THE EMPLOYMENT TRIBUNALS

Claimant: **Mr W Bradley**

Respondent: **Mr J O'Brien t/a O'Brien Mobility**

Heard at: **Teesside Justice Hearing Centre** **On: 20 March 2020**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mr J Wilkin, solicitor**
Respondent: **Mr S Healy of counsel**

RESERVED JUDGMENT ON LIABILTY

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint by reference to Section 94 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair contrary to Section 98 of that Act is well-founded.

2. This case shall now be set down for a hearing on remedy.

3. The claimant's duplicate claim, number 2504249/2019, was withdrawn by the claimant and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr J Wilkin, solicitor, who called the claimant to give evidence. The respondent was represented by S Healy of counsel, who called the respondent, Mr R Morris and Mr A Bailey to give evidence.

2. The Tribunal had before it an agreed bundle of documents comprising 73 pages that was supplemented at the commencement of the hearing by the introduction of further documents from the claimant including a transcript of a conversation

between him and the respondent, which he had recorded on 5 September 2019. The numbers shown in parenthesis below are the numbers of the pages in the bundle.

The claimant's claims

3. The claimant's claim is that his dismissal by the respondent was unfair contrary to Section 98 of the Employment Rights Act 1996 ("the 1996 Act").

Issues

4. The issues in this case were as follows:

   4.1 Was the claimant dismissed?

   4.2 If so, has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted that if the claimant was dismissed the reason was conduct.

   4.3 Is that reason a potentially fair reason within section 98(1) of the 1996 Act?

   4.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act? This would include whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2009) and the guidance in British Home Stores Limited -v- Burchell [1978] IRLR 379, as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal. Additionally, if relevant, whether (in accordance with the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant fell within the band of reasonable responses of a reasonable employer in such circumstances.

   4.5 In this respect, the Tribunal would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, had been amended in 1980 such that neither party now has a burden of proof in that regard.

   4.6 With regard to the above questions, in accordance with the guidance in Burchell and Graham, if I were to find that the claimant was dismissed I would consider whether at the stage at which the respondent made the decision to dismiss him he had in mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

An outline of the facts in this case

5. In each of the judgements that I have given in the many years since my appointment I have proceeded at this stage to make findings of fact to consider against the applicable law. In this case, however, there were such significant conflicts of evidence that, uniquely, I am unable to do that without first setting out something of what I consider to be the key points of the evidence given by or on behalf of the parties; within which there are very few non-contentious points with which both agreed. The conflicts of evidence were between the claimant and the respondent and to a much lesser extent between the respondent and Mr Bailey; further conflicts were apparent between the written and oral evidence of Mr Morris whom I did not find to be a reliable witness although that was probably due to issues of memory and confusion rather than falsehood. The evidence included as follows:

    5.1 The respondent's business is the sale of mobility products. He trades from premises in Middlesbrough where he has a showroom and a workshop that are located on the same road some 200 yards apart.

    5.2 The claimant was employed by the respondent as a repairman and driver. His employment commenced in April 2013 and ended in September 2019. A copy of a contract of employment between the respondent and the claimant is at page 33 of the bundle of documents. The claimant states that he first saw the contract recently and that the signature of his name on page 37 is not his but looks like the respondent's writing. The respondent denies that he forged the claimant's signature.

    5.3 On 3 September 2019 the respondent spoke to the claimant to inform him that he was to complete a delivery that afternoon of a mobility scooter and a ramp to a contract customer. Although the respondent's daughter worked in the business she was on holiday at this time so things were somewhat 'stretched'. That afternoon the claimant went to the van in which he was to make the delivery of the scooter, which was parked outside the respondent's workshop. He then came into the showroom and told the respondent that the tyres on the van were illegal and that he was not prepared to drive it and risk getting points on his licence. He said that the condition of the tyres had been drawn to his attention by a passer-by. The claimant's evidence was that he had then checked the tyres himself. He said that he could see wire hanging out of one and the other was baldy. The respondent's evidence was that although the claimant reported to him the condition of the tyres, at that stage the claimant relied only upon what a passer-by and said to him and did not say that he had also inspected the tyres. Either way, the respondent informed the claimant that he would take full responsibility for the legality of the van as it belonged to him and offered to provide him with a written authority to that effect but this was not sufficient to satisfy the claimant and their discussion became heated. By this time the claimant and the respondent had come out of the showroom and their argument was overheard by Mr Bailey (who operates a business of mechanic and tyre fitter in a garage next door to the respondent's showroom) and he came to see what was happening.

