EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107516/2019

Held in Glasgow on 28 and 29 January 2020

Employment Judge L Wiseman

Mr X	**Claimant** **In Person**
Western Buses Ltd	**Respondent** **Represented by:** **Mr S McLaren - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided the claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant a monetary award of £2082. The prescribed element is £253 and relates to the period from the 5 April 2019 to 15 May 2019. The monetary award exceeds the prescribed element by £1829.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 28 June 2019 alleging he had been unfairly dismissed.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of gross misconduct, but denying the dismissal had been unfair.

3. I heard evidence from Mr Alan Smith, Operations Manager for Dumfries and Stranraer, who took the decision to dismiss; Ms Alison McCluskie, Operations Director, who heard the first appeal; the claimant; Mr Kenneth Hope, Driver, who accompanied the claimant to the disciplinary and appeal hearings and Mr David Kerr, HGV Driver and former employee of the respondent.

4. I was also referred to a number of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The claimant commenced employment with the respondent as a Bus Driver, based at Dumfries, in March 2003. He earned £381 gross per week, giving a net take home pay of £266 per week.

6. The claimant reported to Mr Alan Smith, Operations Manager at Dumfries and Stranraer. Mr Smith started in this role on the 1 April 2019. Mr Smith shadowed the previous Operations Manager, for a period of approximately six weeks, prior to taking on the role. The previous Operations Manager returned to the role of Driver.

7. The claimant received a copy of the respondent's 2011 Handbook. Clause 2.21 of the Handbook (page 29) contained a clause entitled "Convictions" which provided that *"If you are warned by a police officer that prosecution for an offence under the Road Traffic Act is likely or if you receive notice of intended prosecution or a summons for any offence, you must inform your Depot Manager or Supervisor immediately. Any convictions not relating to the Road Traffic Act must also be reported. Failure to do so may lead to you losing your job."*

8. The claimant also received a copy of the respondent's 2018 Handbook, clause 2.23 (page 37) of which was entitled "Convictions/Notification of Arrest" and provided: *"If you are warned by a police officer that prosecution for an offence under the Road Traffic Act is likely or if you receive notice of intended prosecution or a summons for any offence, you must inform your Depot Manager immediately. Any convictions not relating to the Road Traffic Act must also be reported. You must also inform your Depot Manager immediately or as soon as is practically possible should you be placed under arrest, or required to attend court for any reason. Failure to do so may lead to disciplinary action."*

9. The claimant was contacted by the Police on the 5 March 2019 and asked to attend at the Police station for questioning. The claimant subsequently received a letter informing him he had to appear at Dundee Sheriff Court on the 12 March 2019.

10. The allegations against the claimant related to conduct said to have taken place 44 years previously. The claimant was in a state of shock regarding the allegations and understood from his solicitor that he should not say anything to anyone about the matter.

11. The claimant did not inform the respondent regarding his forthcoming attendance at Court.

12. The claimant phoned in sick on Monday 11 March (page 51). He phoned work the following day to confirm he would return to work on Wednesday 13 March.

13. The claimant attended at Court on the 12 March. A copy of the Petition was produced at page 132 and related to historic allegations of abuse. The claimant made no plea or declaration and the case was continued for further examination. The claimant was granted bail.

14. The claimant returned to work on the 13 March and worked until Saturday 16 March: he then went on holiday for two weeks. The claimant phoned Mr Alan Smith, Operations Manager, during the second week of the holiday to arrange a meeting to tell Mr Smith about the Court case. Mr Smith was not available, but returned the claimant's phone call two days later. The claimant asked to meet with Mr Smith and said he needed to speak to Mr Smith about a court case. Mr Smith told the claimant he knew about the Court case because of an article from the newspaper. Mr Smith further told the claimant he would have to seek advice and so a meeting was arranged for the 1 April.

15. Mr Smith met with the claimant on the 1 April. Mr Smith showed the claimant the article (page 53). The claimant asked Mr Smith what would happen and Mr Smith told the claimant that he should attend the following day when he would be suspended for two days and invited to attend a disciplinary hearing. Mr Smith said the company was aware of all the details and at the end of it

the claimant would be sacked. The claimant asked Mr Smith if it would be worth resigning. Mr Smith told the claimant that it was his decision, and that he could go with a good reference. Mr Smith also told the claimant that if he resigned it would be easier for him [Mr Smith] because there would be no disciplinary.

16. The claimant was suspended the following day and given a letter dated 2 April 2019 (page 56) which was a notice of the disciplinary meeting to be held on the 4 April. The allegations against the claimant were that he:-

- failed to inform the Depot Manager about the Court appearance on the 12 March 2019 and
- attended court whilst informing the Depot Supervisor that he was sick on that day.

