Case Number 2304459.2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr. J. Greenlees v Biffa Municipal Limited

Heard at: London South (Ashford) On: 28 February 2020

Before: Employment Judge Mason

Representation
For the Claimant: Mr. Foster, solicitor
For the Respondent: Miss Ahmad, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was fairly dismissed and his claim for unfair dismissal succeeds. He is awarded a Basic Award of £12,954.00 and £500 for loss of statutory rights.

2. The Claimant was wrongfully dismissed and his claim for monies in lieu of notice succeeds and he is awarded the net sum of £8,082.88.

REASONS

Background, issues and procedure at the Hearing

1. In this case Mr. Greenlees ("the Claimant") claims that he has been unfairly and wrongfully dismissed. The Respondent denies that the Claimant was unfairly dismissed (constructively or otherwise) and says that he resigned having refused an offer of reinstatement.

2. The Claimant presented this claim on 12 December 2018. The Respondent lodged a response on 31 January 2019.

3. I agreed with the parties at the outset that the issues to be determined by the Tribunal are as follows:

3.1 Was the Claimant dismissed on either 21 August 2018 or 21 November 2018; or did he resign?

3.2 If the Claimant resigned:

(i) Did the Respondent commit a fundamental breach of the express or implied terms of the Claimant's contract of employment amounting to a repudiation of that contract?

(ii) If so, did the Claimant resign because of that breach?

3.3 If the Claimant was dismissed (constructively or otherwise):

(i) Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).

(ii) Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

(iii) In accordance with the test in ***British Home Stores v Burchell [1980] ICR 303,*** has the Respondent shown that:

a. it had a genuine belief that the Claimant was guilty of misconduct?;

b. it had in its mind reasonable grounds upon which to sustain that belief?; and

c. at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?

(iv) Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

(v) If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be:

a. any reduction in the Compensatory Award on the basis the Claimant failed to take all reasonable steps to mitigate his loss to include consideration of any offer from the Respondent?;

b. any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code?;

c. any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey?*; and/or

d. any reduction to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

3.4 Breach of contract/ Unlawful deduction from Wages and Extension of Jurisdiction claims

(i) Was the Claimant dismissed without notice in circumstances where he was entitled to notice?

(ii) If so, what was his contractual entitlement to notice and how much is he entitled to taking into account any mitigation including any offer from the Respondent?

4. Both parties were represented, the Claimant by Mr. Foster, solicitor and the Respondent by Miss Ahmad, counsel. I am grateful to them both for their courtesy throughout.

5. I was provided with the following:
5.1 A bundle of documents [1-194] to which some additional documents were added (by agreement);
5.2 A Remedy bundle;
5.3 A main witness statement for the Claimant and also an additional statement; and
5.4 Skeleton arguments from both representatives.

6. The Respondent applied to amend its response (in accordance with a draft provided on 30 October 2019) to plead that there was no dismissal as the Respondent reinstated the Claimant and the original dismissal therefore "vanished"; the Claimant then resigned. Mr. Foster did not object and I allowed the amendments.

7. I also allowed the Claimant to amend the claim (by consent) in accordance with wording provided by Mr. Foster as follows:
"*a) If it be deemed that the failure to respond to the Respondent's letter offering reinstatement of the 12th November 2018 be a resignation on the part of the Claimant, then the Claimant would assert that he was justified in such resignation*.
b) As stated in paragraph 4 of the Particulars of Claim, the process employed in the disciplinary proceedings against the Claimant were such so as to undermine his trust and confidence in the Respondent's employer, which was a repudiatory breach of the implied term of trust and confidence that must exist in any employment contract.
In particular to be offered reinstatement on terms that:
(i) he should accept a final warning:
(ii) he should accept a finding of wrongdoing
(iii) that the original finding was sound
In circumstances where he done nothing wrong was perverse and would be unacceptable"

8. It was agreed in view of the amount of evidence and time constraints, to consider only liability at this stage and to have a separate remedy hearing if the Claimant is successful. However, it was agreed I would consider issues of mitigation, **Polkey,** the Acas code and contribution.

9. Having retired to read the witness statements and the bundle, I heard from Mr. Mark Porter ("MP") (Collections Manager and Investigating Officer) and Mr. David Maidman ("DM") (Business Director and Appeals Officer) on behalf of the Respondent. I then heard from the Claimant.

10. On conclusion of the evidence, I heard submissions from both Mr. Foster and Miss Ahmad. I gave both representatives a copy of the Court of Appeal's decision in ***Patel v Folkestone Nursing Home Ltd [2018] EQCA Civ 1689***. I reserved my decision which I now give with reasons.

Findings of fact

11. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

12. The Respondent provides waste management and recycling services to public and private sector clients across the UK. It employs 7,693 people in the UK [ET3 page 20]. The Respondent requires an Operator's Licence issued by the Traffic Commissioners Office in order to run its business. Vehicles are required to comply with regulatory standards and if vehicles are driven which fall below those standards, this could jeopardise the Respondent's Operator's Licence and result in regulatory action.