5.4 There is then significant dispute as to what next occurred. The claimant's evidence in his witness statement is relatively simple. He states that as a result of him refusing to drive the van the respondent said to him, while they were still in the showroom, "If you are refusing to drive it, you may as well go home", which he had done. He added to that in oral evidence including as follows. He explained that after they had gone outside he had called Mr Bailey over, told him that the respondent wanted him to drive the van and asked who would get the points. Mr Bailey had held his hands up and said to leave him out of it. Before that, according to the claimant, the respondent had said, "He just doesn't want to drive – he's a wanker." The claimant had then said that if the respondent wanted him to go he would go. As he walked off he heard the respondent shout but he thought it was more abuse so he just ignored it. The respondent did not ask him to stay and had not run after him. If the claimant had known that he was getting the tyres done he would have waited but the respondent had made it clear that he wanted him to go. He had not said to the respondent that he would not see him again and he would be in trouble. If he had done that why had he returned the next day to start work?

5.5 The respondent's evidence of events on 3 September after he the claimant come out of the showroom included as follows. The claimant started to walk away but he asked him to wait while Mr Bailey had time to assess the tyres to check if they were within the legal limit and would change them if required. The claimant repeated that he was going home and started to walk away. The respondent followed him down the road for about 50 yards and asked him to return to the workshop as there was plenty of work to do apart from the deliveries but he again said that he was going home and continued to walk away. The respondent then ran back to Mr Bailey and said it would be quicker just to change the tyres instead of checking as he was desperate to get the job done as he had customers waiting and, as a favour, Mr Bailey agreed to do so within 10 minutes. The respondent threw Mr Bailey the keys, told him where the van was parked and Mr Bailey went to collect it. The respondent then caught up with the claimant and told him that Mr Bailey was to change the tyres and that it would be available to drive in 10 minutes. He responded that he was going home and continued to walk away. He then turned and said that the respondent would not see him again and would be in trouble as he could not make the claimant drive an illegal van and that he had a lot of money and would get him sorted out. The claimant denied that any of this occurred. Mr Bailey then changed the tyres although informing the respondent that in his opinion they did not need to changed.

5.6 Mr Bailey's evidence is broadly consistent with that given by the respondent. Although not going into the same amount of detail he confirmed as follows: the claimant kept repeating that he was going home and the respondent could not make him drive an illegal van; Mr Bailey had asked the respondent the whereabouts of the van and said that he could check the tyres; the respondent had asked him to change the front tyres and not to bother checking them as that would be quicker; the respondent gave him

the keys so he could get van, which he had done; he told the respondent that it would take 10 minutes to fit the tyres; the claimant said that he was going home and started to walk away; the respondent told the claimant that the tyres were getting changed and that he should return to the workshop until they were fitted; the claimant continued to walk away and said that he was going home as he would not drive an illegal van. In oral evidence Mr Bailey explained that the tyres had been close to 2mm of tread which compared with the legal limit of 1.6mm; the respondent had collected the van (this being inconsistent with his witness statement, "I collected the van"); the claimant had walked off after the tyres had been changed, which he then amended to say that he heard the claimant say "I'm off, I'm going home" as he was putting the second wheel back onto the van and he then started reversing the van out of his premises.

