Mr Prescott in July 2018. The emails show Mr Prescott explaining why the claimant was not being paid for the full hours he claimed for April 2018 and the claimant responding to explain why he thought he was due what he had claimed. The emails record that there had been a meeting and

telephone calls between Mr Prescott and the claimant before the emails were exchanged, and Mr Prescott confirmed in evidence that this had been discussed at the time. Mr Prescott's email identified that the claimant had been underpaid for some elements, but overpaid for others, resulting in an £82.50 overpayment. The claimant's email stated that he believed he had been underpaid by £195.50. The claimant did not take this issue further.

20. An issue upon which the tribunal heard evidence was about how time was recorded and, in particular, the claimant's use of his digicard. The claimant's evidence was that he regularly removed the digicard from the reader and undertook work (including driving) whilst the digicard was removed. This meant that the claimant was not complying with the legal requirements for working hours or rest breaks. The claimant's evidence was that if he had done what the law said he was supposed to do, he would never have got the job done. He stated to the tribunal that he had broken the law every day and appeared to be unconcerned either by the fact that he had done so, or that he was admitting doing so to the tribunal.

21. Mr Prescott's evidence was that when he met the claimant in July 2018 he told him that if he worked during a stop period he would not be paid for it.

22. Included in the bundle of documents (pages 35 and 36) were further particulars of the unlawful deductions claim. This recorded the claimant's view that he had been underpaid a total of £1,302.38 for the period from 2 April 2018 to 21 January 2019.

23. In the bundle of documents was a diary which the claimant said he had kept, to keep an accurate record of his working hours. His evidence was that this was more accurate than the respondent's tacograph records because of his non-compliance with the tacograph regulations. The diary entries had not been provided to the respondent when the claimant was employed, but he had used it as a basis for the requests he made for payment from the respondent. Save for the emails in July 2018 about the hours worked in April (and one other email), the claimant's evidence was that he did not document these requests or include them in an email, he would simply telephone the respondent and inform the person in the office of the hours he believed were due to be paid.

24. In cross-examination, the claimant was taken through the claims which he made for underpayment with reference to his diary and the respondent's records. A number of errors were identified in the claimant's own record in his diary including: he claimed for the full time worked without deducting unpaid breaks from his totals, whilst the claimant accepted that he was not entitled to be paid for such breaks; and on one occasion he had been paid for 25 hours for a working day, but had still claimed that he was due additional pay for that date.

25. The claimant's statement detailed the sums which he said were due from the respondent and which he said meant that there had been unlawful deductions from wages. All of this evidence was based upon the claimant's diary. This document was hard to read, was not a document which had been provided to the respondent at the time, the accuracy of it could not be corroborated, and in cross examination errors

were identified in what had been recorded in it. The claimant's stated indifference to complying with the law and his willingness to alter official records regarding his driving and working time, also undermined his credibility when relying upon his diary as a definitive record. On this basis and in the absence of any other evidence to support the diary provided by the claimant, the tribunal does not find that the claimant has proved that he was entitled to any payment for wages which had not been paid by the respondent.

20 January

26. On Sunday, 20 January 2019 the claimant went to the respondent's yard and spent some time manoeuvring vehicles. The claimant confirmed in his evidence that: he was not asked to do this; he decided to do this himself; and no authority whatsoever was given for him to do so. He says it took four and a half hours and he claimed he should have been paid £87.75 as overtime as a result. The claimant did not use his digicard when undertaking the moving of vehicles. The claimant says that the work was required so that he was not late on site on the Monday morning, something which the respondent disputes (and Mr Prescott disputed in evidence). The claimant claimed overtime pay for the work undertaken. The tribunal does not find that the claimant was entitled to be paid for this time.

23 January

27. On 23 January 2019 the claimant realised that he had not been paid what he had claimed for the Sunday work. He described himself as being annoyed about this. He spoke to a member of the administration staff who told him that Mr Prescott had knocked the work back and that he should speak to him.

28. There was a conversation between Mr Prescott and the claimant about this. There was some common ground between the parties about what was said in this conversation. It was agreed that Mr Prescott told the claimant to park and "*f*** off*". However, there were fundamental difference between the parties about precisely what else was said and how the conversation occurred.

