Case No: 2302403/2017
2300276/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr O Oti		**Abellio London Ltd**

Heard at: London South Employment Tribunal **On:** 7, 8, 9,10 & 11 November 2020

Before: Employment Judge Hyams-Parish
Members: Ms L Brooks and Ms N Beeston

Representation:
For the Claimant: Mr J Neckes (Union Representative)
For the Respondent: Ms R Jones (Counsel)

JUDGMENT

The claim for breaching the statutory right to be accompanied (s.10 ERelA) is well founded and succeeds.

The claim of unfair dismissal (s.98 ERA) fails and is dismissed.

The claim of wrongful dismissal fails and is dismissed.

The claim of automatic unfair dismissal because the Claimant asserted his statutory right to be accompanied (S.12 ERelA) fails and is dismissed.

The claim that a detriment was suffered because the Claimant asserted his statutory right to be accompanied (S.12 ERelA) fails and is dismissed.

The claim of automatic unfair dismissal because he asserted a relevant statutory right (s.104 ERA) fails and is dismissed.

The claim that the Claimant was victimised (s.27 EQA) fails and is dismissed.

The Claimant is awarded compensation of 250.00 in respect of the above breach of s.10 ERelA.

REASONS

Claims

1. By a claim form presented to the Tribunal on 5 September 2017, the Claimant brings the following claims:

   (a) Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA"))

   (b) Wrongful dismissal

   (c) Dismissal because the Claimant asserted a statutory right (s.104 ERA)

   (d) Whistleblowing detriment and dismissal (s.103A/47B ERA)

   (e) Victimisation (Race) (s.27 Equality Act 2010 ("EQA"))

2. A second claim was presented on 19 January 2018. It re-pleaded the above claims, but also added the following additional claims:

   (a) Breach of s.10 Employment Relations Act 1999 ("ERelA")

   (b) Dismissal and detriment claim pursuant to s.12 ERelA

   (c) Breach of Regulations 3 & 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010

3. Prior to this hearing, the blacklisting claim seems to have been withdrawn. On the first day of this hearing, Mr Neckles also withdrew the whistleblowing claims on behalf of the Claimant. Although Mr Neckles said that he notified the Employment Tribunal and the Respondent of the proposed withdrawal on Sunday 6 December, the Tribunal could not see any such correspondence on file.

4. The live claims that the Tribunal was therefore asked to determine are as follows:

   (a) Unfair dismissal (s.98 ERA)

   (b) Wrongful dismissal

(c) Dismissal and detriment claims because the Claimant asserted a statutory right to be accompanied (s.12 ERelA)

(d) Breach of the right to be accompanied (s.10 ERelA)

(e) Dismissal because the Claimant asserted a relevant statutory right (s.104 ERA)

(f) Victimisation (s.27 EQA)

Legal issues

5. The following questions were agreed by the parties as those which the Tribunal needed to answer in order to determine the claims:

A. Unfair dismissal (s.98 ERA)

I. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

II. Was that belief based on reasonable grounds?

III. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

IV. Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

V. Was it reasonable for the employer to regard that conduct in totality as gross misconduct on the facts of the case?

VI. Was the dismissal procedurally fair?

VII. If the Claimant's dismissal was unfair, should there be a "Polkey" reduction in the compensation awarded and if so, by how much?

VIII. Did the Claimant contribute to the dismissal and if so, by how much, if any, should any basic and compensatory awards be reduced?

B. Wrongful dismissal

I. Did the Claimant commit a repudiatory breach of contract entitling the Respondent to treat the contract as at an end and dismiss the Claimant summarily?

C. Right to be accompanied (s.10 and 12 ERelA)

I. Did the Claimant reasonably request that the be accompanied to

meetings on 17, 29 August, 1 September 2017 and 9 October 2017?

II. Was each of those a disciplinary or grievance hearing that the Claimant was required to attend or invited to?

III. Did the Respondent permit the Claimant to be accompanied by his chosen companion?

IV. Have the claims in respect of the above breaches been presented to the Tribunal in accordance with s.11(2) ERelA?

V. Was the reason (or principal reason) for the Claimant's dismissal that he exercised or sought to exercise his rights under s.10 ERelA?

VI. Did the Claimant suffer the following detriments on the grounds that he exercised or sought to exercise his rights under s.10 ERelA[1]?

(a) The Respondent failed to seek further information and clarification from the Claimant's Trade Union Representative prior to discharging their disciplinary and appeal decisions, which may have had a positive impact by preventing his summary dismissal.