17. The allegations were said to be gross misconduct and the letter confirmed one of the outcomes of the disciplinary hearing could be dismissal.

18. The disciplinary hearing took place on the 4 April. Mr Smith chaired the hearing and the claimant was accompanied by Mr Kenneth Hope. A note of the hearing was produced at pages 57 – 61.

19. Mr Smith asked the claimant why he had not informed the company about the court case, and the claimant responded that he had read the 2011 handbook and thought that if he had not been charged he did not need to inform them. The claimant confirmed he had no convictions. Mr Smith asked why the claimant had not informed the Depot Manager, and the claimant responded that he had been advised by his lawyer not to speak to anyone because the case might get thrown out of court. The claimant also said it was not an easy thing to talk about.

20. The claimant told Mr Smith he had spoken to him on the 16 March to ask when he was taking over as Operations Manager. He had also phoned him on the 25 March and left a message saying he needed to speak to him as a matter of urgency.

21. Mr Smith adjourned the hearing and, after an hour, returned to inform the claimant he was being summarily dismissed for gross misconduct. Mr Smith considered he had no option but to dismiss given the severity of the charges, and the fact the claimant had not informed the depot manager of the situation meant trust had been broken.

22. The claimant received a letter dated 4 April (page 66) confirming the decision to dismiss and the right of appeal.

23. The claimant exercised the right of appeal to Mrs Alison McCluskie, Operations Director. The notes of the appeal hearing were produced at pages 69 – 71. The claimant was accompanied by Mr Kenneth Hope. The claimant told Mrs McCluskie that he felt the company had decided he was guilty of the criminal charges and dismissed him for that reason. He referred to his length of service and the fact he had driven buses for 30 years with no blemishes on his record. The claimant referred to the previous Operations Manager only having three days left in the job, and that he had asked Mr Smith when he was starting in the role. The claimant had phoned Mr Smith whilst on holiday abroad to arrange to meet with him, but by the time Mr Smith phoned him back the story of his court appearance had been reported in the Dundee local paper.

24. The claimant acknowledged the handbook stated employees must inform the company of charges or court appearances.

25. Mrs McCluskie asked the claimant if he acknowledged the matter was now in the public domain. The claimant did not agree: the newspaper had not stated his occupation; he was not guilty and the matter may not in fact come to court.

26. Mrs McCluskie rejected the claimant's appeal. She concluded the claimant had deliberately chosen not to inform the company of the court appearance. The claimant had purported to be ill and failed to attend work, but instead attended at court. Mrs McCluskie also concluded the matter was in the public domain and she had regard to damage to the company's reputation and their standing with the Traffic Commissioner.

27. The Traffic Commissioner has a regulatory role in the bus transport industry. This includes power to impose sanctions up to, and including, removal of operating licences.

28. The respondent has a practice, when informed by employees of criminal charges (of a sexual nature) of removing drivers from driving duties (where this is appropriate) and moving the employee to alternative duties pending the outcome of the court case. The respondent had shunting duties available. Mrs McCluskie took the decision that because the claimant had not informed the company of the court appearance, he had prevented them from moving him to alternative duties.

29. Mr Kenneth Hope had raised the issue of moving the claimant with Mr Smith, but had been informed by Mr Smith that it was too late to consider moving the claimant.

30. The claimant exercised the right to make a final appeal to the Managing Director (page 72). The final appeal took place on the 16 May and the notes of the hearing were produced at pages 75 – 77. The appeal was heard by Ms Fiona Doherty, Chief Executive and the claimant was accompanied by Mr Kenneth Hope. The basis of the appeal was (i) that the claimant could not understand how he had brought the company into disrepute and (ii) the second charge against him was that he had attended court whilst sick. The claimant's position was that he had not been sick on the Tuesday when he attended court.

31. The claimant questioned how he could have brought the company into disrepute when he had done nothing wrong. The allegations were from 44 years ago and he was innocent. The claimant also explained that he had not wanted to notify the previous Operations Manager because he only had three days left in the job. He was going to contact Mr Smith upon his return from holiday. He had called Mr Smith during the second week of his holiday to arrange a meeting. The claimant also referred to having read the wrong handbook. The claimant was under the impression that he might not need to

go to court, or the case might not continue. The claimant accepted he should have told the company sooner.

32. Ms Doherty concluded the claimant had phoned in sick on Monday to give himself breathing space to attend court on the Tuesday. She further concluded that but for the article in the paper, the claimant would not have told the company of the court appearance. She rejected the appeal.

