EMPLOYMENT TRIBUNALS

Claimant: Mr Gerald Glover

Respondent: Bulkhaul Ltd

Heard at: Newcastle via CVP **On:** 7th December 2020

Before: Employment Judge Pitt

Representation
Claimant: Mr J Morgan of Counsel
Respondent: Mr R Bloom, Solicitor

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.
2. Applying the rule in Polkey there was a 50% chance of the claimant being fairly dismissed and any compensation shall be reduced accordingly.
3. The compensation shall NOT be reduced by reason of the claimant's conduct.

REASONS

1. This is a claim by Gerrard Glover, the claimant, arising from his employment with Bulkhaul Limited, the respondent. The claimant was employed from 1st August 2015 until 19th August 2019 as 'Senior Chauffeur'. At the effective date of termination, the claimant who was born on 14th February 1968, was 51 years of age.

2. The claimant was represented by Mr J Morgan of Counsel, the respondent was represented by Mr R Bloom, Solicitor. I had before me an agreed bundle of documents which included the claimant's employment contract, various emails and text messages, and posts from Facebook. I read witness

statements and heard evidence from Tracy Flanagan, HR Manager for the respondents and the claimant.

The Issues

3. The issues were identified by Employment Judge Aspden at a hearing on 7th May 2020; I note at that hearing the claimant was represented by Mr Crabtree from his Trade Union and the respondent by Mr Bloom. The issues were set out as follows:
    i. can the respondent show that the reason or main reason for the dismissal was that the claimant was redundant i.e., had the requirements for the respondent's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish. If so, was the dismissal wholly or mainly actually attributable to that fact?
    ii. if so, did the employer act reasonably or unreasonably in treating that reason as sufficient reason for dismissing the claimant, taking into account all the circumstances, including the size and administrative resources of the respondent. Relevant considerations are likely to include:
        a. whether the claimant was warned of and consulted with about the redundancy;
        b. whether suitable alternative vacancies were available and offered to the claimant or could have been offered;
        c. the procedure followed by the respondent.
    iii. if the dismissal is found to be unfair what remedy would be appropriate? Issues for consideration will include:
        a. whether there was a chance that the claimant would have been fairly dismissed in any event ;
        b. whether the claimant has mitigated his loss;
        c. whether any compensatory award should be reduced on account of the claimants conduct, either because the claimant caused or contributed to his dismissal or on a just and equitable basis;
        d. whether any basic award should be reduced on account of the claimants conduct.

4. At the commencement of the hearing, I discussed these issues with the parties. Mr Bloom now also wants to argue that the dismissal might be fair for some other substantial reason or misconduct. I have reviewed the ET1 and ET3 and the response and note that at paragraphs 10,11, and 12 the respondent's case is set out as follows:
    - The redundancy was not a 'sham'
    - If the procedure is deficient 'it is denied that following a fair procedure would have resulted in a different outcome'

- If the dismissal is unfair it is denied that the claimant is entitled to any compensation on a just and equitable basis. The respondent would have been entitled to dismiss the claimant for gross misconduct in light of the text sent by the claimant on 10th July 2019. Further or in the alternative the Respondent would have been entitled to dismiss on the grounds of some other substantial reason, namely the breakdown in the mutual trust and confidence. In either case the payment made to the claimant as a result of his dismissal on the grounds of redundancy equals or exceed any payment which would have been due to the Claimant in any event.

5. It is clear that the respondent's case is that the claimant was redundant. In so far as misconduct or some other substantial reason is concerned these are pleaded only in so far as they go to remedy. I permitted the respondent to cross examine on the basis of misconduct, making it clear I did so as the facts were so interwoven, and I would hear further submissions on the issue of the respondent changing the reason for the dismissal at the conclusion of the evidence, in particular as to whether I could make a finding that the dismissal was not for a reason put forward by either party.

The facts

6. In making my findings of fact I have taken account of the witness statements, the oral evidence of the witnesses, and the contemporaneous documents I have been provided with. Where there was a conflict of evidence, I determined it on the balance of probabilities. I note that I was not provided with a witness statement or heard evidence from Mr Gibson, Chairman of the respondent, who dismissed the claimant nor his partner to whom I refer where necessary as Mrs Gibson. Ms Flanagan and the claimant both gave evidence of conversations with Mr and Mrs Gibson. I am asked to consider that these are hearsay. Hearsay applies where a person is relating information given to them by a third party from whom the Tribunal does not hear. In the case before me this rule applies to Ms Flanagan's evidence where she relates conversations between the claimant and Mr Gibson. Just because the evidence is hearsay does not mean I should discount it, but I must weigh it carefully against any other evidence and give it such weight as I think fit. In considering it I bear in mind that I have not heard direct evidence from Mr and Mrs Gibson as to the conversations referred to and the claimant has been unable to challenge it, but I have heard direct evidence from the claimant who was a party to the conversations. Where Ms Flanagan relates conversations, she had with Mr Gibson these are not hearsay.