(b) The Respondent failed to permit the Claimant to seek advice, legal or otherwise, from his Trade Union Official during his disciplinary and appeal hearing by their decision to bar Mr John Neckles attendance at the same.

(c) The Respondent by barring the physical attendance of Mr John Neckles on their premises, recklessly failed to permit the Claimant the opportunity to utilize the legal training, advocacy skills and vast experience of his chosen trade Union Official Mr John Neckles, whose training, knowledge and experience of Employment Law may have benefitted the Claimant in persuading the Respondent that summary dismissal of the Claimant would be wholly unfair.

(d) The Respondent by their decision to preclude Mr John Neckles from lawfully trespassing on their premises, thus prevented the Claimant from conferring on the subject matter during the Disciplinary and Appeal process with his Trade Union Representative, which may have aided him in understanding and responding to questions advanced by the Respondent's Disciplinary & Appeal Officer.

(e) The Respondent's barring of the Claimant's Trade Union Official Mr John Neckles from entering their premises, prevented the Claimant from utilizing on oral submissions whether legal or otherwise in support of the Claimant's advanced claims during his Disciplinary & Appeal Hearing process. That the legal knowledge, superior advocacy training and skills, experience and representation ability was far advanced to any other forms of representations which the Claimant could have drawn from. This denial of Mr John Neckles to represent and accompany the Claimant was to his detriment and for all the reasons outlined above; was wholly unreasonable and in

[1] The detriments are copied exactly from the claim form

breach of law.

(f) The Respondent awarded the Claimant with Disciplinary & Appeal Awards/Sanctions devoid of his asserted statutory rights of accompaniment.

D. Dismissal for asserting a statutory right

I. Did the Claimant allege that the employer had infringed a right of his which is a relevant statutory right?

II. The Claimant says that he alleged that the employer had infringed the right to be accompanied on 17 and 29 August 2017, 1 September 2017 and 9 October 2017.

III. Was the reason (or principal reason) for the Claimant's dismissal that he had alleged a breach of the above statutory right?

E. Victimisation (s.27 EQA)

I. Did the Respondent subject the Claimant to a detriment? The detriments relied on are as follows:

(a) Summary dismissal on 01/09/2017.

(b) Failure to pay entitled notice.

(c) Denial of the contractual rights of accompaniment asserted on the 13 August 2017 with regards to a Fact-Find/Investigatory Hearing.

(d) Denial of the statutory right to be accompanied

(e) Failure to deal with, investigate and determine and conclude the Claimant's Grievance Complaint submitted on the 14th & 31 August 2017.

II. The protected acts alleged are:

(a) Disclosure via email on 13 August to Dave Hannan

(b) Internal Grievance complaint dated 14 August 2017 against Mr Jackson

(c) Internal Grievance complaint dated 31 August 2017 against Mr D Hannan

Practical and preliminary matters

6. The Tribunal heard evidence from the Claimant and the following witnesses for the Respondent:

   (a) Mr David Hannam – Investigating officer

   (b) Mr Martin Moran – Chairperson of the first disciplinary hearing

   (c) Ms Urvi Patel – dismissing officer

   (d) Mr Jon Eardley – appeal officer

7. The Tribunal was referred throughout the hearing to documents in a bundle extending to 485 pages. References to numbers in square brackets in this judgment are to pages in the hearing bundle.

8. A decision with oral reasons was given to the parties at the conclusion of the hearing. These written reasons are provided at the request of the Respondent.

Findings of fact

9. The following findings of fact were reached on the balance of probabilities having considered all the evidence given by witnesses during the hearing and documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

10. The Claimant commenced employment with the Respondent on 16 May 2011.

11. The Respondent is a private limited company, which along with Abellio Surrey Limited (ASL), operates public transport services in Central, South and West London and across North Surrey.

12. The Respondent operates over 600 buses over 42 bus routes from 6 depots and employs approximately 2,500 staff.

13. The Claimant worked out of the Respondent's Battersea depot until his dismissal on 1 September 2017.

14. The Claimant was issued with particulars of his terms and conditions of employment (“Particulars”) on 16 May 2011 when he commenced employment with the Respondent [94].