13. The Claimant was employed by the Respondent as Workshop Supervisor as part of the Refuse and Recycling Workshop team at the Respondent's Tunbridge Wells depot ("TW Depot") at North Farm Lane, a council site. As a result of a number of TUPE transfers, it is not in dispute that the Claimant had continuous employment going back to 1 April 1995; his employment was TUPE transferred to the Respondent on 8 June 2016 when the Respondent took over from the outgoing contractor, Cory Environmental Municipal Services ("Cory").

14. The Claimant had carried out the role of Workshop Supervisor at TW depot since about 2000. His role was to supervise staff in the maintenance of refuse and other vehicles contracted to local authority work at the TW depot [48].

14.1 This involved the maintenance of the Respondent's Heavy-Goods vehicles on a regular preventative programme. He was responsible for ensuring that all maintenance work on the Respondent's vehicles at the TW depot was completed correctly and on time and he was required to report all defects to ensure compliance with the regulatory standards [examples at pages 73-74].

14.2 A Job Description [48] sets out 9 Principal Accountabilities including:

"*5. To keep the Business/Contract Manager and Contract Supervisors informed on workshop/vehicle and personnel status on a daily basis to ensure that any problems are resolved effectively.*
6. To maintain quality control of engineering standards for all servicing and repairs carried out by workshop and external contractors".

The Claimant does not accept that this was his actual Job Description as it is dated April 2016 before the Respondent took over. However he accepted that it reflects his role and duties.

15. The Respondent's Disciplinary Policy and Procedure [49-59] is dated 1 October 2014:

15.2 It gives as an example of Gross Misconduct (para. 4.7 page 54):

"Breach of health and safety compliance regulations or other company rules".

15.3 Under the heading "Outcome of the appeal hearing" [para 4.9.3 page 57] it states:

"Having listened to the evidence presented, the manager hearing the appeal should call an adjournment of the hearing before reaching a decision. The manager's decision options are:

- *to reject the appeal*
- *to uphold the appeal*
- *to reduce the level of disciplinary sanction*

"Where the decision is to reduce the disciplinary sanction, the letter must clearly state the new level of warning, its duration and future conduct and performance standards together with the consequences of not sustaining these standards"

16. The Claimant received training from the Respondent on health and safety including "Workshop – Safe System of Work" on 20 October 2017 [60- 65].

16.1 As part of that training he confirmed as "true" that:

(i) if he saw a work colleague working unsafely he should say something;
(ii) under Health & Safety law he was responsible for himself and others;
(iii) he should never improvise in place of the correct equipment/tools;
(iv) if he was unsure of anything he should ask.

16.2 He confirmed that if he had any questions or concerns regarding health and safety he would immediately contact his supervisor or manager.

16.3 The Claimant says [w/s para. 8] that although he never received any formal safety training, he was well aware of what he thought was required and that safety has always been one of his priorities.

16.4 The Respondent accepts [DM's verbal evidence] that there was a lack of internal written procedures with regard specifically to towing of vehicles.

17. The Claimant's line manager was MP who at that time was Transport Manager; MP was appointed Transport Manager in 2006. MP and the Claimant had weekly meetings; MP was on site most days and otherwise generally contactable by phone. Working alongside the Claimant was a Transport Supervisor, Magdalena Latocha ("ML") who was a Certificated Transport Supervisor. ML left in May 2018.

18. The Claimant's monthly salary was £3,631.00 gross (£2,694.00 net). He had the use of a company van and fuel and six months sick leave on full pay.

19. On Wednesday **10 January 2018**, the Claimant became aware that one of the vehicles he was responsible for, Ford Transit 3.5 (reg. MM13) ("MM13") was out of service. An outside contractor attended and diagnosed the problem but was unable to fix it on site and recommended that it be towed to the main Ford dealer about 2.3 miles away.

20. On Thursday **11 January 2018**, the Claimant planned that the following morning (12 January) he would be responsible for towing MM13 along with a workshop colleague Mick Freeman ("MF"). (MF subsequently left in April 2018).

21. On Friday **12 January 2018**, MF phoned the Claimant at about 6am on his way in to work to say he would not be in. The Claimant decided to proceed with moving MM13 in any event. He called ML whilst still on his way in to work and asked her to find a substitute for MF. When the Claimant arrived on site, ML said she had identified three people to tow MMI3 so that he could get on with his work. He agreed. The three drivers arranged by ML were Joe Butler ("JB"), Paul Higgins ("PH") and Dave Relfs ("RD").

22. The Claimant then fixed a tow rope between MM13 and the towing vehicle, a Ford Transit 3.3 (Reg. WU55) ("WU55"). [For the purposes of this decision, I use the words "rope", "strap" and "strop" interchangeably; they all refer to the rope used to attach the vehicles together for the purposes of towing on this occasion.] He placed a flag at the midway point between the two vehicles and ML prepared a warning sign which was placed on the back of MM13. The engine of MM13 was not functioning which meant it did not have power steering or assisted brakes which compromised its ability to steer and stop. The rope broke twice during the journey to the dealer.

23. On the morning of Friday **12 January 2018**, the three drivers (JB, PH and DR) raised with MP their concerns about the health and safety aspects of MM13 having being towed earlier that morning (whilst still dark) by WU55; they were concerned that a rope (rather than a fixed towing bar) had been use along with other inadequate equipment.

