



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Carroll

**Respondent:** Hartlepool Borough Council

**Heard at:** Teesside Hearing Centre      **On:** 13-15 January 2020

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

**Members:**

***Representation:***

**Claimant:** Mr S Healy (Counsel)

**Respondent:** Ms A Rumble (Counsel)

## RESERVED JUDGMENT

1. The claimant was fairly dismissed by the respondent and his unfair dismissal claim fails.
2. The respondent did not breach the claimant's contract when it dismissed him without notice, and his wrongful dismissal claim fails.

## REASONS

### Introduction

1. This was a claim for unfair dismissal and wrongful dismissal arising from the claimant's employment as a highways inspector from 14 October 1999. The claimant was summarily dismissed without notice on 8 March 2019 for reasons which the respondent treated as gross misconduct. The allegations related to the claimant abandoning his duties, in that the respondent concluded that he was not carrying out his duties during unaccounted for periods of time while he was supposed to be working. The same set of facts were also categorised as a failure

to follow a reasonable management instruction and deliberate falsification of time sheet records. In his claim form the claimant alleged that the respondent had no genuine belief that he was guilty of gross misconduct, or that it was unreasonable to reach that conclusion as the allegations were not supported by the evidence. In addition he felt that the sanction of dismissal was an unreasonable one.

2. In its response to the claim the respondent asserted that it dismissed the claimant fairly in accordance with the Burchell guidelines, in that it had a genuine belief in guilt, a reasonable investigation was carried out and the evidence supported the allegations. It said there were prolonged periods when the claimant was away from his duties, and that the volume of fraudulent claims merited summary dismissal.
3. At the outset of the hearing there was a preliminary discussion about the issues which had been clearly identified in Judge Aspden's case management orders dated 15 October 2019. The claimant clarified that the breach of the ACAS code which he relied on was delay. It was pointed out to the claimant that his wrongful dismissal claim, unlike unfair dismissal, would require the Tribunal to make findings of fact as to whether he was actually guilty of the misconduct alleged, which the claimant understood.
4. The claimant wished to call four witnesses in addition to giving evidence himself. Those witnesses were Neil Jeffery, a former highways inspector, Mark Carroll, the claimant's son, also employed by the respondent as a highways inspector, Stephen Williams, the trade union representative who attended the disciplinary hearing, and Helen Metcalf, the trade union representative who attended the appeal hearing. The witnesses who gave evidence for the respondent were the investigating officer, Sarah Scarr, Heritage and Countryside Manager, Tony Hanson, Assistant Director (Environment and Neighbourhood Services), the dismissing manager and Councillor Brenda Loynes, the elected member who chaired the panel which heard the claimant's appeal against dismissal.
5. During the preliminary discussion the parties agreed that the list of issues was agreed, and clarified that the claimant's start date was agreed to be 14 October 1999. The parties agreed that the core documents to be read by the Tribunal before the hearing began were the investigation report and notes of the disciplinary hearing and appeal.

### **Issues and relevant law**

6. The agreed list of issues was adapted by the Tribunal as follows:
  - 6.1 Has the respondent shown that the reason for dismissal was related to the claimant's conduct?
  - 6.2 If so, in all the circumstances (including the respondent's size and administrative resources), did the respondent act reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him, in accordance with section 98(4) Employment Rights Act

1996? This is likely to involve consideration of the following guidelines established in Burchell v British Home Stores:

- a. whether the respondent had reasonable grounds for believing the claimant had committed the misconduct alleged;
- b. whether the respondent carried out as much investigation into the matter as was reasonable;
- c. the ACAS Code of Practice on Discipline and Grievances;
- d. whether dismissal was a reasonable sanction.

6.3 If the dismissal was unfair:

- a. is there a chance that the claimant would have been fairly dismissed from his conduct in any event had a fair procedure been followed? If so what is the effect of this on any compensatory award?
- b. did the respondent unreasonably fail to follow the ACAS Code of Practice on discipline and grievances? If so, would it be just and equitable to reduce any compensatory award and, if so, to what extent?
- c. was the conduct of the claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?
- d. did the claimant cause or contribute to his dismissal? If so, to what extent should any compensatory award be reduced?

6.4 Did the claimant commit a fundamental breach of his contract of employment entitling the respondent to dismiss him without notice?

7. In their submissions both parties directed the Tribunal to Sandwell and West Birmingham Hospitals NHS Trust UKEAT/0032/09/LA, which held that gross misconduct raises a mixed question of law and fact. Other aspects of the parties' submissions on law are set out below.

### **Findings of fact**

8. The claimant worked for the respondent local authority as an accredited highways inspector, originally starting work on 14 October 1999. He was a highly experienced inspector and the nature of his work meant that for the most part he worked autonomously from the respondent's van in his assigned areas around Hartlepool. In the latter part of his employment the claimant worked with one other highway inspector, his son Mark Carroll. Both inspectors worked on a flexi-time system and were required to complete time sheets. The claimant and his son shared the travel to and from the depot each day, arriving together and leaving at 4.30pm most days. The claimant was aware that the van from which he worked was fitted with a tracking device. He was responsible for setting his routes each day in a time-efficient manner.
9. The main purpose of the role of a highway inspector is to carry out routine and ad hoc inspections in order to identify and report defects on the highway. This is to

ensure that members of the public are protected from harm, while also protecting the respondent by minimising the risk of costly claims. The respondent is required to comply with certain statutory duties and to provide a high standard of care to the public. At the same time, it is important to the respondent that its resources are put to good use and that its officers are carrying out their work as instructed, and efficiently. On a day to day level the claimant's duties included carrying out detailed zonal inspections, dealing with telephone and personal enquiries and complaints from members of the public, attending court as a witness for the respondent, and inspecting highways to ensure that compliance and safety standards were met. He was aware of a written job description setting out these responsibilities, and also understood the job well from many years of experience. Some inspections were done routinely, on a monthly, quarterly or six-monthly basis. The claimant was responsible for ensuring that he recorded on the respondent's management system the outcome of his inspections, and that any reports of problems received from members of the public were acted upon appropriately, potentially on an emergency basis. The respondent operated a call centre to receive and pass on customer concerns or complaints. Occasionally other requests for inspections came to the claimant through colleagues, either by speaking to them at the depot, or when they phoned or emailed him.

10. Several years before the events that led to the claimant's dismissal, the respondent introduced an electronic management system, known as Confirm, through which requests for inspections and records of inspections were recorded. By that time, the claimant and his son were the only two highway inspectors in Hartlepool, as financial cutbacks had led to the team being reduced from three to two inspectors.
11. By October 2017 managers in the claimant's department had concerns about the backlog of inspections that had built up and on 3 October Mike Blair, then the Transport & Infrastructure Manager, emailed Peter Frost, the claimant's supervisor, expressing his concerns about the inspectors being around six weeks behind their inspections, and not completing flexi-sheets since being provided with vans. Mr Blair had undertaken an analysis of their time using the tracker information. He noted that the tracker recorded the time the van was first started in the morning, but this did not include time spent with the engine idling before leaving the depot "which can be up to 23 minutes in John's case". He noted that the finish time had been taken as the time when the van engine was turned off at the depot in the evening. He expressed the view that there was no need for any further action to be carried out on returning to the depot at the end of the day, nor in fact much to do in the morning before heading out on the road. Mr Blair's email noted that both inspectors were significantly down on the hours they should have worked under the flexi-time system, in the claimant's case by 35 hours. That indicated to Mr Blair that there was more than enough capacity to bring the inspections up to date, and he suggested that Mr Frost instruct the inspectors to achieve this by the end of October 2017. Mr Blair pointed out some information from what he termed the "idle" report which recorded the time the van had been stationary with its engine running. He said the claimant appeared regularly to sit in the van for periods of up to 48 minutes, and he had a total idle time over the 8 week period monitored of 1 day and 9 hours.