15. Section 12 of the Particulars is entitled "*Warranty as to possession of a PCV*

Licence" and states:

> ***It is necessary that you hold a valid Passenger Carrying Vehicle (PCV) licence to drive passenger carrying vehicles and you agree that if you cease to hold a PCV licence, Abellio London may end your employment immediately without notice or payment in lieu of notice.***
>
> ***You shall immediately inform Abellio London:***
>
> ***a) If you are prosecuted or if you are to be prosecuted for any road traffic offence***
>
> ***b) If your driving licence is endorsed***
>
> ***c) If you are disqualified from holding a driving licence.***
>
> ***d) If you are advised by your GP that you are to refrain from driving duties or have advised the DVLA that you are no longer fit to drive.***
>
> ***You shall on request by Abellio London produce your PCV licence for inspection.***

16. Section 20 of the Particulars is entitled "*Disciplinary and Other Rules*" and says:

> ***As a condition of your employment, you are subject to and are required to conform with Abellio London Rules and Regulations which may for the time being be in force and applicable, and to become thoroughly acquainted with those rules and regulations relevant to your work. In particular, the Disciplinary Procedure is referred to under this section, a copy of which along with all other Policies, the Respondent makes readily available to all staff.***

17. At paragraph 31 of the Particulars there is a heading called "*Collective Agreements*" which says:

> ***Terms and conditions of collective agreements may be amended by agreement with the recognised Trade Unions. Any collective agreements with trade unions to which the Company is or may become a party are a matter between the Company and the union and do not confer or create rights between you and the Company. You have the right to belong to a Trade Union and take part in its activities.***

18. The Tribunal finds as fact that there are no collective agreements that confer particular rights on employees, including a right for unions to be consulted prior to changes being introduced to employee contracts of employment. There was no evidence before the Tribunal to contradict what the Respondent said on this point.

19. At paragraph 27 of the Particulars headed "*Changes in your terms and conditions*":

> **The Company reserves the right to make reasonable changes to any of your terms and conditions of employment.**

20. The Tribunal was shown a copy of the company's disciplinary policy. The Particulars expressly state that the disciplinary policy does not form part of the Claimant's employment. Equally there is no suggestion in the disciplinary policy that it forms part of the contract of employment for employees. The Tribunal finds as fact that the disciplinary policy does not have contractual effect.

21. In the list of examples of gross misconduct, the following is included:

> ***Poor attitude or wilful refusal to carry out instructions given by a Manager/Supervisor, or any other act of insubordination***

22. In order to give effect to TFL requirements, the Respondent adopted a system of inspecting the driving licences of employees at least once a year. The Tribunal finds that this was intended to ensure public safety by checking that employees were not disqualified or did not have endorsements which prevented them from performing their duties as bus drivers.

23. Up to 2015, the Respondent had a system of checking driving licences twice a year. The drivers would present the two parts of their driving licence to the company and the counterpart would be photocopied, which importantly contained any information relating to endorsements. It was clearly not a perfect system because if employees received endorsements, or were banned, this would not be picked up until the next inspection unless they were informed by the employee. The old system relied on the trust of employees.

24. In any event the system was changed by the DVLA in 2015 when the paper counterpart ceased to exist. This resulted in a wholesale change to the way the Respondent would monitor whether their drivers had a valid driving licence and whether they had received any endorsements. The change resulted in the employees responsible for managing inspection of driving licences being made redundant. The change to the system meant that at any point the employer could go online and inspect an employer's driving licence and any endorsements. Importantly, however, there was a particularly important change introduced by the new system, and that was the system of the Respondent receiving email alerts when the licence status of employees changed, notably if they received endorsements. The Respondent saw the new system as more effective and streamlined, but importantly reduced the risk of them not knowing that one of their drivers had received endorsements or been banned from driving.

25. The Respondent chose to contract out the system of managing this new system to a third-party company, Descartes Systems UK Ltd. Employees were told about the new system in July 2015 and sent consent forms to

complete and sign. The standard forms produced by the DVLA which allowed the Respondent to check the driving licence of an employee, required the consent of each employee before allowing the Respondent (or any third party) to access the licence information. It was suggested by the Claimant during these proceedings that such forms were not produced by the DVLA and were therefore fraudulent. The Tribunal did not accept the Claimant's evidence in this regard and finds as fact that the forms are genuine and have been produced by the DVLA.