24. The same day (12 January) MP instigated an investigation and the Claimant attended an Investigation Meeting ("IM") with MP. The notes are in the bundle [93-94]. After the meeting, MP adjourned as he needed to speak to ML and the drivers and it was arranged that they would meet again on Monday (15 January 2018).

25. On the same day (12 January) MP also met individually with JB, DR and ML. The notes of those meetings are in the bundle [95-99].

26. From Monday **15 January 2018** the Claimant was off work with stress and anxiety until June 2018 and submitted medical certificates during his absence.

27. On the Claimant's return to work, MP resumed the investigation.

28. On **11 June 2018**, MP spoke to the third driver PH [102-104].

29. Later on **11 June 2018**, MP wrote to the Claimant to ask him to attend an IM on 14 June 2018. The letter [101A] states that the allegations are as follows:
"*The alleged misconduct includes:*
1) Breach of health and safety regulations
2) Instructions to colleagues that resulted in potentially unsafe behaviours.
3) Potential serious negligent behaviour"
MP advised him that he could be accompanied by a trade union representative or a colleague.
The Claimant was invited to remain absent from work until the investigations were complete.

30. On **14 June 2018**, the IM took place. The Claimant was accompanied by Keith Tuck, Union Representative ("KT"). The notes of that meeting are in the bundle [105-110] MP gave the Claimant a copy of the notes from the previous IM.

31. MP concluded the matter should proceed to a disciplinary hearing. In his view, the Claimant's actions were a serious breach of health and safety.

32. On **19 June 2018**, MP wrote to the Claimant [111-112] to advise that he had concluded his investigation and that the Claimant was required to attend a Disciplinary Hearing ("DH") to be conducted by Rikki Sartin, Business Manager ("RS").

32.1 MP states in the letter:

"The Hearing will consider the following charges against you, some of which involve alleged acts of gross misconduct:

1. *Significant Health & Safety Breach of company rules and procedures in as much as you gave instruction to a team to complete an unsafe and potentially dangerous task.*
2. *Significantly placing the company at both legislative and financial risk.*
3. *Potentially endangering the safety of colleagues.*
4. *The three actions above could be construed as an intention to carry out unacceptable and seriously negligent behaviours when other solutions to the cited problem were feasible"*

32.2 MP enclosed: (i) Minutes of the IMs with the Claimant on 12 January and 14 June 2018 (ii) Notes of his interviews with PH, JB and DR and ML; (iii) Job Description; (iv) Disciplinary Policy and Procedure; (v) stills taken from the site CCTV system; and (vi) various Vehicle Inspection and FO documents.

32.3 The Claimant was advised he was entitled to be accompanied at the DH; that he was entitled to call witnesses; and reminded that a possible outcome could be his summary dismissal.

33. On **2 August 2018**, the Disciplinary Hearing ("DH") took place conducted by RS. RS has since left the Respondent and did not provide a witness statement or attend the Tribunal hearing. The Respondent says in its ET3 [para. 16, page 30] that the Claimant did not attend this meeting. However, this is incorrect and during the course of the Tribunal Hearing the notes of that meeting were provided and by consent they were added to the bundle I expressed surprise that these were not already in the extensive bundle.

33.1 The Claimant was again accompanied by KT. RS went through the four allegations/charges and the Claimant was given the opportunity to explain his account of events which tallied with the account he had given during the investigation.

33.2 The Claimant confirmed it was his decision to use a tow rope; he did not book a recovery lorry because of cost; a lightboard had not been fitted to the vehicle being towed; he did not pick the vehicle or the drivers, ML did; he agreed the vehicle being towed had no assisted brakes or power steering; he was asked if he had checked the strap and replied: "*Drivers use them all the time to tow vehicles out of ditches*"; he said the batteries were tested before they were put on the vehicle.

33.3 RS adjourned the meeting in order to make further investigations.

34. The DH resumed on **21 August 2018**. Again, the Claimant attended accompanied by KT. The notes are in the bundle [115-120]. RS adjourned the DH at 10.45 and reconvened at 12.00. He then told the Claimant he was being dismissed for gross misconduct for the following reasons:

- "*You have neglected your Health & Safety responsibilities as a supervisor, in that you have allowed three members of staff to tow a commercial vehicle in the hours of darkness without the correct equipment and procedures being used:*
    - *No solid tow bar was used.*
    - *No appropriate light board was fitted to the towed vehicle.*

- *You were the instigator of this task and you failed to check correct procedures before allowing this task to take place.*
- *You failed in your H&S duties to speak up.*
- *Failing lights on the towing vehicle.*

- *You were fully aware that the commercial vehicle being towed did not have any power steering or servo assisted brakes due to the engine being non-functional, thus putting not only our staff but also members of public at high risk and by using a strap and not a solid tow bar you greatly increased this risk.*
- *You neglected your supervisor responsibilities in this case by not ensuring all maintenance records for the vehicle being towed were kept up to date including:*
  - *Job cards were not completed after repair work was completed.*
  - *Defect report sign offs after repairs had taken place*
  - *3rd party repair records were not attached to the vehicle files.*
- *You put the company at great risk both legislatively and financially by:*
  - *Allowing this task to take place without confirming that the vehicles and the staff were suitable, just because you did not select the staff or vehicles does not relinquish you from those responsibilities."*

35. On **22 August 2018**, RS wrote to the Claimant [121 – 122] to confirm his decision to dismiss the Claimant for gross misconduct with effect from 21 August 2018.