33. The claimant, following his dismissal, was unemployed for six weeks. He was in receipt of Employment Support Allowance during this period. He then obtained employment working as a bus driver until the end of December 2019. The claimant earned £150 per week. The claimant produced a Disclosure Scotland document dated 31 December 2019 showing no convictions.

34. The claimant is in the process of moving house, and will apply for benefits and start looking for a job after this.

Credibility and notes on the evidence

35. I found the claimant to be a credible witness. The claimant's position was that whilst he accepted that he had not informed the depot manager of the court appearance, he had been in a state of shock regarding the criminal allegations and had been told by his solicitor that there was a chance he could appear on the 12 March and the case would not proceed.

36. Mr McLaren challenged the credibility of the claimant's evidence because the claimant had offered at least three reasons why he had not informed the depot manager of the court appearance and there was an inconsistency in that position. I acknowledged the claimant did say he had not told the depot manager of the court appearance because (i) his solicitor had told him not to tell anyone about the case; (ii) he had read the wrong handbook and (iii) he wanted to wait until Mr Smith took over because the previous depot manager was leaving the post to return to being a driver in three days' time and had lost interest. I did not accept the submission that the fact of having put forward three reasons undermined the claimant's credibility. I considered they were all factors which had an influence on the way the claimant behaved.

37. I accepted the claimant's evidence, that he was in a state of shock following learning of the criminal allegations and this, together with the nature of the allegations, influenced his actions. I understood the claimant did not inform the depot manager of the court appearance because he had been told by his solicitor that he may attend on the 12 March and find the case did not proceed. The claimant was hoping this would happen. The claimant told the tribunal on several occasions that once he had attended on the 12 March and knew the case may proceed, he knew he had to inform the respondent. This was supported by the fact the claimant tried to contact Mr Smith during the second week of his holiday to try to arrange a meeting to inform him of the court case.

38. There was one major point of dispute between the evidence of the claimant (and his witness) and that of Mr Smith. The claimant told the tribunal that when he met with Mr Smith on the 2 April, he was told he would be suspended for 2 days, and that there would be a disciplinary hearing. The claimant asked what would happen, and Mr Smith said "we're aware of all the details and at the end of it you will be sacked". The claimant told the tribunal on more than one occasion that he had brought his case to an Employment Tribunal because of this comment: the outcome had been predetermined and no-one had listened to what he had to say.

39. Mr Smith rejected the suggestion he had said this. Mr Smith's position was that the claimant had misconstrued what he had been told which was that the outcome could be up to dismissal.

40. Mr Hope, who attended the disciplinary and appeal hearings with the claimant, confirmed the claimant had told him Mr Smith had said he would be dismissed, and that this point had been raised in the final appeal (although not noted in the appeal notes).

41. Mr Kerr, who had been a Supervisor in the Dumfries depot, told the tribunal that he knew, before the disciplinary hearing, that the claimant was going to be sacked. He knew this because Mr Smith had told him.

42. I preferred the evidence of the claimant regarding this matter and I found as a matter of fact that Mr Smith did tell the claimant (and Mr Kerr) prior to the

disciplinary hearing that the claimant would be sacked. I reached that decision because the claimant's evidence was supported by Mr Kerr, whose credibility was not challenged. I did acknowledge that Mr Smith did not have an opportunity to respond to the suggestion he had said this to Mr Kerr, but I considered Mr Smith would have denied it, and this would have added nothing to my considerations.

43. Mr Hope was also a credible and straightforward witness. He confirmed he had asked Mr Smith why the claimant could not have been moved to non-driving duties pending the outcome of the criminal case, and had been told it was too late. He also confirmed the claimant told him he had been told by Mr Smith that he was going to be dismissed at the disciplinary hearing.

44. Mr Kerr was a credible witness. Mr Kerr has now left the employment of the respondent company but there was no evidence to suggest Mr Kerr may hold a grudge or be deliberately spiteful in his evidence to this tribunal. I got no flavour of that in his evidence, which was straightforward.

45. I found Mr Smith's evidence to be straightforward insofar as his focus was on the fact the claimant had done what was alleged in terms of the disciplinary allegations, and he had had no option but to dismiss. Mr Smith told the tribunal the first allegation was the more serious one: if the claimant had only faced the second allegation, he would have received a written warning. The issue for Mr Smith was that the criminal charges against the claimant were serious, and the claimant, by not informing the company of this, had broken trust and there had been no option but to dismiss. Mr Smith also made reference to damage to the respondent's reputation (although he did not explain what this was or how it had arisen) and to the Traffic Comissioner (although his evidence on this point was virtually identical to that of Ms McCluskey).