26. At the bottom of the consent form, the following words are written:

> ***I authorise the company or companies listed in Section 1 above to ask DVLA for my driver record information as and when they require, at a frequency they shall determine.***
>
> ***I understand that the company I authorise to ask for my driver record information may use an intermediary company to make the enquiry with DVLA on their behalf.***
>
> ***I authorise and direct DVLA to disclose to the company or companies in Section 1, all relevant information relating to my driver record from the computerised register of drivers maintained by DVLA. This includes personal details, driving entitlements, endorsement details, disqualifications, convictions, photo images and CPC details (where appropriate). Medical information is not to be provided.***
>
> ***This authority will expire when I cease to drive in connection with the company and in any case three years from the date of my signature.***

27. The Tribunal accepts the Respondent's evidence, and therefore finds as fact, that the information that can be viewed under the electronic system is no more or less than the information that could be viewed from looking at a driving licence and counterpart under the old system. Although the Claimant alleged that the Respondent could view personal details beyond that mentioned above, he could adduce no other evidence from which the Tribunal could reach a different conclusion than that reached above.

28. By letter dated 22 March 2016 the Respondent wrote to the Claimant stating that he had been reminded to sign the consent form on a number of occasions and asking him again to sign and return it. The letter set out the rationale for the new system and said that if he did not sign it, he could not perform his role as a bus driver and could be dismissed.

29. On 10 August 2017 Mr Hannam sent the Claimant a letter inviting him to an investigatory meeting to discuss his refusal to sign the driving licence consent form. The letter included the following:

> ***…The purpose of an investigatory meeting is to find out as much information relating to the allegation detailed above and to give you the opportunity to respond. It is not a disciplinary hearing.***

> ***There is no statutory right to be accompanied by a work colleague or trade union representative at an Investigatory Meeting….***

30. The Tribunal finds as fact that there was no statutory or contractual right to be accompanied to the investigatory meeting. The Tribunal further finds that this was a meeting convened purely to explore the Claimant's reasons for not signing the consent form.

31. On 11 August 2017 there was a conversation between the Claimant and Darren Jackson which resulted in an official's report being prepared by him which said the following [sic]:

> ***At approx. 06:45 on Friday 11 August 2017 Mr Oti was signing in for his duty, at this point approach Mr Oti and stated to him if he had completed a driving licence mandate form due to me being notified by my admin that he had not completed one. He was going into his wallet to show me his driving licence which at this point I stopped him to inform him that I wasn't asking to see his licence I was asking if he had completed the mandate form.***
>
> ***He mumble something not too sure what he said so I invite him in to the allocation area and asked him again regarding him completing the mandate form.***
>
> ***He replied that he has fill one out already.***
>
> ***I said to him that it seems like we cannot find it so can he please complete another form as we have no record of him doing one. He replied he is not here for this, he is here to do his duty.***
>
> ***I then invite him into my office and asked him again to complete the mandate form, he reply that I should ask HR.***
>
> ***I said to him that am asking him the question if he had completed a form and if not to complete one now.***
>
> ***He replied with the same answer which was he is not here for this only to do his duty***
>
> ***So I said to him that he must take seat and I will get back to him***

32. On 11 August 2017 the Claimant was suspended by Mr Hannam pending an investigation.

33. On 13 August 2017 the Claimant sent an email to Mr Hannam which included the following [sic]:

> ***I hereby assert my contractual right to be accompanied and represented by an official from the PTSC Union of which I am a member. This is a contractual right that is afforded to members of the recognised union Unite.***

> ***I strongly object to condition 2 of my suspension from duty with pay as they are not contractual terms either agreed with the recognise Union through a "Collective Agreement" or with me directly.***
>
> ***In any event, I deem such term as being wholly unreasonable, arbitrary and discriminatory on grounds of my race and Trade Union Membership of the PTSC Union.***

34. On 14 August 2017 a fact-finding meeting was held by Mr Hannam at which the Claimant attended. The hearing was covertly recorded by the Claimant. During the meeting, the Claimant asked to be accompanied by Mr Neckles but Mr Hannam said that as the meeting was a fact-finding meeting only, there was no right to be accompanied. At that meeting, the Claimant said his objection to signing the consent form was because there was no contractual right for him to do so. The Claimant said [sic]:

> ***….I'll have nothing further to say to this, but I'm prepared to sign the driving license mandate form once you're able to supply me with the copy of the contractual agreement between the company and recognised Unite union that requires me to sign it…***

35. He also said later in the meeting [sic]:

> ***I'm not refusing in any change in law, but like I said earlier once you supply me with a copy of the contractual agreement between the company and Unite union that requires me to sign it then I'm prepared to sign it.***

36. By letter dated 14 August 2017, Mr Hannam wrote to the Claimant inviting him to a disciplinary hearing on 17 July 2017 (which is assumed to mean 17 August 2017) to answer allegations of:

> ***poor attitude or wilful refusal to carry out a reasonable instruction given by a Manager***
>
> ***Refusal to sign a Driving Licence Mandate, in order to enable a check of your licence to be performed.***

37. On 16 August 2017 the Claimant wrote to Mr Hannam (although it was written by Mr Neckles on the Claimant's behalf) stating that he wanted Mr Neckles to represent him at his disciplinary hearing.