35.1 The letter of dismissal [121-122] reads as follows

"*During the meeting, it was established to the Company's reasonable satisfaction that the alleged gross misconduct had occurred, namely that:*

1. There were wilful or serious negligent behaviours likely to cause loss or injury to the company, employee or public.
2. There was a serious breach of health and safety or compliance regulations or other company rules;
3. There were actions which potentially bring the company name into disrepute.

The above allegations were founded.

Despite listening to your representations, I was not able to find any mitigating circumstances and I am therefore writing to confirm that the Company has decided to terminate your employment with immediate effect

- *You have neglected your Health & Safety responsibilities as a supervisor, in that you have allowed three members of staff to tow a commercial vehicle in the hours of darkness without the correct equipment and procedures being used, specifically:-*
  - *No solid tow bar was used.*
  - *No appropriate light board was fitted to the towed vehicle.*
  - *You were the instigator of this task and you failed to check correct procedures before allowing this task to take place.*
  - *You failed in your H&S duties to speak up.*
  - *Failing lights on the towed vehicle meant that by the time this vehicle had reached its destination the light had faded to a point that they could not be seen clearly.*
- *You were fully aware that the commercial vehicle being towed did not have any power steering or servo assisted brakes due to the engine being non-functional, meaning this vehicle would have been very difficult to not only steer but also to stop effectively, thus putting not only our staff but also members of public at high risk and by using a strap and not a solid tow bar you greatly increased this risk.*
- *You neglected your supervisor responsibilities in this case by not ensuring all maintenance records for the vehicle being towed were kept up to date including:*
  - *Job cards were not completed after repair work was completed.*
  - *Defect report sign offs after repairs had taken place*
  - *3rd party repair records were not attached to the vehicle files.*
- *You put the company at great risk both legislatively and financially by:*

- *Allowing this task to take place without confirming that the vehicles and the staff were suitable, just because you did not select the staff or vehicles does not relinquish you from those responsibilities.*

I carefully considered your disciplinary record and alternatives to summary dismissal as part of my decision making process however on balance I was satisfied that these incidents were so serious that summary dismissal was the reasonable response given the gravity of the breaches and the potential consequences arising from your actions."

35.2 The Claimant was advised of his right to appeal.

36. On **30 August 2018**, the Claimant's solicitor, Mr. Foster, submitted an appeal on behalf of the Claimant [124-125].

36.1 Mr. Foster stated:

(i) *" .... the process is significantly flawed for a number of obvious reasons:*
"a) There is only one (possibly two including paperwork) allegation that relates to our client's supervision, namely that of allowing a flexible rather than a fixed tow bar to be used for towing of a company vehicle.
b) All other aspects of the allegations against him were the responsibility of others and not our client (as set out in the evidence that was produced for the hearing).
c) Our client had an unblemished record for 23 years of service.
d) Our client has never received training in the areas that are now the subject of complaint"

(ii) He says:
"It is frankly spectacular that the complaint of gross misconduct should arise on a simple failing i.e. the wrong type of tow bar"

(iii) He concludes:
"The purpose of the appeal is to set aside the dismissal and reinstate our client"

36.2 Enclosed with that letter was a statement from the Claimant [127-129] drafted and presented by Mr. Foster which expands on these grounds.

37. On **9 October 2018**, DM heard the Claimant's appeal. He conducted the appeal on the basis it was a review of RS's decision, not a rehearing [w/s para. 8]. The Claimant attended without a companion. The notes are in the bundle [131-136].

37.1 The Claimant said it was common practice to use a soft tow bar rather than a fixed tow bar since the solid tow bar went missing;
"Corey originally had the two bar, but that was 3.5 years ago. They used to tow 7.5 tonne vehicles with it, anything smaller than that a tow rope would be used it was common practice and continued with Biffa"
He said this happened about 5 or 6 times a year.
He said he knew it was not best practice but he did not see it as an issue as it was always carried out like this in the past.

37.2 The Claimant provided statements from ML [137] and MF [138-139]; MF confirmed that he had fitted the new battery and charged it and tested it. At this point, DM adjourned to read these statements. After the adjournment, DM said that both ML and MF had left the Company. DM told the Claimant he needed time to consider his decision

37.3 DM asked the Claimant what he would consider to be a good outcome; the Claimant replied:
"At the start of this I wanted my job back .... But that's not going to happen now.
I would like the "Gross Misconduct" to be removed from my record as I do not believe that this warrants this label.
I would also like a redundancy package."