5.7 The claimant having left, the respondent closed his premises and made the delivery himself.

5.8 The following day, 4 September 2019, the claimant attended at the respondent's premises. Once more there is a significant conflict between the evidence of the claimant and that of the respondent. The claimant maintains that he was in his overalls ready to start work but as he entered the premises the respondent said, "Why are you here? You've been sacked for refusing to make a delivery and walking off the job". The claimant questioned that but the respondent repeated that he had been sacked and he therefore left the showroom and returned home. The claimant maintains that the respondent's evidence as to the claimant's movements that day is contradicted by a printout that he had obtained from Google Maps (71), which tracked his movements on his mobile phone, this facility having been drawn to his attention by a woman at the Job Centre: he had not been late for work but arrived at 8.59am and he had not returned to the respondent's premises in the afternoon. The respondent disputes that the printout accurately records the claimant's movements; if it is accurate at all it only records the location of his mobile phone.

5.9 The respondent's evidence of events on 4 September is again more detailed. He maintained that the claimant turned up late and, as he entered the showroom said that respondent was in trouble over how he had treated him the day before. The respondent was dealing with a customer and told the claimant to take a key for the workshop as there was repair work to do. The claimant did not do so but repeated what he had said the day before that the respondent could not ask him to drive an illegal van. This exchange continued and the claimant became agitated saying that he wanted to collect his tools from the workshop. As the respondent by then had two elderly customers in the showroom he told the claimant that he was not able to go to the workshop with him. The claimant then left the showroom but returned about an hour later demanding to collect his tools. The respondent told him that he had too much to do at that time but he would be willing to go to the workshop with the claimant at a mutually convenient time. The claimant then left.

5.10 The claimant did not attend work the following day, 5 September 2019. At the end of the day, as the respondent was about to lock up the workshop, the claimant entered to collect his tools. Again there is a conflict in the evidence. The claimant maintained that the respondent became aggressive and said that he would lock the claimant in the workshop, which he had done before leaving. The claimant contacted the police (65). The respondent then returned and unlocked the door. A heated exchange ensued, which the claimant recorded on his mobile phone; that being used to produce the transcript referred to above.

5.11 The respondent's version of these events is that as he was locking the workshop the claimant pushed past him and rampaged through the workshop tools. He had therefore contacted the police but they advised that there was little that he could do. He had told the police that the claimant was an ex-employee and that he had sacked him the day before because he thought it would be odd to say that one of his employees was in the workshop. He had, however, asked the claimant whether he would be attending the work the next day after he collected his tools but he replied that the respondent was in trouble and it was going to cost him a lot of money.

5.12 Not having heard from the claimant since 5 September the respondent wrote to him by letter of 12 September 2019 (73). This is an important letter at least part of which bears setting out in some detail:

> "I am writing to confirm our discussion of 4th September 2019 in which I advised you that your contract of employment with O'Brien Mobility has been terminated with immediate effect".
>
> The reason for my decision is that you failed to follow my reasonable instructions in the course of your employment, which I consider to be gross misconduct.
>
> - You refused to make a delivery as requested;
> - When I gave you alternative duties and requested you finish your working day in the repair shop, you again refused and walked off site without my permission; an action which I consider absent without leave.
>
> Having taken all of the facts and circumstances into consideration I have decided to confirm my decision to terminate your contract."

5.13 The above letter notwithstanding, the respondent's evidence was that he believed that, in fact, the claimant had already ended his employment by resigning on 5 September and that his letter merely confirmed what had already happened.