12. The claimant and Mark Carroll were already aware of the respondent's concerns about the backlog of inspections, from their one-to-one meetings with Mr Frost. One such meeting had recently taken place, on 25 September 2017.
13. In February 2018, management and HR advisors in the department exchanged emails expressing concern about what appeared to be interference or tampering with the GPS antenna on the claimant's van. This was not pursued further.
14. A few months later, it was brought to Mr Blair's attention by an officer working for in another department that the claimant was felt to have been acting strangely on 22 May 2018. An analysis of the claimant's activities that day was carried out and indicated that the claimant had carried out a driven inspection, when it should have been walked. The respondent also looked at the data inputted into Confirm which was meant to be electronically uploaded as the work was done. On this occasion the claimant had not entered the data until the following day, when he noted ten potholes in one part of the street, and no actionable defects in the other part of the street. Concern was expressed that inputting information in this way was contrary to training and could cause serious problems if a claim arose and it became apparent that the defects were not entered immediately. Mr Blair, in reporting these issues to Mr Hanson, the Assistant Director (Environment and Neighbourhoods Services) and HR, was pressing for a full investigation to be carried out. He felt that the claimant's actions could put the respondent at risk financially and damage its reputation, if any issues arose.
15. On 22 October 2018 the claimant was called to a meeting with Mr Blair and suspended from work. He was provided with a letter confirming the suspension and that an investigation was underway into the following allegations:
  - Abandoning duties in your place of work without permission or acceptable reason
  - Failure to follow reasonable management instructions
  - Deliberate falsification of records
  - Action or conduct which may bring the organisation into disrepute
16. The respondent relied on its disciplinary policy which set out a non-exhaustive list of acts of gross misconduct. The relevant extracts for the purposes of this case are as follows:
  - "b) fraud or serious theft, eg deliberate falsification of documents such as ... time-sheets
  - h) abandoning duties in place of work without permission or acceptable reason
  - j) wilful negligence or refusal to carry out a reasonable instruction"
17. An investigating officer from another department was appointed, Sarah Scarr, Heritage & Countryside Manager. At the outset Mr Blair provided her with an outline of the nature of the claimant's work to help with her investigation. He explained that route inspections were supposed to be done on foot but he

suspected that the claimant was driving some of them. In his view the volume of work being produced by the claimant was still very low, and tracking information showed that the van appeared to be at rest for prolonged periods of time. The continuing backlog of inspections was another factor leading to the decision to investigate the claimant's working practices, covering a three week period between 1 and 19 October 2018.

18. Once the investigation started Ms Scarr had no further contact with Mr Blair. She knew nothing about any bad feeling between him and the claimant, and Mr Blair did not express to her that he wished to have the claimant out of his job.
19. As part of her investigation Ms Scarr examined the tracker data for the claimant's vehicle covering the period just before his suspension. She compared the tracker data with the information entered onto the claimant's flexi-sheets recording his working hours, and data from Confirm onto which the claimant was required to input his activities. Ms Scarr also looked at the respondent's records of customer service enquiries, the claimant's emails and the handwritten notes he had produced of activities during the working day. Ms Scarr relied on a combination of records to build a picture of what the claimant had been doing day by day, which she then compared with information provided in interviews with witnesses.
20. On 29 November Ms Scarr interviewed Peter Frost in his capacity as Highways Traffic & Transport team leader. Mr Frost described a typical day for a highway inspector, starting at the depot and checking for emails from the customer service team in the Civic Centre. Any such emails would identify defects needing urgent attention. The claimant would then plan his route for the day. All this would take about 10-15 minutes and after that the claimant would work alone with the autonomy to decide when to take his lunch break and the ability to take toilet breaks as required. The claimant was aware that if he was dealing with routine inspections and received a customer call reporting an issue, there was no need to deal with it immediately if the location was some distance away, unless it was an emergency. Such inspections would be fitted in another time so as not to disturb the planned route.
21. Mr Frost explained how entries were made into Confirm, which was supposed to be done by inspectors immediately on completing the inspection. Confirm also helped him to see what the inspectors were doing. He said that any defect identified on an inspection should be noted on Confirm, as should the fact that no defect was found. If an urgent defect was identified the claimant would ring a supervisor. The vehicle tracking and Confirm data would show periods when the van was at rest and it was expected that there would be corresponding entries on Confirm showing where the inspections had been carried out that day. Mr Frost felt that taking phone calls when the vehicle was idling might account for part of the time but not all of it. It would be unusual for only one entry to be made for an entire day (as happened on 8 October). Mr Frost acknowledged that inspectors can fall behind and that a delay of around 4–5 weeks was deemed acceptable. Beyond this period he would contact the inspectors about getting caught up.
22. Ms Scarr interviewed the claimant on 3 December in the presence of Mr Williams, his union representative. He was asked to describe a typical day and

outlined the various inspections he might carry out as well as the sources from which the requests would come. The claimant explained that he would do visual inspections and make a paper record which he would write up later. He would input the information once he was back in the van, or would do it at home. When asked about recording information the claimant said he used an A4 sheet with the date and defects on it. He said the Confirm system "goes down a lot". Mr Williams said it had been reported for eighteen months that the mobile phones were not suitable.

23. The claimant explained that he had autonomy to decide where he started his day and had to prioritise his workload. He input work on Confirm and the system could generate orders for repairs or notices to utility companies, for example where a dangerous defect was found. When asked why there was only one entry on Confirm for 8 October, the claimant initially said the system was down or there was a glitch in the system but offered to check his paper records which he provided to Ms Scarr. He claimed that Confirm did not work consistently so it was better to use his paper system and input the data in the office on a computer afterwards. After checking his notes he explained that the first few entries for 9 October in fact related to the previous day. He thought this was to do with a computer glitch and said that these issues had been mentioned to Mr Blair.
24. The claimant was asked about spending three consecutive days visiting Elwick village. During that time the tracker showed the vehicle going back and forth rather than sticking to the planned route. Initially the claimant said it could take days to inspect that area. When it was pointed out that the tracker data showed 5 hours 32 minutes of activity at Elwick, the claimant referred to his written notes to explain his movements. He explained that on one occasion he had left to go to the dentist and on other occasions he had left to check a report of damage at another location and had taken a toilet break. He referred to the fact that when members of the public saw him they would sometimes speak to him.
25. The claimant was asked why he had been at Throston Service Station for an hour one day, and after checking his notes he said it was to deal with a pothole. He acknowledged he had not recorded this on Confirm. When asked why there were regular instances over the three week period when his van was at rest with the engine running, the claimant said he did this for around fifteen minutes to charge his phone. The claimant said he might stop for breaks or sometimes work through the day. He might take a call on the way to work and do an inspection then, or on the way home from work if he took a call at 4.30pm. He said he might go at 6.00pm at night and would not book that time in.
26. The claimant acknowledged that there may have been occasions when he did driven inspections, but defended himself by saying that he had a very good success rate in court.
27. When asked how he recorded his flexi-time the claimant said he did it on paper rather than electronically as he did not have access to the respondent's new system to do that. He had nothing else to say on the subject, though no particular allegations were made about flexi-time sheets at that meeting. In respect of the questions which were asked, the claimant was able to provide some detail by

reference to the handwritten notes he had kept. He made no complaint about the lapse of time or any inability to remember what he had been doing.