38. On **18 October 2018** DM and the Claimant met again. I have not been provided with the notes of that meeting. However, it is not in dispute that DM told the Claimant at that meeting that he had decided to overturn the original decision to dismiss. Although DM considered the basis for the original decision was sound, in view of the Claimant's 23 years' service and no previous incidents, he was willing to reinstate the Claimant with a final written warning.

39. On **12 November 2018**, DM wrote to the Claimant to confirm the outcome of the appeal [141-143]. Key parts of that letter are as follows:

39.1 "*As you are aware, there has been some time since the appeal meeting took place. This is in part due to us taking into account our intention to reinstate you. The terms of your reinstatement have involved subsequent discussions with the business, which I have now finalised. Therefore, I am now able to confirm the details of your prospective return to work to you in writing (set out below)"*

39.2 "*You made several points about the level of sanction. My view is that the basis for making the decision was sound. The only point that has weight is that you had 23 years' service and the incident on 12 January 2018 is only example of you being involved in something of this nature*."

39.3 *"At the meeting I conveyed that I would overturn the decision and reinstate you. As such, the intention was to reinstate you in your previous role. In light of this, and following internal discussions since, I would like to put forward the following arrangements for you to return to work:*

- *You would return to your previous role at the Tunbridge Wells depot (your previous terms and conditions including length of service) would remain intact.*
- *Notwithstanding we do not consider there is any obligation on us to offer you alternative employment, we would offer you temporary redeployment at another site (Crawley). The temporary redeployment would be for an 8-10 week window whilst you integrate back into Biffa. Following expiry of the afore mentioned window, you would return to your previous role at the Tunbridge Wells depot.*
- *You would be required to return to work as soon as possible*
- *On the first day of work, you would report to the Business Manager at Crawley (Stephen Hanby).*

I would ask that you consider the above prospective offer and revert to me. If you are agreeable to the above, please confirm your acceptance of the aforementioned offer no later than 12pm on Friday 16 November 2018.

In the absence of us being able to agree arrangements for you to return to work, your final date of employment would stand as the original date of dismissal (21 August 2018)."

39.4 There was no further right of appeal.

39.5 DM says [w/s para. 19] that it was an administrative error to state in this letter that, in the absence of being able to agree arrangements to facilitate the Claimant's return to work, the Respondent would consider the original date of dismissal as his final day of return as it is accepted that his decision to overturn the dismissal had the effect of restoring the Claimant's employment. I do not accept that this was an error; DM said the letter was drafted by HR and is therefore unable to give direct evidence on this.

40. With regard to the offer of temporary redeployment to Crawley, DM says [w/s para. 18.2] that this was in recognition "*that there had been an impact on the trust and confidence between the parties".* In verbal evidence, he added that the contract at the TW depot was coming to an end (in April 2019) and the demobilisation process would be very intense. Crawley was a smaller depot than TW and he was conscious that the Claimant had been off sick and it would be less stressful for him. He accepted that Crawley would be a longer journey for the Claimant but did not think this was a factor given that the Claimant had the use of a company van and fuel so would not be put to any additional cost.

41. The Respondent has not at any time in fact sent to the Claimant a final written warning. DM told me in evidence that it would have been sent to the Claimant if he had returned to work.

42. The Claimant did not respond to DM's letter of 12 November:

42.1 The Claimant says [w/s para 36] that by this time he had been absent from work for over eight months. MP his manager was still in post and he feared that retuning would be "injurious" to his health. He says HR had "*seemed to acknowledge that there was a breakdown in the relationship*".

42.2 He says (additional witness statement and verbal evidence) that it was clear to him that reinstatement was conditional on him accepting the following terms:

(i) He was to be given a final warning and therefore still blameworthy. He would have found it very difficult to accept this as he was being blamed unjustly and a final written warning was wholly unjustified. He still believes he was not to blame. He was concerned that if he went back with a final written warning he could be sacked in the future "*just like that*". He also believed that trust and confidence had gone and he thought this was a "witch hunt" by MP who was out to get him; they would get him "*on the slightest little thing"* and then he would lose everything.

(ii) He was being asked to work elsewhere (i.e. Crawley); he regarded this as acknowledgement that there was a loss of trust and confidence and an acceptance of how he felt about the Respondent's conduct. He was being asked to work elsewhere (i.e. Crawley); he regarded this as acknowledgement that there was a loss of trust and confidence and an acceptance of how he felt about the Respondent's conduct.
In verbal evidence the Claimant said that he had never been to Crawley, he did not know the people or the management at Crawley and this would be stressful. However, he also said that this was not the reason why he did not go back to work for the Respondent.

42.3 He said he never had a chance to think about things although he acknowledged that he had legal advice at this point. He told me his head "*was all over the place*".