38. On 14 August 2017 a grievance was submitted by Mr Neckles on the Claimant's behalf. His grievance essentially related the very same complaints that had been subject of the investigation and disciplinary hearing, namely being required to sign a consent form. He referred to this being an act of racial harassment. This is relied on by the Claimant as a protected act.

39. A disciplinary hearing was held on 17 August 2017 and was chaired by Mr Moran. This hearing was covertly recorded. At that hearing the Claimant

asked to be represented by Mr Neckles but was told by Mr Moran that Mr John Neckles and his brother, Francis Neckles, were not permitted on the Respondent's premises to represent any employees. The Tribunal finds as fact that the reason for this arises from a previous Tribunal case brought against the company by Mr Francis Neckles in relation to his employment with the Respondent in which the Tribunal found that Mr John Neckles had manipulated the metadata of a witness statement with the intention of misleading the Tribunal as to when that statement was produced.

40. The Tribunal finds that the Respondent did not object to the PTSC union per se and they encouraged the Claimant to contact someone else at the union to attend. The Tribunal questioned the Claimant about bringing an alternative representative with him to the meeting, particularly whether that is something that he discussed with Mr Neckles given the notification by the Respondent that they would not allow Mr Neckles to attend. The Tribunal found the Claimant's answer wholly unconvincing. Indeed, the Claimant continued to evade answering the question. The Tribunal concludes that there were other options open to him in terms of alternative representation from the same union, but the Claimant chose not to do so. In any event, Mr Moran decided not to proceed with the Claimant unaccompanied but rather to give the Claimant time to find alternative representation. He therefore postponed the hearing to 24 August 2017. However, as Mr Moran was due to go on holiday shortly after this hearing, he was not available to chair the next hearing.

41. On the same day as the disciplinary hearing was due to take place, 24 August 2017, Mr Neckles wrote to the Respondent on behalf of the Claimant and said as follows [sic]:

> ***I hereby make official request for a postponement of my Disciplinary Hearing which is scheduled to be heard and determined this morning at 10:00hrs, due to the unavailability of any Trade Union Official (except Mr John & Francis Neckles) from the PTSC Union to accompany and represent my interest today. As a direct result therefore, please find listed below a date of availability when a Trade Union Official from the PTSC Union can accompany me when the matter is rescheduled….***

42. The disciplinary hearing was therefore rescheduled to take place on 29 August 2017.

43. The disciplinary hearing scheduled for 29 August 2017 proceeded as planned and was chaired by Ms Patel. At that meeting the Claimant persisted in his argument that he should be allowed to bring Mr Neckles. He claimed not to know why Mr Neckles was not allowed to attend the hearing. The Tribunal finds this most unlikely. Given that Mr Neckles knew full well why he had been barred from attending the Respondent to represent their employees, the Tribunal finds it more probable than not that he would have conveyed this information to the Claimant. Ms Patel again told the Claimant

that he was free to bring someone else from the union to the meeting. At the meeting the Claimant said the following:

> ***66.00— I objected signing the driving license mandate because there is no contractual requirement for me to do so, agreed with the union or myself, and I also objected to my employer willy nilly accessing my personal information over a two to five year period held by the DVLA***

44. In response to the Claimant's concerns, Ms Patel said:

> ***79. if you were to sign the mandate, I can assure you that under the Data protection act your information will not be misused. So, are you willing to sign the mandate?***

45. The disciplinary hearing was adjourned for Ms Patel to consider what action to take.

46. On 31 August 2017 the Claimant raised a further grievance reiterating his complaint about the denial of what he referred to as his right to be accompanied by Mr Neckles. It also referred to the Respondent's actions being an act of racial harassment.