5.14 It is the respondent's belief that the claimant was seeking to engineer a situation to leave because he had already decided to try and set up in

competition with him, which is what had occurred. That is denied by the claimant whose evidence is that he has not at any stage set up his own mobility business and that he has been unemployed since 4 September 2019. Further, at that time he had just bought a house where he had been for 25 years and would not have left his job with the respondent unless he knew that he had guaranteed work from which to pay his mortgage

5.15 It is in respect of this above point that Mr Morris' evidence might have come into play as, in his witness statement, he states that at about 9:30pm on a Sunday in August 2019 the claimant came to his door and asked if he could take a broken television and the small mobility scooter both of which he had seen when delivering a new scooter to him in June 2019. In his oral evidence, however, Mr Morris said that the first occasion that the claimant had visited his home was on that Sunday in August 2019 and he had not been before that date. He explained that the claimant knew about the television because he had told him when Mr Morris took his bike to the shop. Also in evidence he said that he collected his new scooter from O'Brien's by getting the bus there and riding it back home. Having been referred to his witness statement to the effect that the claimant "delivered my new scooter in June 2019", he responded, "I'm sure I went for it." Given these and other conflicts between the written and oral evidence of Mr Morris, I consider that I am unable to give weight to it.

5.16 The claimant did not exercise the appeal that the respondent offered to him in the letter of 12 September 2019. He says that was because he knew that the respondent had sacked him and was not going to reconsider. Brian

Submissions

6. After the evidence had been concluded the parties' representatives made submissions. It is not necessary to set the submissions out in detail here because they are a matter of record and the salient points will be obvious from my conclusions below. Suffice it to say that I fully considered all the submissions made, together with the case law referred to by the claimant's representative, and the parties can be assured that they were all taken into account in coming to my decision. That said, I record the key aspects of the submissions below.

7. On behalf of the respondent, Mr Healy made submissions including as follows:

7.1 The respondent's primary case is that the claimant resigned. If that is correct his claim will fail as there was no constructive dismissal.

7.2 The claimant is an unreliable witness. He relied upon a professionally drafted witness statement but there is no reference at all to the involvement of Mr Bailey, that the claimant had been called a wanker by the respondent or that the respondent had forged his signature on his contract of employment. Why would he do that? What would be gained? It is an example of an extravagant assertion to support a weak claim.

7.3 The key is the events on 3 September. The respondent is more reliable. He was candid and accepted if things were against him; for example, documents that were adverse to his case such as the letter of 12 September 2019. The claimant relies upon that but it was written after the event and, in his witness statement, the respondent explains why. It helps, however, in that it records what the claimant had not done. The fact that the respondent describes that he terminated the employment does not assist. What matters is what the Tribunal finds happened on the day: the respondent was short-staffed, a mystery man said that the tyres were bald and the claimant seized the moment. The Tribunal does not need to find why.

7.4 The transcript does not assist as there are parts that either party can say are consistent with their evidence. In any event the recording was made after the event and was done clandestinely so there was scope for the claimant to steer the conversation to assist his case.

7.5 The claimant says that the printout from Google Maps shows his movements but it might show the movements of his phone, which can be on or off. It does not show events on the key day of 3 September.

7.6 For the above reasons there was no dismissal. If there was a dismissal it was for a good reason: conduct. Although it was not fair in accordance with the Acas Code, which was breached, it was bound to happen in any event and the claimant had contributed 100% to his dismissal, which was bound to occur. Therefore there should be no compensation. This is because it is clear from the evidence of Mr Bailey that the issue having been drawn to the attention of the respondent he said that he would sort it. The claimant knew his employer was attending to it yet he still walked off and did so knowing that there was no one else in the business. If the claimant does not deliver the scooter, the respondent would have to close the business and do so himself.

7.7 If the Tribunal accepts that the respondent said that the claimant might as well go home that is ambiguous but if the Tribunal accepts what the claimant claims the respondent said on 4 September, that is a dismissal. There was no reason not to accept the evidence of Mr Bailey. The claimant knew the issue was sorted yet he still walked off. There was therefore the potentially fair reason for dismissal of conduct on 3 September.

8. On behalf of the claimant, Mr Wilkin made submissions including as follows:

8.1 In respect of the credibility of witnesses, not too much emphasis should be based on how a witness comes across in the box. Reliance is placed upon the decision of Goff LJ in Ocean Frost [1985] 1 Lloyd's Rep 1, which he states is of general application and not confined to fraud cases:

> "I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in

particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities"

8.2 In this case there are three key documents.

8.2.1 The first is the letter of 12 September 2019 in relation to which the respondent had given an unconvincing explanation to the effect that he was not a lawyer and it had been written without legal advice. It was as plain as a pikestaff and there was no way that the Tribunal cannot find that it was not genuine and is not the reason why the claimant was dismissed.