7. The Respondent is part of The Gibson O'Neill Company Ltd which is a privately-owned company. It includes not only the Respondent but also

Middlesbrough Football Club and Rockcliffe Hall Hotel. Mr Gibson is actively involved in the running of all three businesses. In addition to this he has numerous external appointments. Mr O'Neill is a co-shareholder with Mr Gibson. The Respondent is an international tank container operating company with a turnover of circa £250m with 250 employees in the UK and a further 150 plus globally.

8. The claimant who was formerly employed in the military and had experience in close protection work, approached Mr Gibson in 2015 to see if he required any security services. Mr Gibson did not but did later contact the claimant offering him a position as driver for himself and his family. The claimant was formally offered the position via a letter from Mr Gibson. The contract of employment which was issued contained the following clauses: salary of £30,000 with an annual review, enrolment into a company pension scheme, working hours to be flexible as discussed, four weeks holiday, a requirement to work Bank Holidays which would be given back in lieu. There was a confidentiality clause in respect of Mr Gibson and his family. The contract sets out that rude offensive or threatening behaviour would be treated as gross misconduct.

9. At the time of the events relating to the claimant's dismissal Mr Gibson resided, with his family, in a property close to where the claimant lived. Mr Gibson was in the process of building a new property to which the family were to relocate; he was also about to be married. Mr Gibson's household as well as the family consisted of employees whose services were paid for through the respondent's payroll. In addition to the claimant being employed in this way I have heard of a housekeeper, Mrs Simpson, who was so employed. From the evidence I have heard it was intended that the household employees would remain with the family when it moved and be provided accommodation at the new property.

10. The claimant's title was 'Senior Chauffeur'. There was a second chauffeur who worked for the respondent, as I understand it principally as a driver for Mr O'Neill. The evidence of Ms Flanagan was that the claimant was employed to work primarily for Mr Gibson and the family but was required from time to time to work for the respondent. This is not clear in the first contract. The claimant's evidence was that he rarely worked for the respondent and considered that he was working for the family. On the evidence I have heard I concluded that the claimant's principal role was that of chauffeur to Mr Gibson and his family, only being called upon to work for the respondent itself if the family did not require him. In relation to the former this would entail driving Mr Gibson to and collecting from a local airport and train station and taking Mr Gibson to football matches. In relation to the wider family, the claimant transported the daughter of the family to and from

school and was available for Mrs Gibson's use for social outings. Ms Flanagan's evidence was that latterly the claimant was not driving the daughter and overall, the amount of time he spent working for the family was becoming less.

11. According to the claimant the work for the respondent was infrequent. The respondent has not adduced any evidence of the times the claimant did carry out work for it rather there was evidence given to me regarding the inflexibility of the claimant. I accept that the claimant was inflexible because this ultimately led to the issue of a second contract on 1st March 2018. This contract guaranteed the claimant two days per week where he did not have to work, the agreement was these were to be Mondays and Tuesdays, but they could be changed. In addition, his terms of work were varied to read: 'In addition to providing services to Mr Gibson and his family you will also be expected to provide services to Head Office staff and visitors when requested.' This is a clear change from the original contract.

12. I also heard complaints that the claimant refused to carry out work following the change in his contract. I saw emails in relation to four such occasions in May, June, and July 2018. Having examined the email chains in relation to each of these, there was never an outright refusal, rather an explanation offered for the inability to carry out the work. Indeed, on one occasion it was the claimant's day off which had been changed by Mr Gibson. Neither Mr Gibson nor Ms Flanagan made any complaint at the time about these 'refusals' and no disciplinary action was taken against the claimant. The evidence of Ms Flanagan was that there continued to be problems with regard to the claimant's work after the second contract was agreed. The claimant disputes this, but it is not a matter which I need to decide for the purpose of this hearing.

13. Mr Gibson was scheduled to be married on 13th July 2019. This was a lavish wedding taking place across the whole of the weekend after which the family were to leave on holiday.