29. The claimant's evidence was that when he arrived back at the respondent's premises, Mr Prescott stormed out of his office and spoke to the claimant through the window of his vehicle saying "*Park that truck over there, get your gear and f*** off*". The claimant said he remained calm and said only "*no problem I will gladly do that*".

30. Mr Prescott's evidence was that he telephoned the claimant who was very bad tempered and aggressive towards him. He said that he explained to the claimant that the company did not pay any unauthorised overtime and that he knew that. He said the claimant accused him of having stolen money from the claimant the previous year and said he was doing it again. Mr Prescott's own evidence was that he told the claimant "*he was nothing but a greedy b******" and he then told him "*that if he was not happy he should drive back to the depot, park up and f*** off*". He says that some time later at the depot he spoke to the claimant again and asked the claimant if he had decided to go, to which he said "*yes*".

31. Mr Prescott's statement said that the words he used were completely out of character. In evidence, Mr Prescott said that he had never used those words to anyone else. Mr Watkins' evidence was that he had never heard Mr Prescott use such terminology to anyone else or to himself, and that what was said should never have been said in the manner it was.

32. The only documentary evidence available was a record of calls made from Mr Prescott's number (page 410) which showed a telephone call to the claimant's number lasting 55 seconds. The claimant denied that this call was made and it was suggested on his behalf that this may have simply recorded Mr Prescott leaving a message (although there was no evidence from anyone that a message had been left). The time of the call appeared to fit with the times recorded on the tacograph record for the claimant, which showed him at rest at that time (page 393).

33. The tribunal finds that the initial conversation between the claimant and Mr Prescott did take place by telephone, as recorded at page 410. However, the tribunal does not find that the conversations occurred exactly as described by either the claimant or Mr Prescott.

34. The claimant's account is not accepted as: he described a conversation in person; and his account of his own response to what was said to him is not considered by the tribunal to be plausible, having heard evidence from the claimant.

35. Mr Prescott's full account is not consistent with the length of the call recorded in the telephone record, it would have taken much more than 55 seconds to have had the discussion he details. There is no reason why the claimant would have accused Mr Prescott of stealing money, that is a very different allegation to saying that he was due pay. As explained in this judgment, the tribunal finds that the evidence included in Mr Prescott's statement appears to endeavour to include elements which suggest adherence to good employment practice, when they did not in fact occur. Accordingly, the tribunal finds that Mr Prescott did say the words stated by him, but as part of a heated discussion rather than in the context of the discussion he describes (and it is not found that a second conversation took place as Mr Prescott described).

36. After this conversation, both parties agree that the claimant began to empty his belongings out of the vehicle which he had been using. It is also agreed that the claimant had a conversation with Mr Watkins when he came out of the office and spoke to the claimant by his vehicle. Both Mr Prescott and Mr Watkins gave evidence that they had spoken to each other following Mr Prescott's conversation with the claimant, and that Mr Prescott had simply told Mr Watkins that the claimant had resigned and did not tell him (in this conversation) exactly what he had said.

37. The claimant's evidence is that he asked Mr Watkins "*is that me sacked*" and Mr Watkins replied "*looks that way..that's you finished*". Mr Watkins evidence was less certain as his statement makes clear that his account is only something along the lines of what was said, being "*Looks like you're off then, is it?*" to which he records the claimant as having responded "*I'm not putting up with his stealing money*

off me anymore". The tribunal finds that a conversation took place and Mr Watkins' account of what he said is preferred to the claimant's, however that wording does not assist the tribunal in determining the question of dismissal or resignation as it is ambiguous about whether the claimant had resigned or been dismissed (and based upon what he had been told Mr Watkins believed the claimant had resigned). In the light of Mr Watkins own uncertainty, no reliance is placed upon the wording he records the claimant as saying in response.

38. The claimant's evidence when questioned was that under no circumstances did he resign. He explained that there was no reason why he would resign in the light of the amount of salary which he was earning. He had brought a house near to the respondent's yard shortly before Christmas 2018 and he said he would not have resigned. The tribunal accepts the claimant's evidence on this.