8.2.2 The police report records the claimant saying that he had been sacked the previous day. This is the most independent source.

8.2.3 The printout from Google Maps is helpful and supports the claimant's case. He arrived more or less on time and was sent packing shortly after he was dismissed for gross misconduct.

8.3 The Tribunal has to have regard to the above documents because of the inconsistencies in the evidence: see Ocean Frost.

8.4 The claimant did not resign, he went home. No witness heard what the respondent says that the claimant said that he would not see him again and that he would be in trouble. The claimant's case has the ring of credibility. Clearly there was a heated argument. It is strange that there should be a stand-up row over whether the claimant would do the job if the respondent never checked the tyres. It beggars belief that it got to that stage unless the claimant's account is true. The respondent did not give a damn whether the tyres were bald and only wanted the job done. That has the ring of truth and probability.

8.5 The respondent's case is that the claimant wanted out of the business. Not only did he have another business set up (of which there is no evidence) but he decided he would manufacture an unfair dismissal case by seizing upon this opportunity and falsely alleging the tyres were bald and illegal. Stepping back that does not ring true. Also, Mr Bailey had said today that the tyres were borderline legal, which compares with the claimant saying the wires were sticking out: maybe Mr Bailey was understating.

8.6 There is more than enough evidence that there was something about the tyres. That was a genuine complaint and it does no credibility to the respondent that, without knowing their condition, he joined in the argument. The claimant might get overexcited but he had cause and the respondent did not have cause. We know from the letter that the claimant was dismissed by the respondent. There was a blatant failure to follow procedure. It is an open question what would have happened if procedure had been followed. Had it been a proper investigation, the respondent would realise at the very least that the tyres were borderline illegal. Until

today he had thought that the tyres were okay and did not need changing. It was possible that they could have been illegal and if a proper investigation had been undertaken the respondent would have realised that he was wrong.

8.7 It was accepted that any suggestion that the claimant's dismissal was automatically unfair, being in breach of section 100 of the 1996 Act as he was dismissed because of a complaint made with regard to health and safety, had not been mentioned in his claim form and there had been no application to amend, and it was not being pursued.

8.8 There is divergence between the evidence of the respondent and Mr Bailey. The claimant is supposed to have set off numerous times but that account was not credible. He was upset at the lack of interest in his allegation and decided to go home. There was no suggestion that he should do alternative duties and if he were shouted at he did not hear and continued home. He reported for work the following morning and was dismissed. He received the letter saying that he could appeal but he did not, which was reasonable such was the unpleasantness on 5 September: he had been locked into the workshop and had to call the police. Also, the respondent had not investigated properly so the chances of a successful appeal were non-existent.

The Law

9. The principal statutory provisions that are relevant to the issues in relation to the claim of unfair dismissal are to be found in the 1996 Act and are as follows:

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it —

……

(b) relates to the conduct of the employee,

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Findings of fact

10. As intimated above, it is rare in my experience that there should be such a conflict of evidence between the parties. My task is not made easier by the fact that (with a significant exception when the claimant was extremely evasive when being asked both by the respondent's representative and me whether he had stopped operating a television repair and sales business) both the claimant and the respondent gave evidence in a believable fashion. I remind myself, however, that it is well-established that the way in which evidence is given is not a reliable basis for assessing the honesty of a witness.

11. In the above context, having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned in these categories), I record that I find the following facts either as agreed between the parties or found by me, which I emphasise I have done on the balance of probabilities.

    11.1 The respondent's business and the factual basis of the employment relationship between him and the claimant is set out above.