43. On **21 November 2018** DM wrote to the Claimant again [144-145]:
"I write further to my letter dated 12 November 2018, a copy of which is enclosed. I note that you have not responded to my letter to confirm if you wish to accept the Company's offer of reinstatement or not. My letter provided that in the absence of us being able to agree arrangements for you to return to work, your final date of employment would stand as the original date of dismissal (21 August 2018). Accordingly, I can confirm that the company (in the absence of any agreement from you to return to work) will have to assume that you no longer wish to seek reinstatement with the company. Therefore, your final date of employment will stand as the original date of dismissal (21 August 2018).
I trust this now brings the matter to a conclusion
DM said in verbal evidence that the Respondent had to bring things to a conclusion mindful of the TUPE situation at the TW depot having learnt in July 2018 that the Respondent had lost the contract and would need to hand over to the incoming contractor in April 2019

44. The Claimant has been paid by the Respondent up until 21 August 2018.

45. From 3 September 2018 to 26 February 2019, the Claimant was employed by Mick Gould Commercials Ltd and during that period he earned £25,436 (gross) [47A]. On 27 February 2019 he commenced employment with Go Plant Fleet Services Ltd as Workshop Manager earning £37,440 per annum. The Respondent lost the TW depot contract to Urbasur Ltd who subcontract to Go Plant; he is therefore carrying out the same role in the same place as he was for the Respondent.

46. Findings of fact for the purposes of assessing contributory conduct and the wrongful dismissal claim:

46.1 For the purposes of the unfair dismissal claim, it is essential that I do not substitute my own view but rather consider whether dismissal fell within the range of reasonable responses of a reasonable employer.

46.2 However, in order to assess contributory conduct and the wrongful dismissal claim, I am required to make findings of fact based on my own conclusions regarding the Claimant's conduct and culpability.

46.3 I find that the Claimant was certainly culpable to some extent.

(i) He acknowledges that he used a rope instead of a fixed tow bar and I accept the Respondent's evidence that this was potentially dangerous as demonstrated by the fact the rope snapped twice during a journey of only 2.3 miles.

(ii) The fact that the Respondent cannot point to specific rules, regulations and legislation does not negate this.

(iii) The Claimant says it was common practice but has failed to provide satisfactory evidence of this. Significantly, the drivers were sufficiently concerned to raise this with MP.

(iv) I accept that he did not select the front towing vehicle or the drivers. However, he had overall responsibility to ensure that the process was carried out in a safe manner and he did not properly discharge that responsibility on this occasion. The fact that ML also shared that responsibility and was to some extent also culpable does not exonerate him.

(v) A final written warning would have been entirely justified and within the range of reasonable responses but his conduct fell short of gross misconduct.

The Law

47. Section 98 (1) ERA:
In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:
- the reason (or if more than one the principal reason for the dismissal); and
- 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.

48. Section 98(4) ERA:

48.1 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 reasons shown by the employer):

(i) 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
(ii) shall be determined in accordance with equity and the substantial merits of the case.

48.2 In accordance with the tests set out in ***Burchell*** the Tribunal must consider:
(i) did the Respondent believe the Claimant was guilty of misconduct?
(ii) did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and
(iii) at the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

48.3 Range of reasonable responses:
(i) When assessing whether the ***Burchell*** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
(ii) The starting point should always be the words of s98(4). In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.
(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

49. Constructive dismissal:

49.1 Under section **95(1)(c)** ERA an employee is dismissed if he or she terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct.

49.2 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment and the task of the Tribunal is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably, sensibly and objectively, is such that the employee cannot be expected to put up with it.

50. Reinstatement

50.1 ***Salmon v Castlebeck Care (Teesdale) Ltd [2015] ICR 735***
The effect of an employee's successful appeal against dismissal was that he could not be regarded as having been dismissed with the result that his claims for unfair dismissal and wrongful dismissal must fail.

50.2 ***Salmon*** was recently approved of by the Court of Appeal in ***Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1689*** in which Lord Justice Sales gave further guidance.

51. Unfair Dismissal Compensation

51.1 In addition to a Basic Award (section 119 ERA), s123(1) ERA provides for a Compensatory Award**:** "... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

51.2 Contributory conduct:

(i) S122(2) ERA:
"*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*"

(ii) S123(6) ERA states:
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

51.3. Mitigation:
S123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

51.4 **Polkey**:
Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

51.5 ACAS Code:
S207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code") provide that if it appears to the Tribunal that the claim to which the

proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer or the employee has failed to comply with that Code in relation to that matter,and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any award it makes to the employee by no more than 25%.

52. Wrongful dismissal
If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

The Parties' Submissions

The Claimant's case

53. Mr. Foster relies on his written Skeleton Argument.

54. He submits that the offer of reinstatement was conditional; the Claimant did not accept the offer and therefore there was no reinstatement and therefore the original dismissal did not "vanish" and the Claimant's employment ended on the original date of dismissal i.e. 21 August 2018.

55. The dismissal on 21 August 2018 was unfair:
55.1 The decision to dismiss the Claimant was "*perverse in determining on hypothetical failings that did not exist a blameworthiness or fault on the part of the Claimant at all, or that such could amount to gross misconduct so as to justify dismissal without warning or notice."*
55.2 DM determined on appeal that the dismissal decision should be replaced with a final written warning which shows that dismissal was outside the range of reasonable responses.
55.3 MP had made up his mind that the Claimant was guilty of gross misconduct, did not prepare an investigatory report and did not interview all the witnesses who could have cast light on previous dealings.
55.4 ML was not the subject of any disciplinary action.