28. Following this interview Mr Frost and Ms Scarr exchanged emails by way of clarification. Further information was provided on the time that might be spent at the beginning or end of the working day, for example sorting out equipment. Mr Frost felt it was reasonable to make an allowance for planning the day and responding to emails, but there was not a lot of equipment to sort out in the van. A further email in January 2019 requested clarification of whether the claimant or his son Mark Carroll had raised any issue about their phones not being suitable and not being able to keep them charged. The reply from Mr Frost on 7 January said that a couple of years previously they had felt the phones were "not ideal" and so another model was obtained, and there had never been any suggestion that these new phones were not usable. Neither of the inspectors had raised an issue about charging their phones.
29. In her email exchanges with Peter Frost Ms Scarr noted that he had changed the one-to-one meetings from monthly to weekly, when there were problems with inspections getting behind. She acknowledged that there were times when inspections could not take place, such as in bad weather or during inspectors' annual leave. Mr Frost told her it was not usual to go to sites immediately on receiving a report of a defect. The number of calls from the contact centre would be around two to three per day, plus enquiries fielded through Confirm. The claimant was very experienced and was in a position to make a judgement over urgency.
30. In the meantime, Ms Scarr conducted the next interview on 6 December with Ralph Young, Asset Management Technician, whose responsibility included supporting the Confirm system. He was asked to explain how Confirm worked.
31. In practice Mr Young would call on inspectors two or three times a day to ask them to inspect a road. If it was straightforward the request would be sent by Confirm, and if it was an emergency he would phone. Usually if someone phoned with a request for an inspection a record would be made, unless they rang the inspectors direct and it was not put on Confirm by them. It was the responsibility of the inspectors to record jobs and outcomes. An immediate response was not usually expected, as a 24 hour period was allowed. Some customer enquiries were emailed to him by the workforce services team. He would check the issue and allocate the job through Confirm as required. This would then go straight to the inspector's hand-held device. If the claimant identified an issue himself, he could raise a job on Confirm from the site.
32. Ms Scarr asked Mr Young if it was possible to say whether Confirm was available for use on 8 October, and he confirmed that it was. If the system ever did go down, he would know about it because he was working in it all the time. He would be the first person to know if it had gone down. The same was confirmed for 17 October. He had never heard any reports of inspectors being unable to do their work because their phone batteries had died.



33. Mr Young provided a statement after the interview confirming that the issue of inspections falling behind was something he was aware of, and he was asked to supply evidence of the current status of inspections for the purpose of discussion with inspectors at one-to-one meetings with managers.
34. A second interview was carried out with the claimant on 18 December, by which time Ms Scarr had prepared detailed spreadsheets incorporating data from the various sources she had obtained. These included information from the flexi-time sheets, the vehicle tracker, Confirm, call logs, emails and the claimant's handwritten notes. He was given an opportunity to review the spreadsheets before being asked questions. As before, Mr Williams accompanied the claimant to the meeting.
35. Ms Scarr asked about specific entries on the spreadsheet by way of example. On 2 October at 12 noon the claimant's vehicle was stopped at the One Life Centre for 23 minutes. He said it might have been a car park inspection or someone might have phoned in. Car park inspections would be recorded on Confirm, though there was no entry to support that instance. Other examples which were not supported by the Confirm data were discussed, but the claimant could provide no specific explanations for the time. He had no idea why he spent 21 minutes at Errol Street on one occasion, and had no particular explanation for spending 44 minutes at Tunstall Avenue, or his van being at rest at the depot for 32 minutes on 2 October. The claimant said he might have been working on Confirm or on emails, but there were no corresponding entries on the spreadsheet drawn from these sources.
36. The claimant's responses to questions about unaccounted-for time were all generalities based on the sort of activity he might or would have been doing rather than being based on any record or recollection of what he was in fact doing. He said he could have been carrying out a scheduled inspection, or the footpath might have been blocked, or it could have been that somebody had phoned him as he could get phone calls from anyone. He said he would not record the inspection on Confirm unless there was a defect, contrary to the information provided by Mr Frost. Nevertheless, the claimant told Ms Scarr that he did record everything he did in his handwritten notes, in addition to which were emails and the customer enquiries records.
37. When asked about a gap in the records between 13:30 and 16:30 on 12 October, the claimant had no particular explanation. He said it might have been an issue of bad weather and it could have been that he was dealing with flooding and the gullies could not cope. Mr Williams pointed out that the inspectors are under instructions not to do work in such weather and the claimant said he would then have been dealing with emails in the van.
38. Ms Scarr asked about 19 October when the tracker showed the vehicle being stationary for just over an hour at 09:06, and the claimant said "it sounds like routine inspections". When asked about there being only two entries from 09:06 to 11:30 that day the claimant said that there were not any issues.

39. There was a discussion about the flexi-time sheets produced at the meeting. The claimant said he would complete these in the van. Discrepancies were pointed out, for example entering 16:30 as a finishing time when he was back at the depot at 16:00. When asked about a 25 minute period between starting work and moving the van on 2 October the claimant said he had “no idea” what he would have been doing. In relation to time at the end of the day, such as 30 minutes on 3 October, the claimant said he would have been disposing of aerosols or going to the toilet. He accepted that he may have made errors in his time sheets but only inadvertently and not deliberately. When asked what he did in the time before and after being out in his van, the claimant said he dealt with inspections and statutory notices. He said he had a lot of discretion. He would inspect and put in requests for work to be carried out. He might inspect a bus shelter and send photos of damage. The claimant said that at times he would do a job on the way to work or on his way home, in response to a phone call, but neither the time nor the information from these jobs would be recorded anywhere.
40. On 19 November the claimant emailed Ms Scarr saying he had reflected on the questions regarding the tracker data when the vehicle was at rest. He clarified that if the ignition was turned to auxiliary power that would engage the tracker even though the vehicle was not moving. He said he would use the van to charge the phone battery on a regular basis, and that he may also be making calls and inputting data during this time. Regarding the van tracker being switched off at 16.00 and his leaving work at 16.30, the claimant said Mr Frost had agreed that the half hour period between returning to the depot and signing out on his flexi-time sheet had been approved for housekeeping purposes. Ms Scarr picked up these points in her email exchanges with Mr Frost, asking about housekeeping tasks such as disposing of the spray cans used to mark defects on the road. Mr Frost’s response was to say there were receptacles at the depot to dispose of those cans, but there would not be a volume each day and the van did not have a quantity of equipment that needed sorting on a daily basis.
41. On 4 January 2019 Ms Scarr asked Mr Frost by email to clarify if any issues had been raised by the claimant or other inspectors that the phones used to access Confirm were unsuitable or if there had been issues regarding charging them. In his reply Mr Frost said that issues had been raised in the past about the phones being “not ideal”, and a different model had been provided. He confirmed that no issues had been raised with regard to charging the phones. He sent a further email saying that the claimant would be aware of acceptable levels of work and practices in view of the nationally accredited qualifications he held. He referred to having met with the claimant in the recent past to discuss inspections being significantly behind despite another inspector helping out.
42. Those inquiries completed Ms Scarr’s investigation. In her evidence challenging omissions in the information gathered, Ms Scarr said she did not think about looking for CCTV footage at the depot, but having subsequently discussed this with colleagues she understood that the coverage was limited and felt it would not have added to her conclusions. She did not interview other workers at the depot, partly because there were over a hundred people working there and it was difficult to know who to speak to. She had asked the claimant what he was

doing, but did not get a clear indication from him of who he had spoken to, such that it was impractical to approach everyone in the depot.

43. Ms Scarr did not speak to the other inspector, Mark Carroll, because she felt he would have a conflict of interest as the claimant's son. He would have limited information to provide other than about the general duties and activities of an inspector. The claimant did not suggest that she should speak to him, or to any other particular person. Ms Scarr did not think it was unfair to expect the claimant to explain what he had been doing in the preceding weeks. She felt she had been fair in making allowance for time spent in the depot at the beginning and end of the day. She could have spoken to the patch team but did not think it necessary because she allowed those two fifteen minutes periods each day. Mr Frost had thought that was a fair assessment of the time needed.
44. Ms Scarr requested mobile phone records but these were not available. The information from both Mr Frost and Mr Young was that neither was in the habit of calling the claimant on a regular basis, although the claimant did say that he got calls from others at the council. Ms Scarr examined the customer service entries on Confirm, which indicated that only one or two queries came through the system intermittently over the three week period. She acknowledged that some emergency work would not be logged onto the system but pointed to Mr Young saying that this would usually not account for more than one incident a week.
45. In January 2019 Ms Scarr compiled the evidence into an investigation report and delivered it to Tony Hanson, Assistant Director. She set out her key findings about the nature of the work done by the claimant and what Mr Frost would expect to comprise a typical day. She referred to the data collected over the three week period and explained that time periods over ten minutes were noted where the van was either stopped or recorded as being at rest. That meant the van was stationary and occupied by the driver with the key in the ignition, but without the engine running.
46. A detailed spreadsheet with supporting documents was provided with the investigation report. This gave a detailed analysis from the vehicle tracker of how the claimant spent his time. For example, on 1 October 2018 the tracker was first activated at 09.29 when it was at rest for seven minutes at the depot. The day was interspersed with time spent moving, time recorded as stopped and time recorded as at rest. The final entry was when the vehicle stopped at the depot at 15:59. The summary report showed that the claimant had been driving for 1 hour 41 minutes and at rest for 2 hours 34 minutes. Data for 2 October showed driving of 2 hours 18 minutes and rest time of 1 hour 42 minutes. On 2 October the van was at rest at the depot but not recorded as stopped for a further 32 minutes. On several other occasions there was virtually no time spent at the depot in the van. For example, the tracker showed that the claimant arrived at the depot and switched off the ignition within less than a minute on 4, 5 and 8 October. This pattern repeated every day until 12 October when the claimant was at rest at the depot for around 35 minutes.
47. In summary, the tracker showed that the claimant consistently spent around 5-10 minutes in the morning at the depot in the van with the tracker engaged, and on

only six of the 15 days worked between 1–19 October did he spend time with the van idling at the end of the working day. Most of those records showed the idling time was around 5 minutes, but on 2 October the claimant was logged as being at rest at the depot for 32 minutes until 16:27, and on 12 October he was at rest for 35 minutes until 16:30.