    11.2 The key events in this case took place on 3 September 2019. They started as set out above leading to the claimant reporting his concerns regarding the tyres on the delivery van and he and the respondent then having a heated argument. Their accounts then diverge but there is a notable coming together of the evidence of Mr Bailey and the respondent as to what then occurred; albeit not so similar as to raise suspicions of them having colluded in the production of their evidence; there being no indication of that whatsoever. That said, I accept, first, that in Mr Bailey's oral evidence there was some discrepancy as to who collected the van but their witness statements were consistent and, secondly, that Mr Bailey gave slightly different accounts of what precisely he was doing when the claimant eventually left. I nevertheless found Mr Bailey to be a convincing witness (because of what he said rather than the way in which he said it) and accept his evidence. Considering all the evidence before me in the round, given the broad similarity of the evidence of Mr Bailey and the respondent I find that

after Mr Bailey became involved (first being to check the tyres and then change them) there were repeated exchanges between the claimant and the respondent as the claimant was saying that he would leave and was proceeding down the road on his way home; those exchanges being as set out in more detail in my account of the respondent's evidence above and being corroborated to an extent by Mr Bailey's evidence that the claimant kept repeating that he was going home and the respondent could not make him drive an illegal van, which is at odds with the claimant's evidence that after the respondent told him that he might as well go home he did so. The respondent's evidence on the point of running back and forth between the claimant and Mr Bailey as he was "desperate" to get the job done was persuasive. I also find that during those exchanges the respondent asked the claimant to return to the workshop as there was plenty of work to do apart from the deliveries, that being corroborated by Mr Bailey's evidence that the respondent asked the claimant to return to the workshop until the tyres were fitted. Also in this regard, while it is agreed between the parties that the claimant reported to the respondent on the condition of the tyres, I do not accept the claimant's evidence that he had observed that wires were sticking out of one of them, which I consider to be an exaggeration in support of his claim. Had that been accurate, I have no doubt that it would have been observed by Mr Bailey, whose trades includes being a tyre fitter, yet his evidence was simply that the tyres had 2mm of tread and were within the legal limit. Clearly, any tyre with wire protruding would not have been legal and I am satisfied that Mr Bailey would have said so. Ultimately, despite the exchanges that I repeat I am satisfied took place between the claimant and the respondent, the claimant left work and, the tyres having been changed, the respondent delivered scooter.

11.3 In summary, repeating that my task is to weigh the evidence for me on the balance of probabilities, for the above reasons I find that I prefer the evidence of the respondent as to the later events on 3 September.

11.4 As set out above, the first issue for me is to determine is whether the claimant was dismissed by the respondent; he does not argue that this was a case of constructive dismissal. The case law on whether there has been a dismissal, whether by word conduct, is extensive and well-known; sufficiently so that no authorities were cited by the representatives. Suffice it to say that I am satisfied that none of the dialogue between the claimant and the respondent on 3 September 2019 or any of the non-verbal interaction between them that day amounted to either unambiguous words of dismissal or resignation or conduct amounting unambiguously to dismissal or resignation. Thus, I am satisfied that the claimant was not dismissed on that day.

11.5 I turn next to consider the events on the following day of 4 September 2019 and, particularly, whether the claimant was dismissed that day. The respondent did not dispute that the claimant attended his premises that morning wearing his overalls as if ready to work. Key aspects of the different versions of what then occurred are set out above. There is a paucity of documentary evidence in this case, a notable exception being the