46. Mr Smith accepted the claimant had seventeen years' service with the respondent and that his record had been "exceptional".

47. I found much of Ms McCluskey's evidence to be a repetition of what Mr Smith had said, although Ms McCluskey focussed more on the matter being in the public domain, the Traffic Commissioner and the need for the respondent to

"take action to stop being brought into disrepute". Ms McCluskey did not explain what it was the claimant had done to bring the respondent into disrepute.

Respondent's submissions

48. Mr McLaren submitted the claimant had been dismissed for reasons of misconduct and that the respondent had acted reasonably and fairly in dismissing the claimant for that reason.

49. Mr McLaren referred to the case of **British Home Stores Ltd v Burchell 1979 IRLR 379** and submitted the respondent had reasonable grounds for its belief that the claimant was guilty of the allegations against him. The claimant himself acknowledged that he had chosen not to tell the respondent of the criminal charges he faced, despite having many opportunities to do so. There was no dispute regarding the fact the claimant had received both Handbooks, and Mr McLaren invited the tribunal to find the claimant was aware of the requirement to immediately inform the company, but did not do so.

50. The respondent believed the claimant had deliberately manipulated the sickness system to attend Court. The respondent will, if advised of a court appearance, grant time off or a holiday to attend court. The claimant did not do this and, it was submitted, the reason he did not do this was to hide the fact he was attending court.

51. Mr McLaren submitted the investigation carried out by Mr Smith at the stage he reached his decision to dismiss was reasonable. There was no dispute the claimant had appeared in court on three charges and had not informed the respondent, and had taken the day off to attend. There was nothing in the way of additional investigation required to establish the essential elements of the alleged misconduct.

52. Mr McLaren submitted the elements of section 98 Employment Rights Act and the ***Burchell*** test had been satisfied. Mr McLaren referred to the case of **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439** and submitted the respondent's decision to dismiss had fallen within the band of reasonable

responses. Mr McLaren referred to the respondent's additional obligations to its passengers and the Traffic Commissioner and the desire to uphold its good reputation.

53. Mr McLaren noted the respondent operated in a highly regulated industry where the Traffic Commissioner had authority to impose sanctions up to and including removal of licences. It was submitted the reason for having strict penalties for not disclosing allegations was to give the respondent an opportunity (particularly where allegations of the type faced by the claimant) to move employees to non-driving duties. The fact the respondent found out about the allegations against the claimant from the newspaper rather than from the claimant put them in a very difficult position. Mr McLaren submitted that had it come to the attention of the Traffic Commissioner that the respondent had found out about these allegations and done nothing, very serious consequences could have followed.

54. Mr McLaren submitted it was not unreasonable for the respondent to have considered this matter as seriously as it did and for dismissal to be one of the options.

55. The claimant's credibility was undermined by the fact he had sought to avoid any responsibility by adopting contrary positions to explain his failure to inform the company.

56. Mr McLaren invited the tribunal to dismiss the claim. However, if the tribunal found the dismissal unfair, he invited the tribunal to reduce compensation because of (a) a failure to mitigate losses; (ii) ***Polkey*** and (iii) contributory conduct (reducing both the basic and compensatory awards).

Claimant's submissions

57. The claimant submitted the dismissal had been unfair because he had been told he was going to be dismissed prior to the disciplinary hearing: the

outcome was predetermined. Further, the respondent had not carried out any investigation.

58. The claimant had been a bus driver for 30 years, 17 of which had been with the respondent. The claimant submitted that all he had done was misunderstand the Handbook.

59. The claimant had provided a schedule of loss (pages 136 – 137). The respondent agreed the gross weekly pay (£380.97) and net weekly pay (£265.75) set out in the schedule, as well as the calculation of the basic award, award for loss of earnings and pension loss. The figures for future loss were disputed.

Discussion and Decision

60. I had regard firstly to the terms of section 98 Employment Rights Act which set out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). Second, if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires tribunals to consider whether the employer acted reasonably in dismissing the employee for the reason given.

61. I was referred to the case of ***British Home Stores Lt v Burchell*** (above) where it was said that it is the employer who must show the reason for the dismissal. A three stage test applies: the employer must show –

- it believed the employee was guilty of the misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

62. The respondent in this case admitted it had dismissed the claimant and asserted the reason for the dismissal was conduct. The claimant did not

dispute the reason for the dismissal: his position was that dismissal for that reason was unfair. I was satisfied, having regard to these points, and to the points set out below, that the respondent had shown the reason for the dismissal of the claimant was conduct. This is a potentially fair reason for dismissal in terms of section 98(2)(b) Employment Rights Act. I must now continue to consider whether dismissal for that reason was fair or unfair.