48. In her evaluation of the evidence Ms Scarr acknowledged that difficulties might sometimes arise during the claimant's working day, such as being given unclear information or called out at short notice, but her understanding was that such interruptions represented a very small proportion of the claimant's time. According to Mr Frost and Mr Young such inspections were not done on a regular basis. She acknowledged that Mr Young said sometimes work was passed to inspectors outside Confirm though most of the work was put on the system. For that reason she checked email and other records which showed that there was not much email contact between the claimant and his colleagues. Email records showed that on average the claimant was sending and receiving four emails a day.
49. Ms Scarr concluded that the amount of time unaccounted for in the three week review period averaged 1 hour 41 minutes each day, and even after allowing for housekeeping tasks taking on average fifteen minutes each morning and afternoon, that still left an hour a day unexplained. She reported the claimant's allegation that the system was very often down, but noted that there was no evidence to support that. On the contrary, a technical report obtained for October 2018 confirmed that at no time during that month was the system down.
50. Ms Scarr drew attention to the claimant's comments about the mobile phones being inappropriate and the battery draining power. She noted that some of the periods when the van was at rest were longer than the 15 or 20 minutes that the claimant said he would take to charge the phone, and furthermore on most occasions information was uploaded to Confirm as soon as the van was at rest or shortly afterwards. This suggested to her that there was no need to wait for power to be restored in order to complete the tasks.
51. The report dealt with what appeared to be inaccuracies in the times noted on the claimant's flexi-time sheets which had been compared against the tracker information. Looking at the information overall, Ms Scarr concluded that it showed approximately 1½ hours each day which could not be accounted for. She concluded that it appeared the claimant had been abandoning his duties by not doing what he was employed to do.
52. In respect of the alleged failure to follow reasonable management instructions, Ms Scarr referred to the fact that some inspections were driven rather than being walked. In addition, some work was being carried out but not always inputted into Confirm at the time. There was evidence of a lack of a clear logical route being taken each day. Her conclusion was that it was reasonable to expect an experienced officer to plan and manage his time properly in order to meet targets. Despite pressures on resources and an increased workload, it seemed that the claimant was not using his time appropriately during the day to fulfil his duties.

53. Ms Scarr also concluded that the claimant had been recording his flexi-time inaccurately and this amounted to a deliberate falsification of records. She did not find that there was information to support the conclusion that the claimant's conduct may have brought the organisation into disrepute.
54. Ms Scarr's overall conclusion was that the evidence suggested that the claimant was spending prolonged periods of time away from his duties and it was unclear what he was doing with that time. The total unaccounted-for time was just over 25 hours out of a total 111 working hours over the three week review period. She recommended that the allegations, with the exception of bringing the organisation into disrepute, be progressed to a disciplinary hearing. This was on the grounds that it appeared that the claimant was abandoning his duties without permission or acceptable reason, and falsifying his timesheets. She felt that he was failing to follow reasonable management instructions in view of the amount of time that he spent away from his duties and was not achieving what was expected of him in his role.
55. On 6 February 2019 the claimant was invited to a disciplinary hearing with Mr Hanson. The invitation reiterated the four allegations which had been outlined in the suspension letter including, against Ms Scarr's recommendation, the fourth allegation about bringing the organisation into disrepute. Mr Hanson wished to explore this at the hearing. The letter to the claimant enclosed all the documentation that would be referred to at the hearing. He was invited to supply a written statement and to call witnesses if he wished, in which case he was to provide statements and details of any witnesses to Mr Hanson in advance.
56. The disciplinary hearing took place on 28 February when the claimant was again accompanied by Mr Williams. Mr Hanson was accompanied by an HR advisor, Chris Pendlington. The management case was presented by Ms Scarr, who was asked questions on behalf of the claimant. He in turn was questioned by Mr Hanson. The claimant said he felt Mr Hanson did not understand his role and commented that "there was work coming in all day long from the public". When asked where he would record that, he said he would do it immediately on Confirm. Later the claimant said he did not always record such incidents. When asked who would contact him during the day the claimant said it could be a utility company, members of the public or managers. The claimant said he recorded all jobs that came through onto Confirm, and if there was a defect he would enter it. He did not, however, record all work. Mr Hanson said the practice was that all work should be recorded on Confirm, even if no defect was found. When he asked the claimant whether he accepted that, the latter replied "No, it's not my job, I've not been told to". He said that no-one entered everything onto Confirm.
57. At the disciplinary hearing the claimant was challenged about the fact that Confirm had been available throughout October 2018, but he could provide no answer to this. Mr Hanson said the evidence suggested that the claimant was not doing a full day's work as there was insufficient detailed information on Confirm and in his handwritten notes. He asked the claimant to explain what work was being carried out when the van was at rest or stationary. The claimant said he could have been doing other tasks, such as talking to people or dealing

with administrative tasks in the vehicle. As previously, the claimant responded in terms of what he might or could have been doing rather than by reference to anything he was actually doing on any given occasion.

58. When discussing the example of 12 October 2018, Mr Hanson pointed out there was a three hour period between 13:20 and 16:30 when there were no entries on Confirm and only three emails sent between 14:02 and 14:30. The claimant said this was due to adverse weather.
59. Mr Hanson queried why the tracker details appeared to show a lack of route planning, as the vehicle was travelling all over Hartlepool and even revisiting sites on the same day without any apparent reason. The claimant's trade union representative conceded that the respondent should be able to expect staff to carry out work in an effective way, using time and fuel efficiently.
60. The claimant said his volume of work had increased when the number of highways inspectors reduced to two and he had to cover nine zones instead of six. The claimant alleged that work was coming in every day from the public which he would record onto Confirm immediately. He said there was a one hour response time for emergencies. Mr Pendlington responded that that was incorrect and management had advised that the emergency response time was in fact 24 hours. Furthermore, there had been no emergency calls in the period in question.
61. The claimant admitted that he did not record all incidents. He maintained that work was getting done but he was just not recording it on Confirm.
62. At the end of a two hour meeting the disciplinary hearing was adjourned for Mr Hanson to consider the information and make a decision. On 7 March 2019 he wrote to the claimant with an outcome in a detailed letter addressing each of the four allegations. He reached the conclusion that with the exception of the fourth allegation, the evidence did support his decision to dismiss summarily without notice on the grounds of gross misconduct. In his conclusion he noted that the claimant had not appeared to accept there was any wrongdoing and at no point could he provide a reasonable explanation in mitigation. Mr Hanson made the claimant aware that he considered carefully whether to issue a final written warning, but given his failure to carry out the role he was employed to undertake and the number of fraudulent time sheets submitted, his decision was that the claimant should be summarily dismissed with effect from 8 March. The claimant was made aware of his right of appeal.
63. Mr Hanson was satisfied that the claimant had failed to record all inspections on Confirm without any justifiable explanation. This gave him significant concern as one purpose of the inspections was to be able to successfully defend highway claims. He was also satisfied that the investigation showed there were periods during the day when it was unclear what work, if any, the claimant had been doing. He concluded that the claimant had been unable to give any explanation for the times when the vehicle was at rest, and that he had therefore abandoned his duties. There were periods averaging around 1 hour 30 minutes each day which could not be accounted for. There was a gross disparity between what

was claimed on the flexi-time sheet and the work undertaken, which Mr Hanson felt was a fraudulent claim of salary. As the discrepancies occurred multiple times over the three week period, the excess claimed amounted to almost half a day's work.