respondent's letter of 12 September 2019. That is not, itself, a letter of dismissal. It clearly states that it is "to confirm" their discussion of 4 September in which the respondent states that he, "advised you that your contract of employment with O'Brien Mobility has been terminated with immediate effect." As set out above, reasons are then given and the respondent records that in the circumstances, "I have decided to confirm my decision to terminate your contract." When questioned during the course of the hearing, the respondent accepted, in turn, that the first paragraph of his letter was consistent with claimant's account that he had been sacked, that the second paragraph recorded his conclusion that the claimant had been guilty of gross misconduct and the third paragraph that he had dismissed the claimant for gross misconduct. The respondent was then referred to paragraph 15 in his Response (25) in which he had stated that he regarded the claimant's employment "as having ended by resignation on 5th September 2019 and a letter was sent to him confirming the position on 12th September 2019". He was asked how that letter could be construed as the claimant having resigned and he answered, "It can't - not according to the letter". He explained that the content of his letter arose probably through his lack of knowledge of employment law, which he said is very specialist. He wrote the letter without advice, "It's incongruent with that paragraph, I agree." Although I accept that the respondent lacked specialist knowledge of employment law, the letter of 12 September is well-written and addresses the points that one would expect to find in such a letter; for example, the reference to the claimant having failed to follow his "reasonable instruction" in the course of his employment. Having considered the natural meaning of the words used in that letter in context of the facts of the case, I am satisfied that it is unambiguous and was understood to be so by the claimant: Southern v Franks Charlesly and Co [1981] IRLR 278 CA and J & J Stern v Simpson [1983] IRLR 52. I find no basis for not taking the letter at face value.

11.6 The respondent's representative submitted that the fact that the respondent describes that he terminated the employment does not assist and what matters is what the Tribunal finds happened on the day. While that might be right, the evidence of the letter, which was written reasonably contemporaneously with the events, it is said "to confirm" what occurred on 4 September (and the respondent confirmed that when he wrote it he had as clear recollection as anyone of the events on that day, "When you write it, it brings the memories back") and I consider that it is important evidence that I must bring into account in coming to my decision. That accords with the guidance in Ocean Frost referred to above but it is a basic principle in any event.

11.7 Also with regard to whether the claimant was dismissed on 4 September, there is also the evidence of the police "Storm Incident Report" timed at 17:22:34 on 5 September 2019 (65). That report is consistent with the claimant's account that he had gone to the workshop to collect his tools and that "his boss as locked him in on purpose" and records the respondent's remarks that the claimant "is an ex-employee and he got sacked" yesterday.

11.8 Finally, in this connection there is the Google Maps printout (71) in relation to which the claimant's evidence, on which he would not challenged, was that he had been unaware of this facility on his mobile phone until a woman in the Job Centre had pointed out to him. Given the respondent's assertion that the claimant is manipulative, I consider it to be of some relevance that the claimant was unaware of this app. when he attended at the respondent's premises on 4 September. That said, given the uncertainties explored at the hearing as to how the app. works and how accurate it is, I do not give great weight to the printout. That said it does seem to support the claimant's account that he arrived at work, not late, but approximately on time and, having left within a few minutes, did not return later that morning; both these aspects being contrary to the respondent's evidence.

11.9 In summary, but the above reasons, I am satisfied that the claimant was dismissed by the respondent when he attended his premises on the morning of 4 September 2019. I return to this point below.

Further consideration: application of the facts and the law to determine the issues

12. The above are the salient facts (as agreed between the parties or as I have found them on balance of probabilities) and submissions relevant to and upon which I based my judgment. I considered those facts and the submissions made in the light of the relevant law and the case precedents in this area of law.

13. I address first, the issue that is crucial in any complaint of unfair dismissal of whether the claimant was, in fact, dismissed by the respondent.

14. In light of the above findings, again repeating (perhaps unnecessarily so) that I have weighed the evidence before me on the balance of probabilities, I repeat that I find that the respondent did dismiss the claimant when he attended for work on 4 September 2019.

15. Moving onto the remaining issues, while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three

aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals Act 1996."

16. In light of the above, the remaining issues arising from the statutory and case law referred to above that are relevant to the determination of this case fall into two principal parts, which I shall address in turn.

What was the reason for the dismissal and was it a potentially fair reason?

17. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of his dismissal of the claimant.