63. I considered the investigation carried out by the respondent. The onus on the employer is to carry out as much investigation into the matter as is reasonable in the circumstances. The ACAS Code of Practice recognises that in some cases the investigation will involve little more than the employer collating evidence: in other cases, an investigatory meeting with the employee will be required.

64. The respondent in this case did not carry out any investigation other than to collate information regarding the sickness absence reporting form and the newspaper article concerning the claimant's appearance in court. Mr Smith was asked why a fuller investigation had not taken place and replied "*we were made aware of serious allegations … [the claimant] had ample opportunity to inform us and didn't".*

65. Mr McLaren, in his submission, stated that given the evidence and circumstances, nothing in the way of additional investigation was required to establish the essential elements of the alleged misconduct.

66. I noted the claimant argued the respondent had failed to carry out an investigation, but he did not explain what he thought the respondent could and should have investigated.

67. I, having had regard to the above points, and the facts of this case, accepted there was very little for the respondent to investigate in circumstances where the issue, essentially, was not whether the claimant acted as alleged, but why he had done so and whether there were any mitigating factors.

68. I considered the fact there was no separate investigation process prior to the disciplinary hearing, meant there was an onus on Mr Smith to investigate points raised by the claimant during the disciplinary hearing. One point raised, which was not investigated, related to the fact the claimant had phoned Mr Smith during the second week of his holiday to arrange to meet with him to tell him about the court case. There was no investigation into whether the claimant made the phone call because he knew the respondent had learned of his court appearance or whether the claimant had genuinely wanted to meet with Mr Smith to inform him of the court case. The respondent, rather than investigate this point, proceeded on the assumption the claimant had phoned because he knew the respondent had learned of the court appearance.

69. I acknowledged this point does not go to whether the claimant acted as alleged, but it may have been a point of mitigation. I concluded the respondent's investigation was flawed because this point was not investigated.

70. I next considered whether the respondent, based on the evidence they had collated, had reasonable grounds upon which to sustain their belief that the claimant had done what was alleged. The claimant did not deny that he had failed to inform the depot manager about the court appearance on the 12 March. Accordingly, Mr Smith had reasonable grounds upon which to sustain his belief the claimant had acted as alleged.

71. The second charge against the claimant was that he had attended court whilst informing the depot supervisor that he was on sick leave. There was no dispute regarding the fact the claimant had phoned in sick on Monday 11 March at 5am. The claimant, in doing so, complied with the respondent's sickness reporting procedure. Employees who are off sick are required to phone the depot prior to 11am on the day prior to returning to work, if they wish to be allocated a shift for the following day. The claimant telephoned prior to 11am on Tuesday 12 March to confirm he would return to work on Wednesday 13 March.

72. The claimant took issue with the second allegation because he had not informed the depot supervisor that he was sick on Tuesday 12 March. The claimant maintained he had not been sick that day.

73. Mr Smith's evidence regarding this allegation was very weak and I say that because the focus of his evidence was on the first allegation and, apart from noting the claimant had phoned in sick on Monday 11 March, he did not refer to the second allegation. The notes of the disciplinary hearing (page 60) disclose that Mr Smith noted the claimant had called in sick on the morning of the 11 March, and asked if he had called again. The claimant confirmed he had phoned on the 12 March before 11am to confirm he would be back at work on the 13 March. Mr Smith did not ask any further questions about the allegation.

74. I considered the second allegation was poorly framed because it was not clear that the issue for the respondent was that they believed the claimant had taken advantage of the sickness reporting procedure in order to attend court on the 12 March. The allegation against the claimant was not (as the claimant understood) that he had told the depot supervisor on Tuesday 12 March that he was sick, but rather that the respondent understood from the claimant's phone call on the Monday that he would be off because of sickness that day (Monday) and the next (Tuesday).

75. I concluded that notwithstanding the allegation was poorly framed and that there was a lack of understanding by the claimant, Mr Smith had reasonable grounds based on the facts concerning the phone calls, to conclude the claimant had allowed the depot supervisor to believe the claimant would be off sick on the Monday and Tuesday in order to enable him to attend court on Tuesday 12 March.

76. I, in conclusion, was satisfied Mr Smith had reasonable grounds upon which to sustain his belief that the claimant had acted as alleged in respect of the two disciplinary charges against him.