64. As far as the sanction was concerned, Mr Hanson was aware that the claimant had no existing written warning. He knew there had been one-to-one discussions about his inspections being behind, shortly before the period examined, and the claimant knew he needed to address the backlog, yet in spite of this there were considerable periods where no work was being done. He did not accept the claimant's explanation that he did not have to account for all his work on Confirm. Mr Hanson felt that the claimant did not accept that he had been guilty of any wrongdoing and at no point gave a reasonable explanation in mitigation. He considered a final written warning but felt that dismissal without notice was appropriate due to the volume of fraudulent claims.
65. The claimant had acknowledged inaccuracies in his flexi-time sheets but said these were mistakes rather than deliberate falsification. There were eight occasions when the van stopped at the depot but the claimant did not clock off for periods ranging from seven to fifteen minutes, after allowing for fifteen minutes of housekeeping tasks. For example, on 11 October 2018 and 16 October the tracking data showed the vehicle parked in streets near the depot for 22 minutes and 25 minutes respectively, without any records of work being done. On 11 October the claimant returned to the depot then recorded on his flexi-time sheet that he had left at 16:00, but on 16 October he returned to the depot and did not sign out until 16:30. The total time amounted to 1 hour 36 minutes, and Mr Hanson concluded that the claimant could not explain the discrepancies. He believed there was a theme recurring at the end of the working day, which he did not consider to be simple oversight or error. Mr Hanson felt that repeated incidents of this nature amounted to a substantial cost to the respondent and this was not acceptable, particularly when the claimant claimed his workload was too high.
66. In his handling of the disciplinary case Mr Hanson did not speak to Mr Blair, who had left his employment with the respondent in October 2018, before the investigation report was produced.
67. On 18 March the claimant provided grounds of appeal against his dismissal, stating that at the disciplinary hearing he had been able to establish the following:
  - He did not abandon his duties or place of work, and management's evidence at the hearing established he was at work in the depot during the times when he was alleged to have left.
  - The allegation of failure to follow instructions was based on a flaw in management's understanding of the job, in claiming that activities should be recorded on Confirm. The system was not set up to allow this and there was no other system in place. He had used his initiative and had been recording his daily activities for his own use on a very loose basis.

- He was still at work at the times it was claimed he was not, as confirmed by the respondent's own evidence. He did not deliberately falsify his flexi-time sheets.
68. There followed a number of email exchanges regarding the difficulty of arranging an appeal hearing promptly. On 11 April the respondent's HR manager wrote to the claimant making him aware of the reasons for this. She said it had not been possible to identify a suitable date when everyone involved was available, and allowing time for submitting statements of case on both sides. The Easter period had had an impact with people on annual leave, and the forthcoming local government elections meant it would not be possible to fix a date until the middle of June, after the appointment of elected members to sub-committees.
69. Once it could be constituted, the appeal panel comprised members of the Personnel Sub-Committee and the hearing of the appeal took place on 15 August 2019. It was chaired by Councillor Brenda Loynes. The claimant was accompanied by a Unison official, Helen Metcalf. At the hearing both parties presented their statements of case, and neither asked that any witnesses attend the hearing.
70. Ms Metcalf read out the claimant's statement of case at the appeal. She referred to the claimant's length of service and unblemished record. In respect of the allegation of abandoning duties the document made some general submissions about recording work onto Confirm. Reference was made to a document signed by Mr Young setting out the recording process. This was a new document obtained by the claimant for the appeal. Mr Young said in this second statement that enquiries entered onto Confirm would initially be received from a customer into the contact centre from where it was entered. It would then be obtained by a highways officer in the Civic Centre. Any highway-related defects would be passed directly to inspectors through Confirm, by entering their initials against the enquiry record. The inspector would then schedule a visit to the location, the timing of which would depend on location and the potential danger to the public. Upon arrival the location would be inspected for any sign of the reported defect. A job would then be raised to carry out any necessary repairs, to be done within 24 hours or 28 days depending upon the severity. In cases where no job was raised because no defect was found, both those points would be noted in Confirm for record-keeping purposes.
71. Mr Young said that in other cases, enquiries might be received direct by the highway inspector from a member of the public or a colleague. Such jobs would likely not be entered into Confirm and would instead be sent to the inspector by an email, phone call or in person. In those cases the inspector would visit the location as above and raise a defect in Confirm for repair. If no defect was found then usually a reply email or phone call was made to the original officer. Mr Young gave examples of such "non-recorded issues", including overgrown hedges, illegal skips and blocked footpaths.
72. The claimant's statement of case included a short statement made by a former colleague, Alan Shield, who had worked for 23 years as a Principal Roads and Street Works Officer. He had spent some time in the same team as the claimant



though they had little day-to-day involvement with each other. The purpose of Mr Shield's statement was to report a comment allegedly made by Mr Blair, that he would "have John [the claimant] out before he left". He reported that this was said in front of others on a couple of occasions in the office, though he could not recall specific times or dates.

73. Mr Hanson told the appeal panel that this had not been raised at any time during the disciplinary process. He was aware that Mr Blair had previously raised concerns regarding the claimant's performance and possible misconduct issues, but no disciplinary proceedings had been taken.
74. Mr Hanson's management case appended detailed documents containing all the evidence gathered in the investigation. He pointed out that the claimant knew his inspections were behind and explained that this was not a case where the claimant needed a written action plan. He was an experienced officer and knew what needed to be done. Mr Hanson had brought in an agency worker to help clear the backlog, and that person had covered the equivalent of six months' inspections in a four month period. The other inspector, Mark Carroll, was not as far behind in his inspections as the claimant.
75. Mr Hanson clarified the reasoning behind his decision. He saw the issues as relating to the claimant's conduct because he knew inspections were behind, and understood that he was expected to plan his work and carry it out efficiently and effectively. In his answers to questions during the disciplinary process the claimant had sometimes given contradictory answers about whether he did or did not record everything on Confirm, but Mr Hanson did not feel it was a case of the claimant needing management guidance on how to carry out his duties.
76. After deliberating the appeal panel reached a majority decision in favour of upholding the dismissal. The outcome letter was sent to the claimant on 28 August, in which Councillor Loynes recorded briefly the panel's reasons. The majority had agreed that dismissal was an appropriate sanction. The position of a highway inspector was a lone working post where management needed to place their trust in the employee to carry out their duties efficiently and effectively. The claimant's inspections had been significantly behind when he met Mr Frost on 25 September 2017. The panel concluded that the investigation had taken into account where possible some non-recorded work but that this nevertheless left a significant period of working time unaccounted for, amounting to 25 hours over a three week period. The panel felt that in the absence of a complete audit trail of the work undertaken, the claimant's failure to record some work placed the respondent in a vulnerable position when defending cases in court. Councillor Loynes noted the absence of any evidence or explanation to explain the unaccounted-for time and concluded that the dismissal was appropriate.
77. The dissenting councillor noted that the claimant "did not have a brilliant work ethic" but felt he should have had better guidance and management. He wondered whether the claimant had been dismissed because his "face doesn't fit". The majority did not agree. They accepted the claimant's position that he was not required to account for every minute at work, but nevertheless agreed from

Ms Scarr's analysis of the records that this still left significant periods of time which could not be accounted for.

78. The panel was concerned that the claimant was not recording all findings from his inspections on Confirm, but to some extent was keeping a handwritten note for his own purposes. He had not reported any difficulties accessing Confirm with the work mobile phone. They felt that this left the respondent in a vulnerable position if it had to defend a highway trip case as it would not have an audit trail. The panel also accepted that the tracker information showed there was no logical structure to the way the claimant appeared to be carrying out inspections, which was not efficient. He had been unable to provide an explanation for visiting numerous locations.
79. The panel agreed that management had shown evidence of fraudulent completion of multiple flexi-time sheets over a three week period, with the claimant failing to provide a satisfactory reason for not signing out until sometime after returning to the depot. One of their concerns was the claimant's failure to accept any responsibility for the allegations. The panel considered whether the decision was too harsh, but on balance the majority felt that dismissal was warranted. That concluded the internal procedures.