18. I am satisfied on the basis of the evidence, not least the respondent's letter of 12 September 2019 in which (as was put to him in cross-examination) his reasons are set out, that the reason why the claimant was dismissed related to his conduct; that being a potentially fair reason as set out in section 98(2)(b) of the 1996 Act. During my hearing of this complaint, the claimant did not question that it was his conduct that was relied upon by the respondent as the reason for his dismissal.

In all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing the claimant?

19. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably as is required by section 98(4) of the 1996 Act. That is a convenient phrase but the section itself contains three overlapping elements (albeit of a single question), each of which the Tribunal must take into account:

    19.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    19.2 secondly, the size and administrative resources of the respondent;

    19.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

20. In addressing 'the section 98(4) question', I am alert to two preliminary points. First, I must not substitute my own view for that of the respondent. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not."

    This approach has been maintained over the years in many decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and Sainsburys v Hitt [2003] IRLR 23.

21. Secondly, I am to apply what has been referred to as the 'band' or 'range' of reasonable responses approach. In respect each of these two preliminary points, reference is again made to the excerpt from Graham above.

22. In this context, I now turn to consider the basic question of fairness as more fully set out in the three elements in Burchell and Graham. I do so following the order of the issues as set out in Graham (which reflects the chronological order of such matters) of considering the investigation, the respondent's belief and the grounds for that belief.

23. The first element in Graham (the third element in Burchell) is that at the stage that the respondent formed his belief in the claimant's misconduct, he must have carried out "an investigation into the matter that was reasonable in the circumstances of the case".

24. On the evidence before me, it is clear that the respondent did not carry out any investigation. It might have been said that he did not need to carry out an investigation as the facts and circumstances were more than sufficiently clear to him. That argument was not, however, advanced in the respondent's evidence or in the submissions made on his behalf: rightly so as there were matters that could have been investigated, such as the actual condition of the tyres of which the respondent was ignorant, and the claimant could have been invited to 'have his say' on any number of matters but he was not.

25. In summary, therefore, as to the first of the three elements, I am not satisfied that the respondent had carried out a reasonable investigation at the stage when he formed his belief in the claimant's misconduct.

26. The second element in Graham, is whether the respondent believed that the claimant "was guilty of the conduct complained of". This is a moot point. Subjectively it might well be that he did hold that belief but any such belief was not sustainable given the lack of a reasonable investigation. As such, this second element in Graham, the fact of belief of misconduct, is not satisfied.

27. Similarly, given the lack of investigation, the third element in Graham, that the respondent must have in mind reasonable grounds upon which to sustain is belief, is not satisfied either.

28. In regard to the above I repeat that the respondent's representative accepted that if there was a dismissal (which I have found there was) it was not fair in accordance with the Acas Code, which was breached,

29. In summary, by reference to the three elements in Burchell/Graham, on the evidence available to me and on the basis of the findings of fact set out above I find that while the respondent might have believed that the claimant was guilty of misconduct he did not have in his mind reasonable grounds upon which to sustain that belief and had not carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

30. As such, I am not satisfied, as is required of me by section 98(4) of the 1996 Act, that the respondent acted reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing him.

31. Finally, in submissions, the respondent's representative raised the issues of the claimant's contribution to his dismissal and what might be termed 'the Polkey reduction' given that, he said, the dismissal was bound to have happened in any event; albeit accepting that any basic award cannot be reduced on that basis of Polkey. He submitted, however, that the reduction in compensation because of the claimant's contribution should be assessed at 100%.

32. Self-evidently, these matters stray into the question of remedy and were not explored to any extent during the course of this hearing. While understanding the basis of the submissions, I therefore consider it inappropriate to address these aspects at this stage.

Conclusion

33. In conclusion, my judgment is that the reason for dismissal of the claimant was conduct but that the respondent did not act reasonably in accordance with section 98(4) of the 1996 Act.

34. For the above reasons the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act, is well-founded.

35. This case shall now be set down for a hearing on remedy, as and when that can be arranged.

36. The claimant's duplicate claim, number 2504249/2019, was withdrawn by the claimant and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 25 March 2020