14. On 10th July 2019 the claimant received a text requesting he drive Mrs Gibson to Harrogate. She received the following responses
Need Dave to come round babe bout 1100hrs taking fucknuts to Harrogate taking the piss now
Followed by
I meant Catterick
And
Lol sorry Polly talking about pain in the bum dog to Catterick apologies
She, Polly, Mrs Gibson, responded with

I think the damage is done
Mrs Gibson immediately forwarded the first text to Mr Gibson. Who replied with a thumbs up. Mr Gibson therefore knew about the situation immediately after it happened.

15. The claimant's explanation for the text was that it was sent in error being intended for his partner. He required his brother in law, Dave, to come and collect his dog as he, Dave, was going to Catterick with the dog. I admit I was confused by the explanation as I understood initially this was to go to the vet, however this was incorrect, the claimant clarified that the dog was unwell, and Dave was taking him to work with him. He went on that 'fucknuts' refers to the dog as he is a 'pain in the bum'

16. Whilst I accept that the text was sent in error, I do not accept this explanation. Other than his own assertion about the 'name' for the dog, the claimant did not adduce any supporting evidence to confirm this, such as from his partner or brother in law. There is a clear reference to Harrogate, it is inconceivable that a person would type Harrogate and not Catterick. Further I fail to see why an ill dog would be transported to Catterick to spend time with someone who was working. I found the whole explanation confusing and disingenuous. I concluded that the reference to 'fuck nuts' was a reference to the Gibson family.

17. The claimant told me that he apologised to Mrs Gibson and that it was accepted. To support this he points to the fact that he continued in his driving tasks as required until the family left on holiday and upon their return.

18. From my reading of the text messages on pages 63(a)&(b) of the bundle, which start chronologically at the top of the page with the later events being at the bottom, it is clear that following the text exchange on 10th July the claimant was asked to transport the Gibson's daughter, gifts and dresses to the Gibson's new home. This is clearly after the wedding. He was also asked to go to the Gibson's former home and locate a missing vase. Finally, he was to take, the family to the airport to go on their holiday.

19. Whilst I am not entirely convinced that the matter was completely forgotten, Mr Gibson does not take any action and Mrs Gibson not only continues to use the claimant as a driver but entrusts her daughter to him and allows him to enter her home to locate a missing gift. In light of that I conclude that Mr Gibson was not unduly concerned by the claimant's behaviour at that time.

20. Ms Flanagan's evidence was that the family were simply too busy to deal with the matter. Mr Gibson she said, told her, he would deal with it on his return from honeymoon. Matters were left there.

21. The family arrived back from holiday on or around 9th August and the claimant collected them from the airport. During the time the family were away the claimant had not taken any leave busying himself with general tasks in relation to the car, such as servicing and valeting.

22. There are a series of text messages dated 10th and 11th August between the claimant and Mr Gibson clearly making arrangements for the claimant to drive him and the family that weekend. On 11th August, the claimant requests leave for 13th, 14th, 15th, 16th, 17th August. This is approved by Mr Gibson without demur. Ms Flanagan told me that this was unusual as the claimant normally takes leave when the family were away, and that Mr Gibson was not impressed by this request.

23. The claimant told me, and I accept that he took leave at this time because he had received news his father was ill in Glasgow and he needed to go and see him. I have seen a text from the claimant to Mr Gibson which refers to an appointment with his dad. I concluded that this corroborated the claimant's evidence. The claimant went to Glasgow and returned home on 16th August.

24. The claimant telephoned Mr Gibson on 16th August and was informed he was being made redundant. I accept that there was no discussion concerning any issues of conduct, including the text message sent the preceding month or the claimant taking leave as soon as the family returned home.

25. Ms Flanagan told me that she spoke to both Mr and Mrs Gibson upon their return and they discussed the behaviour of the claimant. Mr Gibson wished to dismiss the claimant because of the text. Her, Ms Flanagan's, clear evidence was that Mr Gibson made the claimant redundant rather than put him through a disciplinary process; that he was in fact dismissed for misconduct, but it was agreed to make him redundant. I took this to mean she and Mr Gibson agreed, rather than Mr Gibson and the claimant.

26. In relation to the redundancy situation, she told me that as Mr O'Neill's Chauffeur had decided to retire suddenly, the company were looking at whether there was a need for any chauffeurs. She went on that as the driving the claimant was undertaking for the respondent was limited and he

was being used less and less by the family that the role would be deleted, the company and Mr O'Neill and Mr Gibson relying on hiring in chauffeurs or taxis as required.