56. In the alternative, if there was a "vanishing dismissal", then the Claimant was dismissed on 21 November 2018:
56.1 He is entitled to salary from 21 August to 21 November 2018.
56.2 The Claimant did not resign by failing to respond to the letter of 12 November 2018; a simple AWOL cannot amount to a resignation.
56.3 That dismissal was unfair as it was without any possible justification and there was no prior procedure.

57. In both cases, the procedures leading up to dismissal were so unfair that it is appropriate to increase compensation by 25% under the ACAS code.

The Respondent's case

58. Ms Foster relies on her Skeleton Argument.

59. The decision to dismiss the Claimant on 21 August 2018 was fair procedurally and substantively. However, this was overturned on appeal having taken into account his long service.

60. Reinstatement was not conditional:

60.1 By giving the Claimant temporary redeployment at another site, the Respondent was accommodating his concerns about working with his line manager. In any event, the Claimant has said in evidence that this was not the reason why he did not want to return.

60.2 The real reason the Claimant did not want to return was because he did not want to accept a final written warning but reinstatement was not conditional on the Claimant accepting a final written warning; the Claimant's agreement to this was not required.

61. The 21 August 2018 dismissal therefore "vanished" upon reinstatement:

61.1 His failure to return to work did not resurrect the old dismissal. The reference in the letter of 21 November 2018 to an EDT of 21 August 2018 is an unfortunate administrative error and does not alter the factual or legal position.

61.2 The Respondent accepts the Claimant is entitled to lost income during the period of retrospective reinstatement. This has been offered to the Claimant but not yet paid as he has not confirmed his bank details.

62. By not returning to work and not confirming that he wished to do so by 16 November 2018, the Claimant effectively resigned. The reality is the Claimant had found another job and had no intention of returning to work. He had from 18 October to think about this.

63. There was no fundamental breach of contract that entitled the Claimant to resign.

63.1 The Respondent was accommodating his concerns about working with his line manager by giving him a temporary 8-10 week redeployment at another site.

63.2 It is not accepted that there was a breach of the implied term of trust and confidence. DM overturned the dismissal on appeal and it was not a breach of contract to reduce the sanction to a final written warning.

64. The Claimant has been employed from 3 September 2018 and has only lost two weeks' earnings. He resigned without notice and is not entitled to notice pay; in any event he was working throughout what would have been the notice period. If there was an unfair dismissal the Claimant contributed to it 100%.

Conclusions

65. Applying the relevant law to my findings of fact and having considered together all the circumstances of the case, I have concluded that the Claimant was unfairly dismissed.

66. The offer of "reinstatement" was conditional and in fact an offer of reengagement:

66.1 I fully accept that the Respondent had the contractual right to substitute a final written warning for dismissal. This right is expressly set out in the Disciplinary and Appeal Procedure. Therefore the Claimant's acceptance of a FWW was not a condition of his reinstatement.

66.2 Reinstatement means treating the Claimant in all respects as if he had not been dismissed; that includes not only full reimbursement of all pay and benefits following the dismissal but also restoring all rights and privileges. The Respondent's offer met these criteria apart from in one key respect, specifically his place of work. The proposed 8-10 week period of redeployment to Crawley was inconsistent with true reinstatement. The Respondent's reasons for redeploying the Claimant and the Claimant's reasons for not accepting are irrelevant.

66.3 The Respondent's letter of 12 November 2018 [141-143] makes it clear that the employment relationship was not revived "*without more*" (para. 45 Patel). Something more was required of the Claimant specifically he was required to accept the "*prospective offer"* by 16 November 2018 failing which his "*final date of employment would stand as the original date of dismissal (21 August 2018*)". He was therefore being given the option to agree or disagree. I draw further support for this from the Court of Appeal's decision in Patel which makes it clear that "*It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not."* .

"*If a contractual appeal is brought against a dismissal for disciplinary reasons, a reasonable person in the shoes of the employee will expect his full contractual rights and employment relationship to be restored without more as soon as he is notified that his appeal has been successful. He would not think that any further action by him was required, in terms of saying that he egress that this is the effect. He has asked for that to happen by the very act of appealing. Similarly, a reasonable person in the shoes of the employer will understand that this is the effect of a successful appeal as soon as the parties are notified of the outcome of the appeal, without any question of a further round of debate about whether the employee is prepared to accept this or not" [para. 30]*

67. Having not accepted the offer of reengagement, the original date of dismissal stood i.e. 21 August 2018 and I have gone on to consider whether or not that dismissal was unfair:

67.1 I am satisfied, that the Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically his conduct (s98(1) ERA) on 12 January 2018. The Claimant has suggested there was a witch hunt but I do not accept this; the Claimant has not given any evidence of any acts of victimisation by MP (or anyone else) during this period.

67.2 I have then considered the fairness of the Claimant's dismissal (s98(4) ERA) and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the Respondent acted reasonably or unreasonably in

treating the Claimant's conduct as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case.

67.3 I accept that RS genuinely believed the Claimant was guilty of misconduct and had in his mind reasonable grounds upon which to sustain that belief and, at the stage at which that belief was formed, as much investigation had been carried out as was reasonable in the circumstances of the case.