Subsequent events

39. The claimant's evidence was that instructions about where to go and what to do were usually sent to him by the respondent the night before each day upon which he worked. Examples were provided to the tribunal (pages 86 and 87). No further instructions were sent to the claimant on or after 23 January 2019.

40. No letter was sent to the claimant confirming either that he had been dismissed or that he had resigned. Mr Watkins' evidence was that letters would usually be sent to someone who had resigned and he regretted that it had not happened in this case. Mr Watkins explained in evidence that he found out about the words that Mr Prescott had used later on 23 January (after his conversation with the claimant) when Mr Prescott was quite upset about using the terminology that he had (he described Mr Prescott as having felt that he had let himself down). Even having been told what Mr Prescott had said, Mr Watkins did nothing about it and did not send a letter to the claimant. It was submitted for the claimant that the absence of a letter confirming resignation evidenced that the respondent did not believe that the claimant had resigned and the tribunal accepts and agrees with that submission. Whilst Mr Watkins is not an experienced or qualified HR person, he was responsible for HR at the respondent and the tribunal's view is that if (after speaking further to Mr Prescott) he had believed that the claimant had resigned he would have confirmed that in writing.

41. The claimant said that he was under no illusion that he had been dismissed. He had given his phone and keys to Mr Watkins. The following day he phoned the office to make sure he was paid notice and holiday pay. This was a further opportunity for a letter to be sent to the claimant confirming his resignation, had the respondent genuinely believed he had resigned.

42. The claimant sent Mr Prescott a letter appealing against his dismissal (page 325). That was a brief letter but said "*I think it was totally wrong what you said and how it was done*". Accordingly, he clearly raised a complaint about the words said to him – and his letter suggests that as at the time of his letter he thought that he had been dismissed.

43. In his statement, Mr Prescott said that he told Mr Watkin that as he had been directly involved in the circumstances surrounding the claimant's resignation that he should not be involved in the investigation. Mr Watkins was asked to investigate and according to Mr Prescott's statement duly investigated. Mr Watkins evidence was rather different. When asked in questioning, Mr Watkins said that Mr Prescott told him here's a letter, deal with it. Mr Watkins clearly undertook no investigation whatsoever. On his own evidence he did not ask Mr Prescott about what had occurred, nor did he follow any procedure. Mr Watkins evidence contradicts what is said in the statement of Mr Prescott. The tribunal finds this part of Mr Prescott's statement to be misleading. As with the evidence given in relation to the 2016 dismissal, he appears to suggest that a process was followed which did not exist. This was found to impact upon the credibility of Mr Prescott's evidence.

44. Mr Watkins sent a letter to the claimant on 14 February (page 326). That letter was extremely brief. It said that the claimant was not dismissed from employment, and said he chose to leave. It also said that had he remained, he would have been subject to an investigation into his conduct and then would have potentially faced disciplinary action. The letter did not describe what this conduct was. Mr Watkins' evidence was that the first time that he had been told that the claimant believed he had been dismissed was when he received his letter. The tribunal does not find this evidence to be credible. It is perhaps surprising that, in the light of what Mr Prescott had said to the claimant, this letter did not address that in more detail or respond to the complaint that what had been said to the claimant was wrong. However, it is simply inconceivable that had Mr Watkins not previously been aware of the possibility that the claimant believed he had been dismissed, that he would not have investigated this with Mr Prescott and/or addressed it in this letter. The response sent was cursory and did not address at all what was being said by the claimant, including whether what had been said to him by Mr Prescott had been inappropriate.

Whether the claimant would have been dismissed in any event

45. The tribunal does not find that the claimant could or would have been dismissed for the way in which he spoke to Mr Prescott, even had he remained in employment after 23 January. There was no evidence that the claimant had said anything in that conversation which could have resulted in dismissal.

46. During the claimant's holiday from the respondent over the Christmas period 2018, the Claimant worked for Amazon. The claimant did not inform the respondent about this. This was in breach of the provision in the documents signed by the claimant when he returned to the respondent's employment, highlighted above.

47. It was accepted by Mr Watkins that the claimant working for Amazon was not in competition with it. Mr Watkins emphasised the importance of drivers taking the breaks they needed to. It is certainly the case that the claimant was indifferent to the rules and requirements relating to driving and working time. Whilst it is likely that the respondent would have raised this with the claimant had it become aware of it whilst he was still employed and might even have given him a formal warning, the tribunal does not find that the claimant would have been dismissed for it.