47. On 1 September 2017, a further disciplinary hearing was held at which Ms Patel informed the Claimant of her decision to dismiss the Claimant. She gave her reasons for the dismissal which she then followed up in a letter dated 5 September 2017. In her letter Ms Patel said as follows [sic]:

> ***After careful consideration of the facts and having taken into consideration your comments and the management team at Battersea have concluded that the allegation of gross misconduct is proven and to summarily dismiss you from the company without notice. I made this decision based on the fact that all Abellio drivers were asked to complete a licence mandate to enable the Company to carry out periodical licence checks. You were given plenty of opportunity to complete the mandate form, including during the disciplinary process, however you refused to do so. You informed me that the reason for this was that it had not been agreed by yourself or the union. In accordance with your contract of employment which you signed on 16th May 2011 licence checks can be carried out by the Company at any time. You have not given me any reasonable explanation as to why you are not prepared to sign the mandate for to enable us to do so. I assured you that all personal information is held in line with our obligations under the Data Protection Act. You explained that you had no objection to us ringing the DVLA in your presence to check your licence, however as explained we currently have approximately 2,500 drivers across the Company; it would not be commercially feasible to arrange appointments with every driver to complete this check. Furthermore, by having access to licence checks this enables us to help organise medical for drivers whose licence is about to expire, although the responsibility lies on drivers to renew their licence we as a Company support this by arranging this in time for them.***

> ***Therefore, I believe that the allegations against you are proven and the appropriate sanction is summary dismissal.***

48. Regarding the Claimant's grievances, Ms Patel said [sic]:

> ***You emailed me on 31st August 2017 with a grievance against myself, Martin Moran and Dave Hannam. Having reviewed the grievance it was decided that based on the contents, the issue of your complaint was the Company's failure to allow you to be accompanied by John or Francis Neckles. As you, and the PTSC union is aware this is applied to all Abellio employees who request those individuals to accompany them. The decision was taken that as the hearing had already commenced, it was not necessary to adjourn it whilst your grievance was formally dealt with as we did not believe that it impacted on my ability to make a decision in relation to the allegations against you. The Company is however happy to arrange a formal hearing if you wish to proceed with the grievance.***

49. The Claimant appealed against his dismissal. That appeal was heard on 9 October 2017, the Claimant having failed to attend a hearing originally scheduled to take place on 20 September 2017.

50. On 7 October 2017 the Claimant emailed the Respondent with a request that he be allowed to attend the appeal hearing with Mr Neckles. This request was refused on 8 October 2017 for the same reasons already mentioned.

51. The appeal was heard by Mr Jon Eardley and not upheld. In a comprehensive letter dated 21 December 2017, Mr Eardley gave reasons for his decision and addressed all the grounds of appeal. In it, the Tribunal also finds that he dealt with the complaints raised in the grievance.

Relevant legal principles

Unfair dismissal

52. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) which says as follows:

> ***(1) In determining….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.***

53. What is clear from the above is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

54. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

55. In a conduct case, it was established in the well-known case of ***British Home Stores v Burchell [1978] IRLR 379 EAT*** that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

56. In another case called ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439 EAT** it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

57. In ***Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.

58. Finally, in ***London Ambulance NHS Trust v Small [2009] IRLR 563*** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

59. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

60. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

61. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (***Polkey v A E Dayton Services Limited [1988] ICR 142***.

62. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

63. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

64. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in ***Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111***. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Right to be accompanied

65. Sections 10, 11 and 12 of the Employment Relations Act 1999 ("ERelA") states:

> ***10. Right to be accompanied.***
>
> ***(1) This section applies where a worker—***
>
> ***(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and***
>
> ***(b) reasonably requests to be accompanied at the hearing.***
>
> ***(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who–***
>
> ***(a) is chosen by the worker; and***
>
> ***(b) is within subsection (3).***
>
> ***11. Complaint to employment tribunal.***
>
> ***(2) A tribunal shall not consider a complaint under this section in relation to a failure or threat unless the complaint is presented(a) before the end of the period of three months beginning with the date of the failure or threat, or***
>
> ***(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.***
>
> ***12. Detriment and dismissal.***
>
> ***(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the—***
>
> ***(a) exercised or sought to exercise the right under section 10(2A), (2B) or (4) or***
>
> ***(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.***

Dismissal for asserting a statutory right

66. Section 104 of the ERA states:

> ***104. Assertion of statutory right.***
>
> ***(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—***
>
> ***(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or***

> ***(b) alleged that the employer had infringed a right of his which is a relevant statutory right.***

Victimisation

67. Section 27 of Equality Act 2010 provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***
>
> ***…..***
>
> ***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***

68. The test to be applied here is threefold:

- Did the Claimant do a protected act?
- Did the Respondent subject the Claimant to a detriment?
- If so, was the Claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

69. The most important decision to be made by the Tribunal is the "*reason why*" the Respondent dismissed the Claimant. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the dismissal is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

70. A person claiming victimisation need not show that less favourable treatment was meted out solely by reason of the protected act. As Lord Nicholls indicated in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out.