67.4 I am unable to identify any procedural shortcomings. Mr. Foster says MP had made up his mind that the Claimant was guilty of gross misconduct, did not prepare an investigatory report and did not interview all the witnesses who could have cast light on previous dealings. However, the investigation was reasonable in all the circumstances and there was no requirement for MP to prepare a report. The fact that MP viewed the Claimant's conduct as gross misconduct is not relevant as he was not the decision maker.

67.5 However, I cannot conclude that dismissal fell within the range of reasonable responses of a reasonable employer given all the circumstances of the case. To conclude otherwise would be perverse given the Respondent's own conclusion on appeal that the dismissal should be replaced with a final written warning.

.

68. The Claimant's dismissal was therefore unfair and his claim of unfair dismissal succeeds.

Compensation for unfair dismissal:

69. As agreed with the representatives, I have considered some aspects of mitigation, the impact of ***Polkey,*** the Acas code and any contribution by the Claimant towards his own dismissal.

70. Basic Award:

70.1 The starting point is the statutory calculation which given the Claimant's age (52), length of service (23 years) and taking the maximum week's pay of £508.00 produces a figure of **£12,954.00.**

70.2 Mitigation, ***Polkey*** and the Acas code do not apply.

70.3 I have then considered whether it is just and equitable to reduce the Basic Award on the basis the Claimant contributed to his own dismissal by his conduct (s122(2) ERA). Unlike the Compensatory Award, I am not obliged to reduce the Basic Award. Miss Ahmad submits the Claimant contributed 100% to his own dismissal. I disagree. I have found that he was to some extent culpable for the reasons explained above (para. 46). However, I have concluded it is not just and equitable to reduce the Basic Award in view of the Claimant's exceptionally long and blameless service (23 years) and the Respondent's lack of specific training, rules and policies with regard to towing.

71. Compensatory Award:

71.1 I have considered whether it was unreasonable for the Claimant to accept the Respondent's offer of reengagement. Taking into account all the circumstances of

the case including the Claimant's subjective reasons for not accepting the offer, I have concluded that his refusal was unreasonable:

(i) Accepting the offer would have meant his continuous service was protected together with his salary and benefits. He would have been in the same role on the same benefits.

(ii) The change of location was limited to 8 – 10 weeks. The fact that the Claimant had never been to the Crawley depot and did not know the people there were insufficient reasons to refuse. In any event, he accepted in evidence that this was not his reason for refusing.

(iii) I have considered the Claimant's state of mind. I accept he may have been stressed and I am mindful of his history of stress and anxiety but he has not suggested that he was off work with stress and has not provided any medical evidence. He had the benefit of legal advice at the time. .

(iv) He would have had to accept a final written warning but on the facts of the case, I have found that he was to some extent culpable and a warning was justified and within the range of reasonable responses.

(v) I am not persuaded that there was a breach of the implied duty of trust and confidence. Mr. Fosters says that the process undermined the Claimant's trust and confidence in the Respondent and that this was a repudiatory breach of the implied term of trust and confidence. I do not accept this. I have concluded the process followed was reasonable and whilst the Claimant was very unhappy that he was required to accept a final warning, DM's proposal to substitute dismissal with a warning was expressly allowed in accordance with the appeal process which the Claimant instigated. DM has acknowledge that there was had been "*an impact on the trust and confidence between the parties*"; this is to be expected but the extent of that impact was not so great as to amount to a complete breakdown in the relationship.

71.2 If the Claimant had accepted the offer of reengagement, this would have covered all his losses both to date and in the future. Accordingly, he is not entitled to a Compensatory Award other than compensation for loss of statutory rights in the sum of **£500**.

71.3 In view of this, it is not necessary to consider adjustments in accordance with **Polke**y and/or the Acas code. It is also not necessary to consider contribution.

72. The Claimant's compensation for unfair dismissal is therefore a Basic Award of £12,954.00 plus £500 for loss of statutory rights.

Wrongful dismissal

73. The Claimant's claim of wrongful dismissal succeeds. Again it would be perverse for me to conclude that the Claimant was guilty of gross misconduct when the Respondent itself took the view on appeal that he should be given a final written warning.

74. The Claimant is seeking a payment in lieu of 3 months' contractual notice and says the "Norton Rule" applies which provides that an unfairly dismissed employee does not need to give credit for earnings received during the notice period where good

industrial relations practice would have required payment in lieu of notice (***Norton Tool Co. Ltd v Tewson [1973] All ER 183*** and ***Voith Turbo Ltd v Stowe [2005] IRLR 228***). I agree and have concluded that the Norton Rule also applies to the Claimant's refusal to accept the offer of reengagement. The Respondent has not disagreed with the length of notice and has not taken issue with the application of Norton. I have therefore awarded the Claimant the net sum claimed of £8,082.88 without any discount for mitigation; this is not subject to any further deductions.

75. In view of my conclusions, it is not necessary to have a Remedy Hearing.

76. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 3 all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 11 to 46; a statement of the applicable law is at paragraphs 47 to 52; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 65 to 74.

Signed by _____
Employment Judge Mason
3 March 2020