The Law

48. The relevant legal principles that the tribunal must apply were not substantially in dispute. The claimant bears the burden of proving that he was dismissed. If it is accepted that the claimant was dismissed, the respondent bears the burden of proving, on a balance of probabilities, that the dismissal was for misconduct or some other substantial reason. For misconduct, if the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

49. In conduct cases, when considering the question of reasonableness, the tribunal is required to have regard to the test outlined in *British Home Stores v Burchell*. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

50. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach. The tribunal must ensure that it does not substitute its own view for that of the employer.

51. The tribunal is required to take into account the ACAS code of practice on disciplinary and grievance procedures. The claimant's representative particularly emphasised the code's provision that a full investigation should take place (the code in fact describes the requirement as that employers should carry out any necessary investigations).

52. For there to be a dismissal the employer must communicate to the employee that it is terminating the contract under which the employee is employed. Communication of dismissal may be by express words (whether oral or written) or it may be by words or deeds which convey that the employer is dismissing. Whether it is a communication of dismissal must be determined by the tribunal in the light of the wider context and all the facts of the particular case. A termination can be communicated by conduct as well as words, but whether a termination has been

communicated is to be judged by how the words or conduct would be understood by the objective observer.

53. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that the Tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the Tribunal that the employer has unreasonably failed to comply with the relevant code of practice. Consequently, the Tribunal may vary any award for unfair dismissal if it considers that there has been unreasonable non-compliance with the ACAS Code on Disciplinary and Grievance Procedures

54. Each of the representatives made oral submissions to the tribunal at the end of the hearing and the content of those submissions has been considered in reaching this judgment. At the start of the hearing the claimant's representative produced an opening note which was also considered. The only specific case referred to by either party was *Assamoi v Spirit Pub Company (Services) Ltd* which the claimant's representative handed up and argued should be distinguished from the facts of the current case.

Discussion and Analysis

Unlawful deduction from wages

55. The respondent did not have any obligation to pay the claimant for the work undertaken on 20 January and the section of the contract referred to does not impose an obligation on the respondent to pay the claimant for work undertaken of his own volition.

56. As confirmed in the section on the facts above, the tribunal finds that the respondent did not make any unlawful deduction from wages due to the claimant.

Dismissal or resignation

57. The tribunal finds that the words used by Mr Prescott to the claimant in the conversation of 23 January do amount to a dismissal. Those words being said to an employee by the managing director of the business in such circumstances are clearly objectively capable of being a dismissal. Where it followed the managing director telling the claimant in abusive terms that he was greedy and was part of a statement where he was telling him to return to the depot and park up, that is found to be a clear and unequivocal dismissal. The claimant certainly took it that he had been dismissed, and that appears to have been corroborated by the surrounding circumstances and the absence of any instructions for work for the following day.

58. Even had it not been found that the claimant was dismissed by what was said by Mr Prescott, the tribunal would have found that the respondent's managing director speaking to the claimant in those terms was a fundamental breach of the claimant's contract of employment, breaching the implied term/duty of trust and confidence.

59. In the respondent's submission it was argued that this was the construction industry where this type of language is commonly used. There was no evidence to support that this kind of language was commonly used at the respondent. The evidence of Mr Prescott and Mr Watkins was very clear that this was a unique event and that Mr Prescott did not speak to employees using this type of language. Even had the respondent provided evidence of this type of language being used by others on the sites attended by the claimant (and no such evidence was provided), this would not have impacted upon the tribunal's conclusion that this language being directed at the claimant by the respondent's managing director in the course of a conversation, was a fundamental breach of contract. Had it been found that the claimant resigned in response, it would have been found that he had been constructively dismissed.

60. The claimant also contended that the respondent fundamentally breached the terms of his employment contract by failing to pay him for the hours claimed: as identified in his further particulars; and on 23 January 2019 (being for the time spent on Sunday 20 January 2019). For the reasons outlined in the findings of fact on wages and the work undertaken by the claimant on 20 January, the tribunal finds that the claimant was paid what he was due and does not find that the respondent fundamentally breached the claimant's contract in this way.