#### **Submissions for respondent**

80. For the respondent Ms Rumble submitted that gross misconduct raises a mixed question of law and fact, and on the facts of this case the conduct was correctly treated as deliberate wrongdoing. She referred to Small v London Ambulance Service [2009] EWCA Civ in support of the well-established principle that a tribunal should not substitute its own view for that of the employer, though it is nevertheless entitled to analyse the evidence and scrutinise the employer's reasoning in coming to a decision on the fairness of the dismissal.
81. The Tribunal was referred to the EAT judgment in Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09/LA, paragraph 110 of which says:

“The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract.”
82. Ms Rumble relied on the definition of gross misconduct in paragraph 113 of the judgment, which the EAT characterised either as gross negligence (not applicable here) or a deliberate and wilful contradiction of the contractual terms. The application of that legal principle requires a tribunal to consider the character of the conduct and whether it was reasonable for the employer to regard it as having the character of gross misconduct on the facts. In the present case, she submitted that the claimant was held to a high standard in his role which was to protect the public and also be seen to do so. As a lone worker he was

accountable for his time and a high level of trust was placed in him. He was unable to account for his time or point to the activity undertaken. Furthermore, the conduct fitted into the examples of gross misconduct in the respondent's disciplinary policy. The claimant was an experienced and qualified highways inspector, and it was not a case that he could not do the job but that he would not. As a local authority the respondent is held up to scrutiny and entitled to hold its officers accountable.

83. Ms Rumble's submissions addressed the Burchell test. She said the respondent genuinely believed in the misconduct and this was not a vendetta on the part of Mr Blair. Ms Scarr's investigation was impartial and independent. The spreadsheet she compiled presented a very clear picture including those ad hoc activities which were recorded and content taken from the claimant's own notes. She then made allowances for administrative work and emails as well as taking into account the customer call logs. The claimant should have been able to account for the 25 hours unrecorded, and had ample opportunity to do so.
84. Ms Rumble pointed out specific examples where the claimant could have taken steps to identify the work he had been doing, such as directing the respondent to the names of particular colleagues based at the depot. She acknowledged that the respondent could have checked phone records but pointed out that at no time did the claimant suggest his calls were taking up the majority of his time. The claimant himself did not suggest that the respondent check the phone logs. She admitted that the respondent did not think of looking at the CCTV footage, but in any event the limited coverage would not have told the respondent anything. She submitted that the respondent was not expected to investigate to the standard of a criminal investigation but rather it took all reasonable steps in providing a full picture to the claimant. The evidence uncovered by the investigation gave them reasonable grounds on which to dismiss.
85. As for the sanction of dismissal, Mr Hanson did consider a final written warning but the band of reasonable responses applies to his decision. There were 25 hours missing in the short period covered by the investigation, and as a local authority the respondent is accountable, especially given the nature of the work relating to defects on the highway and potential claims. Dismissal was a reasonable sanction for gross misconduct.
86. Ms Rumble submitted that the procedure followed was fair. The claimant had opportunities to participate in the process including two investigation meetings and a disciplinary hearing. He had a fair and impartial appeal. There were some delays but the respondent made its best efforts to prevent that. In the approach to an election the respondent had to avoid involving councillors in decisions, and after the election it became a question of the availability of diaries.
87. On wrongful dismissal Ms Rumble pointed out that the claimant was in a position of trust which was breached, and invited the tribunal to make findings based on all the available evidence and not necessarily the evidence that the respondent had or should have had before it at the time.

**Submissions for claimant**

88. Mr Healy's submissions also relied on the Sandwell judgment as authority for the approach to be adopted by the Tribunal, which is entitled to engage with the question whether the respondent correctly treated the matter as a conduct issue. He said it is a question of how the employer treats the reason for dismissal, but this is not a case involving deliberate or wilful conduct. It goes more to the claimant's performance. Under the ACAS code of conduct and guidance such issues should be treated firstly informally and then formally. He submitted that if the Tribunal felt this was not a conduct case then the claim must succeed. It is not a question of the Tribunal substituting its own view, but the respondent should have taken a different approach. Mr Healy clarified that he was not alleging a witch hunt on the part of Mr Blair. He acknowledged that the assertion of an honest belief can be an easy threshold to overcome, except that in this case there is a doubt over the reason for dismissal.
89. A crucial point in this case is that the claimant was unable to explain his activities due to the lapse of time and because his activities were "blending into one". This was especially difficult when he was not told to keep records. The respondent's interpretation of how the claimant spent his time would be affected by a number of factors, not least that the individuals concerned did not really understand the nature of the job or how long inspections take. There would be unplanned work such as phone calls and being approached on the street. If the claimant was taking longer to do the job than they wanted, then that would be a question of inefficiency not misconduct.
90. On the question of delay Mr Healy expressed surprise that the appeal took as long as it did. Councillor Loynes had referred to the claimant as "struggling" and in Mr Healy's submission that was not a question of conduct. The panel carried out a very limited review rather than a full reconsideration. The policy allows witnesses to be called by both sides. Fresh evidence from Mr Young was not taken account of and did not feature in the deliberations. The appeal could not correct the failure to investigate.
91. Mr Healy referred the Tribunal to the judgment dated 31 January 2020 in East Coast Mainline Company Limited v Cameron UKEAT/0212/19/BA. The EAT held that the tribunal had erred in taking into account the claimant's long service, which as matter of law, was not a relevant consideration in his wrongful dismissal claim. The case turned on whether the tribunal's finding that the claimant had been wrongfully dismissed was perverse in the face of the evidence. The EAT reviewed the relevant case law, particularly Adesokan v Sainsbury's Supermarkets [2017] ICR 590, CA. That authority set out the applicable principles when considering whether misconduct is gross and justifies summary dismissal. In Adesokan the EAT held the tribunal's conclusion to be perverse on the facts of the case. It took into account the tribunal's finding that the claimant's conduct had not been wilful. The question to be asked was whether the conduct was "so grave and weighty to justify summary dismissal". The EAT held that length of service had no bearing on that question and it was an error of law to hold to the contrary.

92. The respondent relied on the distinction between conduct and capability issues in this case, the latter relating to the employee's ability to do the work or to do it in the way required by the employer. Such cases should be managed in a different way through performance management steps. Mr Healy submitted that the respondent was wrong to treat this as a conduct case at all and as such it had not established a potentially fair reason for dismissal.
93. Alternatively Mr Healy argued that the dismissal was not fair under section 98(4) Employment Rights Act 1996 and set out his reasons by reference to British Home Stores v Burchell. He challenged the existence of an honest and genuine belief in the misconduct on the grounds that this was not a conduct case at all, and cited the evidence which undermined the notion that there were reasonable grounds for supporting the such belief. He referred to the tasks that would not be recorded in the Confirm system and submitted that there was no evidence that the claimant's method of working was resulting in an unusual backlog of inspections or an increase in the liabilities to which the respondent was exposed by way of highway claims. No issues had ever been raised with the claimant about the way he was working, nor had he been instructed to work differently. Mr Healy also took issue with the reasonableness of the investigation, submitting that other witnesses should have been spoken to including the claimant's son, Mark Carroll and giving consideration to the claimant's job descriptions and his qualifications and training. The respondent could and should have spoken to other colleagues including those at the depot, obtained and reviewed the claimant's phone records and obtained CCTV footage.
94. The claimant made further criticisms relating to the procedure followed, alleging that there was unreasonable delay dealing with the disciplinary hearing and especially the appeal. It was submitted that the appeal panel's deliberations suggested they had a natural bias towards upholding the decision already reached by management.
95. As for the sanction imposed, Mr Healy said the claimant's good disciplinary record and length of service made it unreasonable to summarily dismiss him and so that sanction fell outside the band of reasonable responses.
96. On the wrongful dismissal claim Mr Healy submitted that whatever the Tribunal's findings in respect of unfair dismissal, on the evidence presented before it, the Tribunal could be satisfied that the claimant was not guilty of gross misconduct justifying summary dismissal. Put simply, the respondent must show on the balance of probabilities that the claimant was guilty of conduct sufficiently serious to entitle it to terminate his employment without notice.