Wrongful dismissal

71. Cases involving repudiatory breaches by employees typically rely on serious misconduct by the employee, such as dishonesty, intentional disobedience or negligence. They often speak of 'gross misconduct' and 'gross negligence', but the underlying legal test to be applied by a Tribunal is whether it amounts to a repudiation of the whole contract.

72. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

73. The Respondent in this case relies on a breach of the implied term that an employee will obey lawful and reasonable orders.

Submissions

74. The representatives made oral submissions which the Tribunal considered carefully before reaching its decision.

Analysis, conclusions and associated findings of fact

(a) Unfair dismissal

75. The Tribunal concludes that the Respondent has established the reason for dismissal, namely misconduct due to the Claimant's wilful and unreasonable refusal to sign the DVLA consent form enabling the Respondent to check the Claimant's driving licence status as and when they wanted to.

76. Turning to the fairness of the decision, the Claimant's primary position appears to be that it was not reasonable for him to sign the consent form in circumstances where he had concerns about his data, who would have access to it, and whether that data could be amended. The Tribunal notes, however, that this whole argument is undermined by the stance taken by the Claimant during meetings that he would sign the consent form if the Respondent could demonstrate that there was union agreement to it. The effect of this appeared to be that if the Respondent could prove there had been union agreement, all his privacy concerns disappeared.

77. Much has been made about whether the Respondent was allowed to make the change it did. Although not directly relevant to the issue of fairness of the dismissal, the Tribunal concludes that it did. It was not a term of the Claimant's contract, in the Tribunal's view, that a particular method of checking licences would be adopted. The policy that applied to the pre 2015 system was not contractual – it was management guidance. It means that no consent was required to introduce this change. There are many ways in which an employer can change the way it operates its business without securing the consent of employees. There was no agreement with the unions, as far as the Tribunal can see from the evidence, requiring that consent to be obtained.

78. The Claimant's position is that a system whereby he would give access to

his driving licence, as and when required, was an appropriate and reasonable alternative which the Respondent should have adopted rather than insisting on him signing the consent form and then dismissing him for his refusal to do so. The Respondent's position is that this was not the system they wanted to adopt. Not only did this create a logistical problem for the Respondent, but it created risks that they did not want to take; namely a risk that someone's driving licence status could change and the Respondent would not know about it. This has an obvious impact on the safety of the public.

79. It is not for the Tribunal to interfere with this decision simply if it disagrees with the approach taken by the Respondent. It is only for the Tribunal to interfere with the decision to dismiss if the approach falls outside the band of reasonable responses or is a decision that no other reasonable employer would take.

80. The Tribunal notes that there was a considerable amount of time given to the Claimant to sign the consent. Their informal attempts failed in 2016, and then later in 2017. Faced with the Claimant's abject refusal to sign, it is difficult to understand what other choices were open to the Respondent. The Tribunal accepts that the Respondent considered all the circumstances carefully, including the Claimant's reasons for not signing, his clean disciplinary record and his length of service. However, the Respondent concluded that dismissal was the only option open to them in the circumstances.

81. The Tribunal considered whether there were procedural failings or defects in the investigation that could render the dismissal unfair. The Tribunal found none. The Respondent did not refuse the request to be accompanied per se; they just objected to Mr Neckles or his brother attending to accompany the Claimant. They suggested alternatives but the Tribunal finds that the Claimant did not explore this and was not interested in having anyone else with him. The first disciplinary hearing was adjourned purely to allow the Claimant to explore this. The disciplinary hearing scheduled for 24 August was even postponed because there was no one else apart from Mr Neckles who was available – which clearly suggests there being other options available in terms of representation at that Union.

82. For all the above reasons, the Tribunal finds that the decision to dismiss the Claimant was fair and that it was reasonable to treat the conduct as gross misconduct given that the alleged conduct is clearly stated in the disciplinary policy as one that would be considered as gross misconduct.

83. The Tribunal does not think the manner in which the grievance was dealt with affected the reasonableness or fairness of the dismissal for the reasons which are dealt with below.