77. I must now consider whether dismissal for that reason was fair. I was referred to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT set out the correct approach for tribunals to adopt in answering the question posed by section 98(4) Employment Rights Act. It was said:

"(1) the starting point should always be the words of section 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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."

78. The claimant's principal argument was that the decision to dismiss him was unfair because it was predetermined. The claimant, in support of that position, told the tribunal that Mr Smith had told him, prior to the hearing, that he would be dismissed. Mr Smith rejected that suggestion and insisted the claimant had misinterpreted what he had said, which was the sanction could be up to and including dismissal. I, as set out above, preferred the claimant's evidence regarding this matter, and I did so because it was supported by Mr Kerr's evidence. Mr Kerr told the tribunal that on the day of, and prior to, the disciplinary hearing, he knew the claimant was going to be sacked because Mr Smith told him this. Mr Kerr was asked if he could be mistaken about this, and replied "no". Mr Kerr said he was specifically told by Mr Smith what was

going to happen, “no ifs, no buts, no maybes. I was standing in front of Mr Smith’s desk at the time it was said to me”.

79. Mr Kerr’s credibility was not challenged during the hearing. I noted there had been disciplinary proceedings against Mr Kerr where he had been dismissed, but this decision had subsequently been reversed and a final written warning put in place. There was no evidence to suggest this had soured the relationship between the parties.

80. I, for these reasons, accepted the claimant’s evidence that he was told by Mr Smith, prior to the disciplinary hearing, that he was going to be dismissed. I further accepted the decision to dismiss was predetermined: there was only ever going to be one outcome to the disciplinary hearing, regardless what the claimant said, and that was dismissal.

81. I, in considering the fairness of the dismissal, also had regard to the fact the respondent failed to investigate whether the claimant phoned to arrange a meeting with Mr Smith because he had learned the respondent knew of the court appearance, or because he genuinely wished to meet him to inform him of the circumstances. The respondent’s failure to investigate meant there was no consideration of an issue which may have gone towards mitigating the claimant’s actions.

82. I did consider whether the appeal hearings cured either of these defects. Ms McCluskie did not investigate the motivation for the claimant’s phone call to Mr Smith during the second week of his holiday. She also proceeded on the basis of an assumption the claimant had phoned because he knew the employer had learned of the court appearance.

83. There was no suggestion Ms McCluskie had predetermined the outcome of the appeal, but she did introduce additional reasons to support dismissal. Ms McCluskie referred, for example, to bringing the company into disrepute and she also referred to the Traffic Commissioner. Ms McCluskie did not, when referring to bringing the company into disrepute, explain what it was the claimant had done to bring the company into disrepute. The fact of the criminal charges could not have been the issue because the respondent tries, where

possible, to move employees facing such charges, from driving duties to alternative duties. Ms McCluskie did (see below) refer to having to take action to stop being brought into disrepute, but again she did not explain what was meant by this.

84. I also noted this matter had not been put to the claimant prior to the appeal hearing, and indeed, at the second appeal hearing the claimant challenged what he had done to bring the company into disrepute.

85. Ms McCluskie also referred to the Traffic Commissioner. Ms McCluskie told the tribunal the respondent had given an undertaking to the Traffic Commissioner to disclose employees' material criminal convictions and she explained there would have been serious repercussions for the company if the Traffic Commissioner learned the respondent had known of the article and taken no action. I noted two points, firstly, there was no material criminal conviction against the claimant and secondly, there was never, at any time, a suggestion that the respondent, knowing of the article, would take no action.

86. The claimant asked Ms McCluskie if the Traffic Commissioner would have stopped him working because of allegations which were 44 years old. Ms McCluskie responded "No, I don't believe she would have, but the respondent had to make a decision … we had to take action to stop being brought into disrepute." I have dealt with this above, but note again that Ms McCluskie did not explain how the actions of the claimant could have brought the company into disrepute.

87. Ms McCluskie also attached weight to the issue being "in the public domain". She told the claimant that she had googled his name plus Annan, and the newspaper article had come up. This had not previously been put to the claimant and he had no opportunity to respond to, or counter, what Ms McCluskie said.

88. The second appeal hearing before Ms Doherty took into account the same points as the appeal hearing before Ms McCluskie.

89. I, having considered these points, concluded the appeal hearings did not cure the defects arising at the disciplinary stage.