## **Conclusions**

97. The Tribunal has set out above its findings on key aspects of the evidence, and in reaching its decision has taken into account the entirety of the evidence presented at the hearing. It was necessary to make detailed findings of fact in this case in order to address the legal test applicable to a wrongful dismissal claim, that being different from the test applicable to consideration of unfairness under section 98(4) Employment Rights Act 1996. In the latter case, the Tribunal

must not substitute its own conclusions for those reached by the employer, but must instead evaluate the evidence in order to decide whether the respondent had a potentially fair reason for dismissing, and whether in relying on that reason it acted reasonably. The reasonableness of the dismissal is to be assessed by reference to the approach that a reasonable employer would adopt, and not the approach that the Tribunal might have taken in the circumstances. Considerations affecting unfairness in a conduct case are assessed by reference to the guidelines in British Home Stores v Burchell and by reference to the information the respondent had, or should have had, in front of it at the time of making its decisions. A fair procedure is also an important feature of fairness.

98. By contrast, the wrongful dismissal claim required the Tribunal to reach its own conclusions about the claimant's conduct, and whether it amounted to gross misconduct entitling the respondent to terminate his contract summarily without notice.

### **Conclusions on unfair dismissal**

99. The claimant suggested that the underlying reason for his dismissal was not his conduct in the sense of deliberate or wilful actions, but rather his performance in the job. On this view of it, the respondent might have categorised its concerns about the way he spent his time as a case of the claimant working inefficiently. The respondent was firmly of the view that the claimant's conduct was deliberate and a breach of trust on the part of an employee whose role required him to work autonomously. The role of a highway inspector carries with it the responsibility to identify defects as well as carrying out routine inspections, so as to protect members of the public from injury or harm and protect the respondent from claims.
100. The claimant in his evidence sought to persuade the Tribunal that his former manager Mr Blair had a vendetta against him and wished to see his employment terminated. This was not supported by any concrete evidence, other than a suggestion that the claimant had, by giving evidence in a colleague's grievance in 2016, led Mr Blair to form this negative opinion.
101. The Tribunal is satisfied that the reason for the claimant's dismissal was conduct and not capability under section 98 of the 1996 Act. This was not a case which turned solely on the claimant having a backlog of inspections due to working inefficiently, but rather a case of the claimant being unable to explain significant gaps in his working days which amounted to a total of 25 hours in only a three week period. The claimant was a very experienced and longstanding inspector who understood well the responsibilities and duties of his role. He did not require instruction or training or close supervision in order to work efficiently. The respondent satisfied the Tribunal that when it categorised the claimant's behaviour (the unrecorded time and inaccurate time sheets), it did so by reference to his conduct rather than unsatisfactory performance. Accordingly the respondent had a potentially fair reason to dismiss the claimant.
102. Whether the dismissal was actually fair turns on the wording of section 98(4) of the 1996 Act considered alongside the Burchell guidelines and the standards

established by the ACAS code of conduct and guidelines. Dealing first with the Burchell guidelines, the Tribunal has to be satisfied that the respondent genuinely believed in the claimant's guilt. Although the claimant's suspicions about Mr Blair were raised in the hearing, this aspect of the case was not pursued with any enthusiasm, and Mr Healy clarified that a witch hunt was not being suggested. The Tribunal considered whether Mr Blair's having initiated the investigation had an impact, even indirectly, on the chain of events which followed. The Tribunal is satisfied that this was not the case and accepted the evidence of Ms Scarr that she acted independently and was not improperly influenced in her investigation. Neither she as the investigator nor Mr Hanson as the dismissing officer were in any way influenced by whatever bad feeling may have existed between the claimant and Mr Blair in the past. Mr Blair played no active role in the investigation beyond supplying Ms Scarr with some factual information at the outset. By the time Mr Hanson dealt with the disciplinary hearing, Mr Blair no longer worked for the respondent.

103. Not only was there no evidence to support the claimant's suspicion about Mr Blair's motives, but the claimant himself conceded during oral evidence that there was a proper basis for the respondent to investigate the concerns, and to suspend him for this purpose.
104. The next consideration under Burchell is whether the respondent carried out a reasonable investigation. The standard required is not one of perfection but reasonableness. Some time was spent at the hearing exploring the omissions in the investigation, such as the claimant's mobile telephone records, CCTV footage at the depot and the lack of interviews with other workers at the depot or with Mark Carroll as the only other inspector.
105. Having examined the detail of these assertions and the evidence as a whole, the Tribunal is not persuaded that the investigation was incomplete or unreasonably conducted. Ms Scarr fairly conceded that some of the above enquiries had not occurred to her at the time, such as the CCTV footage, but the question is not to be judged with hindsight. It is a matter of what the respondent ought reasonably to have done with the information available to it at the time. At no time during the internal proceedings did the claimant himself suggest that Ms Scarr approach any particular colleague, including his son, to obtain information, nor did he assert that the telephone records would explain how he had spent his time in the three week period under review. Although the claimant was aware at the point of suspension that his activities in the previous three weeks needed to be explained, and he had daily handwritten logs of his activities in his possession, he was unable to provide the investigator with any concrete or specific information to explain the gaps in his days. Had Ms Scarr been alerted to the possibility that gaps in time could be explained by reference to numerous phone calls, or particular conversations with the team at the depot, then she might have made those enquiries. However, the Tribunal does not consider it unreasonable for Ms Scarr not to have cast her net more widely. Furthermore, no such exculpatory evidence has ever been identified. This is not a case where the claimant could say that, if only the investigator had taken certain steps, then the picture presented by the evidence would have looked different.

106. This is illustrated by the fact that Mark Carroll gave evidence in support of his father's claim, as did the claimant's trade union representatives, but nothing that they put forward had any bearing on the adequacy of the information obtained by the respondent at the time. Although the respondent's actions are to be judged by reference to what it knew or ought to have known then, the Tribunal notes that any statement obtained from Mark Carroll would have added to nothing to the inquiry. Even the claimant in his evidence asserted that the importance of speaking to his son was to have a better understanding of the role of the highway inspector, rather than to obtain any specific piece of information. There was nothing to point the respondent in this direction at the time.
107. The third element to be assessed under Burchell is whether the evidence obtained through the investigation reasonably supports the respondent's belief in the misconduct. This was more challenging for the Tribunal to determine, as it was conscious that the respondent was in effect seeking to prove an absence of activity. Ms Scarr compiled a detailed and thorough spreadsheet containing data from the numerous sources she relied on, including information from the claimant himself, and it was a clear from this that there were indeed significant gaps of time in the claimant's working days. The question for the Tribunal was whether it was reasonable for the respondent to expect the claimant to prove that he was working, or whether it was reasonable to conclude that he must not have been, because otherwise there would have been some supporting evidence. Being mindful of the duty not to substitute its own view of the evidence, the Tribunal concludes that the evidence collated by Ms Scarr did support Mr Hanson's decision to dismiss. The respondent had to decide, on balance, whether it believed the claimant when he said he was working even though he could not point to any concrete examples to show what he was doing. The respondent had to take a view of the overall picture that was presented, including what it perceived to be patterns of behaviour. Those patterns included inefficient route planning and unexplained journeys back and forth to inspection sites, and numerous examples of the claimant spending unexplained time at the depot at the end of the day, but completing a timesheet based on his working until 16:30 each day.
108. After evaluating the evidence as a whole the Tribunal considers that the respondent's decision to treat the conduct as gross misconduct justifying summary dismissal fell within the band of reasonable responses. It cannot be said that no employer acting reasonably would have reached the conclusion that this respondent did.
109. The fairness of the dismissal also requires consideration of the procedural fairness. No serious challenge was mounted in this respect except in relation to delay in the time taken to hear the appeal. Again, this is not an exercise in perfection though it is important to respect principles of natural justice. The claimant was aware very promptly of the nature of the respondent's concerns and given a clear explanation at the point of suspension. He was able to refresh his memory promptly from his own handwritten records and given full opportunities to set out his case in two investigation interviews and at the disciplinary hearing. He was supported by his trade union throughout. Neither the claimant nor his union felt the need to direct the investigator to take any



additional steps, nor did they request that any witnesses be called to the disciplinary hearing even though this was an option for them. Mr Hanson conducted a fair disciplinary hearing and gave the claimant a full opportunity to defend the allegations. The Tribunal is satisfied that Mr Hanson gave his decision conscientious thought and conducted the process in a fair and reasonable manner. The sanction of summary dismissal also fell within the range of reasonable responses, given the trust issues raised.