Fair dismissal

61. The respondent contends that the principal reason for dismissal was misconduct or some other substantial reason. Mr Prescott spoke to the claimant in the way that he did and therefore dismissed him because he was unhappy about: the claimant's statement that he was going to cease working that shift and would not return to collect the second vehicle; the claimant's continued unhappiness about what he was being paid and the respondent's refusal to pay him for the work undertaken on Sunday; the claimant's manner towards him in the call; and the fact that the claimant was complaining about pay even after the respondent had introduced the new pay structure. It is found that collectively this means that the principal reason for the claimant's dismissal was his conduct. There was nothing heard by the tribunal to support the contention that the principal reason for dismissal was some other substantial reason.

62. The respondent has not demonstrated that dismissal was fair in the circumstances, in accordance with equity and the substantial merits of the case. The respondent did not follow any procedure whatsoever and did not follow any of the steps required under the ACAS Code of Practice on disciplinary and grievance procedures. The respondent did not: undertake any investigation; establish the facts of the case; invite the claimant to a meeting to discuss the problem; hold such a meeting; decide on the appropriate action; or invite the claimant to an appeal hearing before an impartial person at which his appeal would be heard, when he appealed. The respondent simply dismissed the claimant in the course of a telephone conversation. The respondent had neither reasonable grounds for its belief, nor did it carry out all reasonable investigation in all the circumstances.

63. The decision to dismiss was also not one which a reasonable employer could reach within the range of reasonable responses. The reasons described above do

not amount to reasons for which a reasonable employer could dismiss even had a procedure been followed.

ACAS code

64. As confirmed, the respondent dismissed the claimant without following any aspect of the ACAS code at all. As a result, it is appropriate to adjust the award. Taking into account the lack of any investigation process or appeal, but also noting that the dismissal was one which occurred during a brief telephone conversation which does not appear to have been thought-through in advance, the tribunal finds that it is just and equitable to increase any award by 10%.

Polkey

65. With regard to *Polkey* the question which the Tribunal needs to assess is could the respondent have fairly dismissed and, if so, what are the chances that this actual employer would have done so? This is not an assessment of a hypothetical fair employer, but an assessment of what this employer would have done if it had hypothetically acted fairly. It is the tribunal's finding that there is no realistic possibility that the claimant could ultimately have been fairly dismissed by this respondent as a result of the conduct relied upon.

66. As confirmed in the findings of fact regarding the Christmas working, it is not found that the claimant could or would have been dismissed for working for a third party over the Christmas period even had he still been employed when this was identified. Whilst Mr Watkins evidence about why it was important for employees (and those involved in driving in particular) to have a genuine break during a period of leave is correct, the tribunal does not find that the respondent either could or would have dismissed the claimant for not taking such a break, when working for a non-competitive business (when such work did not interfere at all with the respondent's business).

Holiday

67. In relation to holiday, there is no evidence which proves that the claimant was due a further day's pay for accrued but untaken holiday. The claimant relied upon the admission made in the response (page 28 of the bundle), but that day's pay had already been paid to the claimant – it was a further second day which was in dispute. There was no evidence to substantiate this claim. In these circumstances the Tribunal does not find that the claimant was entitled to any further pay for annual leave or pay in lieu of accrued but untaken annual leave as at termination.

Remedy hearing

68. At the end of the hearing on 15 November 2019 a remedy hearing was listed for **17 February 2020** at Manchester Employment Tribunal, to commence at 10 am, at which the issues of remedy will be determined. It had been agreed that the issues of *Polkey* and compliance with the ACAS code would be determined at the same time as liability, as they have been in the Judgment above, but other issues regarding remedy will be addressed at the remedy hearing.

69. The parties should ensure that they are ready and prepared for the remedy hearing, with any documents to be referred to having been exchanged and being included in the bundle (or an additional bundle) and any further statements of evidence being relied upon having been exchanged.

Conclusion

70. For the reasons given above, the conclusion of the tribunal is that the claimant was unfairly dismissed, however the respondent did not make any unlawful deduction from the claimant's wages and no further pay is due regarding annual leave.

Employment Judge Phil Allen

22 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
5 December 2019

FOR THE TRIBUNAL OFFICE