(b) Wrongful dismissal

84. The Tribunal finds that the Claimant was not wrongfully dismissed. It is an implied term in every contract that an employee will obey lawful and reasonable orders. The Tribunal finds as fact that the order, namely, to sign the consent form, was both reasonable and lawful for the reasons stated. An employee who refuses willfully to do something asked of an employer which is reasonable and lawful, the Tribunal believes, goes to the very heart of the contract of employment. Therefore, a breach of this term left the employer fully entitled to treat the contract as at an end and terminate it without notice.

(c) Right to be accompanied

85. The Tribunal finds that there were breaches of the right to be accompanied. The legislation does not import reasonableness to the decision as to the choice of the representative. Regardless of what had gone on previously, the Claimant was entitled to choose Mr Neckles to represent him. However, the Tribunal finds that the only breach that is in time is in respect of the failure to allow the Claimant to be accompanied to the meeting on 9 October 2017. The Tribunal is satisfied that a request was made on 7 October 2017 that the Claimant be accompanied by Mr Neckles and this was refused. This is a breach. In respect of alleged breaches for hearings taking place before then, the Tribunal finds that they were presented to the Tribunal outside the three-month time limit. The s.10 ERelA claims were only pleaded in the second claim presented to the Tribunal on 19 January 2018, a point conceded by Mr Neckles. It was clearly reasonably practicable for them to have been brought before because there was a claim form submitted on 5 September 2017.

86. The Tribunal then has to consider the compensation to be awarded. The Tribunal clearly has a discretion on the amount of compensation to award subject to a cap of two weeks pay. The Tribunal is fully aware that there have been other cases dealing with the same issue against this employer that have made different decisions regarding compensation. The Tribunal weighed a number of different factors in the balance when reaching its decision.

87. Firstly, one cannot avoid the fact that the legislation exists for a reason; it allows an employee to choose their representative from the allowed categories, and the Respondent refused this. The Tribunal takes note of the fact that the Respondent continues to breach s.10 knowing that previous Employment Tribunals have decided the point and have found against the Respondent. There is no evidence before the Tribunal whether the Respondent has reviewed the position or considered whether there are conditions which could be imposed which would allow a relaxation to what is evidently a complete ban on either of the Neckles brothers attending to accompany employees of the Respondent.

88. On the other hand, the Tribunal accepts the Respondent has valid concerns which have led to this ban and can accept they continue to have those concerns. The Tribunal also notes that the Respondent was not attempting to deny the Claimant the right to be accompanied – indeed they encouraged the Claimant to be accompanied and suggested that he bring someone else from the same union. The Respondent even postponed a hearing for that purpose. Taking all those matters into account the Tribunal considers that compensation of £250 is appropriate in this case and makes an order for that amount. The Tribunal makes no ACAS uplift. Even had the Tribunal considered an ACAS uplift appropriate, it would not have awarded an amount in excess of 250.00 as a global amount.

(d) Dismissal for asserting (i) a right to be accompanied; and (ii) a relevant statutory right

89. The Tribunal concludes that these claims are not well founded. The Tribunal concludes that the dismissal was not in any sense whatsoever influenced by the Claimant's assertion of his right to be accompanied or indeed any other relevant statutory rights. The reason for the dismissal is as stated above.

(e) Detriment claims

90. The Tribunal concluded that the detriments claimed at paragraph 5(C)(iv)(a)-(f) were not detriments at all, but particulars of the breach of s.10 ERelA. In any event, the Tribunal was not satisfied that the Claimant suffered any detriment on the grounds that he sought to exercise his rights under s.10 ERelA.

(f) Victimisation

91. In relation to the victimisation claim, the Tribunal finds that the reasons for the detriments stated in support of the victimisation claim were not because the Claimant complained about race discrimination. With regards the grievance, the Tribunal was concerned that this did not appear to have been dealt with and processed in the normal way. However, balanced against that is the fact that there was a considerable overlap between his grievance and the matters raised as part of the disciplinary process. It is the kind of grievance the Tribunal believes an employer would normally say that it should not be dealt with as a grievance but as part of the disciplinary process. In any event, it seems that the dismissing officer and appeal officer were aware of it. Ms Patel clearly had viewed the grievance as having significant overlap and gave the Claimant the option of pursuing anything not dealt with as part of the disciplinary. The issues raised in the grievance were also picked up on appeal. It was perhaps not the perfect way of dealing with it, but the Tribunal concludes that the reason for this had nothing to do with the Claimant's race. This claim is therefore not well founded and fails.

92. For all of the above reasons, aside from the claim for breach of s.10 ERelA, all other claims fail and are dismissed.

Employment Judge Hyams-Parish
30 December 2020