110. Once the decision to dismiss was reached, the claimant was given a right of appeal. His dissatisfaction with the delay in hearing the appeal was understandable, but in the circumstances of the case the Tribunal cannot say that the respondent acted unreasonably. An appeal before elected members, involves coordinating the diaries of councillors, managers, HR advisors, the employee and his union representatives, and this in itself can often present challenges. When the impending local elections are factored into the picture, it is clear that the respondent's hands were tied for some time before it was able to appoint a panel and arrange a hearing date. Importantly, nothing about that delay created any unfairness to the claimant.
111. For these reasons the Tribunal finds that the respondent acted reasonably both in reaching its substantive decision and in its procedural handling of the claimant's dismissal.

### **Conclusions on wrongful dismissal**

112. In dealing with the wrongful dismissal claim, the Tribunal had to consider mixed questions of fact and law in reaching its own conclusions about whether the claimant was guilty of misconduct and, if so, if that amounted to gross misconduct. At this point the Tribunal is duty bound to draw its own conclusions based on the evidence represented at the hearing, again applying the balance of probabilities. Put simply, the question is whether the respondent was entitled to terminate the claimant's contract summarily on the grounds that he had committed an act of gross misconduct which repudiated the terms of his contract. The key term which is relevant to this question is the implied duty of trust and confidence, which would require a highways inspector to carry out his work diligently, to avoid deliberate inefficiency, to record his inspections and their outcomes conscientiously, and to submit time sheets which accurately reflected the hours actually worked.
113. The Tribunal gave careful consideration to the detail of the evidence summarised in the respondent's spreadsheet to assist it in reaching conclusions on the facts. The spreadsheet incorporated information supplied by the claimant so as to reflect what he had been able to say about his activities. In addition the Tribunal considered the claimant's oral evidence and that of the witnesses who gave evidence on his behalf. None of those witnesses had any specific evidence to provide which assisted in answering this question. Mr Jeffrey agreed with the claimant that Mr Blair had a negative attitude towards him relating back to his supporting a colleague's grievance in 2016. Mr Jeffrey had not worked as a highways inspector since 2009 and had little day to day contact with the claimant since July 2017. Mr Williams and Ms Metcalf supported the claimant's case in

the sense that they did not believe the evidence warranted the conclusion reached by the respondent. Mark Carroll gave evidence of a fairly generic nature about the work done by a highways inspector. He himself had been around two to three weeks behind with his inspections and was not aware that the claimant's work continued to be significantly behind schedule.

114. Overall the Tribunal found the claimant's evidence unconvincing. As happened during the internal investigation, the claimant responded to the evidence that he was not working for an average of an hour and a half a day by reference to things he 'might' or 'could' have been doing. Making allowances for the fact that the claimant might not be expected to account for every minute of his days, and even shortly after the events might not have a complete recall of his activities, the Tribunal was nevertheless struck by the fact that he provided not a single example of any activity reflecting the time unaccounted for. While the events were fresh in his memory, the claimant could have been expected to remember a particular unexpected call-out, or a conversation with a resident in a particular area, or a request from a colleague to carry out an inspection which for some reason caused him difficulties such as being given the wrong address. Had the claimant had to deal with any emergency requests, the Tribunal would expect that to have been recorded in the respondent's systems (whether in Confirm or in emails), and furthermore would expect the claimant to have remembered it.
115. The claimant maintained that the Confirm system did go down though he agreed with Mr Young's view that this happened rarely. When giving evidence about one particular occasion when he had to go to the Civic Centre to input data, the claimant clarified that this was in fact an issue about 4G cover in the area. There was no evidence that there were technical obstacles preventing work from being recorded, and on the contrary Mr Young confirmed that the system was working at the relevant time.
116. There were several examples in the claimant's evidence of his giving vague or inconsistent answers to questions. When first asked about his job description the claimant confirmed it was accurate, though he later took issue with the requirement to make accurate records where defects were not found. The claimant maintained that ad hoc inspections were not recorded, in the face of contradictory evidence from Mr Frost's statement. In evidence he avoided direct questions about making a record saying 'no defect', and simply repeated that if a defect was found it would be recorded. The Tribunal asked for clarification on the point, querying how the respondent would deal with any complaint to the effect that a reported defect had not been inspected or dealt with. In answer to this the claimant said "We'd go back to the person, meet at their house, talk about it, look at it." The Tribunal was unconvinced by the evidence on this point and did not believe that such unreported inspections would in any case explain the lack of recorded activity.
117. In reaching this view of the evidence the Tribunal was also influenced by inconsistencies in Mark Carroll's evidence about whether a record was made when no defect was found. Initially he said during oral evidence, "If I find nothing, I type in 'no defect found'". Later Mr Carroll both confirmed this and contradicted it, drawing a distinction according to who had reported the defect. If it were a

fellow officer, no formal record was made in Confirm. This left unanswered the suggestion that the claimant might make no record in response to a report from a member of the public – something which he was keen to suggest could account for some of his working time.

118. At the second investigation interview the claimant told Ms Scarr that there were reasons why he had been in the areas identified by the tracker, but these “could be anything”. He said “I do that much of it, it all blends in to one.” The Tribunal did not find this credible so as to explain the number of gaps across the three week period. This was reinforced by the claimant's response on cross-examination when asked if he could give one detailed example of something he was spending his time on. The claimant had no answer other than to say it was going back months in time.
119. The question of how much work had to be done at the depot at the beginning and end of each working day was also unsatisfactorily explained by the claimant and Mark Carroll. Both were inconsistent in their response to whether a 30 minute allowance was reasonable, and unable to provide credible reasons for challenging this assessment. When asked why he disagreed with a 30 minute average per day, Mark Carroll did ultimately agree that this was reasonable. Some specific tasks were identified in the evidence, such as stocking up equipment, but this was not done every day. Refuelling the van would happen once a month. Neither of these jobs took much time. Otherwise, emails might be dealt with, though in that case the respondent's investigation would have identified them.
120. The claimant and his son shared a car to and from work each day but they did not arrive back at the depot at the same time. Mr Carroll said that whereas the claimant might arrive at around 4.00pm, he might be five or ten minutes later, or vice versa. If the claimant was already there waiting for him, Mr Carroll would do some work and they would leave together at 4.30pm every day.
121. The Tribunal did not accept the claimant's evidence about carrying out other work on the way to and from the depot, or at home, for which he made no records nor claimed any time on his flexi-time sheet. The examples of discrepancies between the flexi-time sheets and the tracker data identified in the respondent's investigation report, do tend to show a pattern of unaccounted for time in the depot at the end of the day, with no evidence to show that any work was being done. Some individual examples are referred to in the Tribunal's findings of fact above and are not repeated here. It is important to add that the examples singled out in this judgment are intended to highlight individual instances of concern and are not a comprehensive account of other such instances in the respondent's spreadsheet, the accuracy of which is accepted.
122. Overall the Tribunal is satisfied that the respondent has provided evidence showing that the claimant was guilty of conduct amounting to a breach of the trust placed in him, both by reference to the substantial unexplained time during the working day and the inaccurate completion of time sheets suggesting incorrectly that work was being done at the end of the day in the depot. The facts of the case support this conclusion on the balance of probabilities. As a matter of

law, such conduct does amount to a breach of trust and a repudiatory breach of the contract. Accordingly the respondent was entitled to terminate the claimant's contract without notice and the wrongful dismissal claim fails.

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**EMPLOYMENT JUDGE LANGRIDGE**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 25 September 2020**

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