90. The question I must now ask is whether, in the particular circumstances of this case, the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. I was satisfied as set out above, that the respondent had reasonable grounds upon which to sustain the belief the claimant had acted as alleged in the disciplinary charges, but the fact the decision to dismiss was predetermined prior to the disciplinary hearing and prior to having spoken to the claimant to hear what he had to say about matters, rendered the decision to dismiss unfair. I reached the decision that the decision to dismiss was unfair because I was entirely satisfied that predetermining a decision to dismiss fell outside the band of reasonable responses which a reasonable employer might have adopted: in other words, no other reasonable employer would have decided to dismiss an employee before putting the disciplinary allegations to him and hearing what he had to say by way of explanation and/or mitigation.

91. The claimant is entitled to an award of compensation for the unfair dismissal, but before turning to that, I must consider the respondent's submission that any award of compensation should be reduced because the claimant (i) failed to mitigate his losses; (ii) contributed to his dismissal and (iii) the application of ***Polkey***.

92. I considered each of those points. I could not accept the claimant failed to mitigate his losses. The claimant obtained alternative employment after a period of six weeks. The employment was not permanent and terminated at the end of December 2019. The claimant has not been looking for alternative employment since the end of December 2019 because he has been moving house. He will start looking for work again once the house move is complete. I was entirely satisfied the claimant had taken all reasonable steps to reduce his loss.

93. I next considered the ***Polkey*** case, where it was decided that an employer could not argue that a procedurally improper dismissal was nevertheless fair

because it would have made no difference to the outcome if the employer had followed a fair procedure. The issue of difference to the outcome is to be considered when assessing compensation. Mr McLaren, in his submission, argued that if the tribunal found there were procedural failings, they made no difference to the outcome of dismissal.

94. The substantive failure in this case related to the decision to dismiss having been predetermined prior to the disciplinary hearing. The question I must ask is what the percentage chance of dismissal was if the outcome had not been predetermined. I, in considering this matter, acknowledged, on the one hand, the claimant had done what was alleged in terms of the disciplinary charges. On the other hand, I considered that if the decision to dismiss had not been predetermined there would not have been such a rush to judgment. For example, there was no consideration of the impact the criminal charges may have had upon the claimant; there was no consideration of the reasons why the claimant had not wanted to tell the depot manager who held the position prior to Mr Smith taking over and no investigation into whether the claimant phoned Mr Smith during the second week of his holiday to arrange to meet him because he knew the respondent had learned of the court appearance, or because he genuinely wanted to inform Mr Smith of the situation. Mr Smith, rather than investigate this matter, simply assumed the worst of the claimant (that is, that he was phoning because he knew the respondent had learned of the court appearance).

95. I considered the failure to investigate the reason for the phone call to be important because if the claimant made contact with Mr Smith to arrange a meeting to inform him of the court case, without knowing his employer already knew of it, this would have demonstrated some good faith on the part of the claimant and an endeavour to inform his employer of the situation albeit late. This would have been a factor for Mr Smith to consider in terms of mitigation.

96. I further considered that if the decision to dismiss had not been predetermined, and if the respondent had investigated the reason for the

phone call this may have led to the respondent properly considering whether the claimant could be moved to non-driving duties (which were available) pending the outcome of the court case.

97. I decided, having had regard to these points, that there was an 80% chance the claimant would still have been dismissed even if the decision to dismiss had not been predetermined, and even if the respondent had investigated the reason for the claimant's phone call to Mr Smith during the second week of his holiday.

98. I next had regard to the issue of contributory fault. Section 123(6) Employment Rights Act provides that "*where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

99. The Court of Appeal in the case of **Nelson v BBC (No 2) 1980 ICR 110** said that three factors must be satisfied if the tribunal is to find contributory conduct:-

- the relevant action must be culpable or blameworthy;
- it must have actually caused or contributed to the dismissal and
- it must be just and equitable to reduce the award by the proportion specified.

100. The first disciplinary allegation against the claimant was that he had failed to inform the depot manager about the court appearance on the 12 March. There was no dispute regarding the fact the claimant did fail to inform the depot manager (or anyone else) of the court appearance on the 12 March. There was also no dispute regarding the fact the claimant had received the 2011 and 2018 Handbooks from the respondent. The 2011 handbook made clear that if an employee received notice of intended prosecution or a summons for any offence, s/he must inform the depot manager or supervisor immediately. The 2018 handbook also stated that if any employee received notice of intended prosecution or a summons for any offence the employee must inform

the depot manager immediately. Further, employees were also required to inform the depot manager if they were placed under arrest or required to attend court for any reason.

101. The claimant's failure to inform the depot manager of the court appearance on the 12 March was culpable and blameworthy conduct, particularly given the terms of the handbooks.

102. The claimant sought to argue that he had looked at the 2011 handbook instead of the 2018 handbook and that explained why he had not informed the depot manager. There was no dispute the claimant may have looked at the wrong handbook, but even if he had done so, it was still clear he was required to inform the depot manager.

103. The second disciplinary allegation against the claimant was that he had attended court whilst informing the depot supervisor that he was sick on that day. I have set out, above, the fact this disciplinary allegation was poorly framed because the claimant had not phoned in sick on the Tuesday. The allegation against the claimant was that having phoned in sick on the Monday, and having confirmed on the Tuesday that he would return to work the following day, he had implied that he was not fit to work on the Tuesday. In other words, the claimant had taken advantage of the sickness absence reporting procedure to attend court on the 12 March.

104. The claimant did use the sickness absence reporting procedure to allow him to attend court on the 12 March, and I was satisfied this was culpable and blameworthy conduct.

105. I must now ask if this conduct caused or contributed to the dismissal. I was satisfied this conduct did cause or contribute to the dismissal of the claimant.

106. I must next consider whether it would be just and equitable to reduce the award of compensation and if so, by how much. I decided it would be just and equitable to reduce the award of compensation and I must now decide by how much the award should be reduced. I, in considering this question, had regard to the fact the claimant did do what was alleged in terms of the disciplinary

charges. The claimant gave a number of reasons why he had not informed the depot manager of the court appearance. I did not accept this undermined the claimant's credibility, but rather I accepted these were all reasons influencing the way the claimant behaved at that time. I, having heard the claimant's evidence, understood the claimant did not inform the depot manager because he was in shock regarding the allegations; at a loss in the criminal process and clinging to his solicitor's advice that the case may not proceed. I inferred from these points that the claimant had hoped to attend court on the 12 March, have the case go no further, and to return to work.

107. I also had regard to the fact the claimant phoned Mr Smith during the second week of his holiday to arrange a meeting with him to tell him about the court case. The respondent did not investigate the claimant's motivation for making this call, and adversely assumed he had only phoned because he knew the respondent had learned of the court case. I considered the lack of investigation into this matter to be material because if the claimant had been phoning to genuinely arrange a meeting to inform Mr Smith of the court case, it would have been a mitigating factor and would have had a bearing on the claimant's credibility in the eyes of his employer.

108. There was no evidence before the tribunal regarding the claimant's motivation for making the phone call beyond two points, which were (i) the claimant's statement that he understood, following the hearing on the 12 March, that he had to inform his employer and (ii) the claimant's rejection (in cross examination) of the suggestion that he had only phoned because he had been caught out.

109. I decided, having had regard to the above points, that it would be just and equitable to reduce the compensatory award by 80%.

110. I next had regard to the terms of section 122(2) Employment Rights Act which provide that a tribunal may reduce the basic award on the grounds of any conduct on the employee's part that occurred prior to dismissal. I decided, for the reasons set out above, to also reduce the basic award by 80%.

111. The claimant is entitled to a basic award of 24 weeks x £380.97 per week, giving a total of £9,143. This sum must be reduced by 80%, which I calculate gives a revised award of £1829.

112. The claimant is entitled to a compensatory award. The claimant has lost wages in the period 4 April 2019 to the date of the hearing. This is a period of 9.5 months, which I calculate to be 39 weeks. The claimant has, in this period, lost wages of 39 weeks x £265.75, which I calculate to be £10,364.

113. The claimant found alternative employment, and his earnings from this employment must be deducted from the overall losses. I calculate the claimant earned £5400 in this period. The net loss is accordingly £10,364 less £5,400 = £4,964.

114. The claimant has also lost statutory employment rights for which I award the sum of £300.

115. There was also agreed pension loss of £1064.

116. The claimant's immediate loss is £4,964 + £300 + £1.064 = £6,328.

117. I did not make any award of future loss in circumstances where the claimant obtained alternative employment for a period from May until December. I considered the termination of this employment broke the chain of causation (that is, the link) to the claimant's dismissal.

118. The compensatory award must be reduced by 80% to reflect the decision made that there was an 80% chance the claimant would still have been dismissed even if the respondent had not predetermined the outcome of the disciplinary hearing. The award of £6,328 is reduced by 80% to £1266.

119. The sum of £1266 must be reduced by 80% to reflect the decision made that the claimant contributed to his dismissal by 80%. The sum of £1266 is reduced by 80% to £253.

120. The decision of the tribunal is that the claimant was unfairly dismissed and the respondent shall pay to the claimant the sum of £1829 (basic award) and £253 (compensatory award).

Employment Judge: L Wiseman

Date of Judgement: 23 March 2020

Entered in Register,

Copied to Parties: 28 March 2020