27. Following the wedding, the Gibson family moved to their new home which required more staff than they had previously. In total there were four staff; a Head Gardener; an Estate Housekeeper; a Chef and a Housekeeper. The new staff were employed direct by Mr Gibson and some were provided with accommodation on site. The housekeeper Mrs Simpson remained in the employment of the respondent, although she now worked from the new house. She was provided with a house on the site.

28. Following the dismissal, the claimant alleges that Mr Gibson employed a new driver, Mr Keith Simpson, the husband of the housekeeper. I have seen Facebook Posts from Mr Simpson. In particular one dated 20th November 2019; there is a photograph of Mr Gibson's car with the comment: 'All done ready for tonight'. In the comment section he adds 'Nah, new job it goes with it'. On 24th November he posts from The Riverside Stadium, Middlesbrough Football Club's home ground; in response to a post, he writes, 'New job' and then later; 'Couldn't be happier new house as well' and later 'I've taken to driving the rich and famous about…' and 'Steve Gibson took the photo this job is awesome'.

29. The evidence of Ms Flanagan was that Mr Simpson was not employed by Mr Gibson as a driver, although he may carry out odd jobs. The Jaguar was now a pool car for any employees of Mr Gibson's to use.

30. I have seen invoices from Potters Chauffeurs which show it provided a Chauffeur to the respondent on 10 occasions between August 2018 and May 2019. I note that one of the invoices for services in August 2018 appears in the bundle more than once. The invoices show journeys to Rockcliffe Hall, the football ground, a nearby train station and on one occasion a journey to Bridgend.

The Law

31. Section 98 Employment Rights Act 1996, The Act, sets out the law in relation to Unfair Dismissal. It is for the respondent to show the reason or principal reason for the dismissal and that it is a reason falling within section 98(2) of the Act or is some other substantial reason for dismissal. Redundancy and misconduct may both found a fair dismissal. The Tribunal must then apply section 98(4) of The Act and consider whether the dismissal was fair or unfair which depends on;

Whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and it shall be determined in accordance with equity and the substantial merits of the case.

32. In determining the reason for the dismissal, I had regard to the following cases. The leading case on establishing the 'real' reason for dismissal is *Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT*. B, the General Secretary of the respondent trade union, was dismissed following an incident at a workplace barbecue. The union argued that the dismissal was for misconduct. The EAT held that the tribunal was entitled to find on the facts that the real reason for the dismissal was the employer's political antipathy towards B. This was so even if his conduct may have justified dismissing him. The EAT accepted that the fact an employer acts opportunistically in dismissing does not preclude the potentially fair reason from being the true reason for the dismissal.

33. *Kuzel v Roche Products Ltd 2008 ICR 799, CA*. A Tribunal may also dismiss the reason a claimant puts forward and conclude that the real reason was on the evidence a third reason.

34. Counsel for the Respondent referred me to the case of Hotson v Wisbech Conservative Club, [1984] I.C.R. 859 (1984). In particular this reference which although decided under the previous legislation remains valid today.

The position, according to authority, appears to be as follows. In satisfying the industrial tribunal as to the reason for the dismissal under section 57(1) of the Act of 1978, the employer is not tied to the label he happens to put upon the particular facts relied on. Thus, he may say "I made the employee redundant." But he will not be prevented from saying later "No. I have changed my mind. It was really a case of incapability." Nor will he be prevented from running the two as alternatives: either redundancy or lack of capability. By the same token, the industrial tribunal may, it appears, of its own motion declare that the reason relied upon by the employer was not the real reason: for the real reason may be something that he shrank from mentioning, either through ignorance of the technicalities involved or perhaps through sheer kindness of heart or natural delicacy. In the same way, some other substantial reason under section 57(1)(b) may be advanced by the employer or found by the tribunal to be the real reason for dismissal, differing from the sole or principal reason, such as redundancy or incapability, that may have been advanced by the employer himself.

35. In determining the reason for the dismissal, the tribunal is entitled to reject not only the respondent's asserted reason but also any reason proffered by

the claimant., In the case before me this is the request to take time off, and if there is evidence available, conclude that the reason or principal reason for the dismissal was for some other reason entirely.

36. The definition of redundancy is found in Section 139 of the Act

An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to

(a) [Not relevant]

(b) the fact that the requirements of that business

(i) For employees to carry out work of a particular kind, or,

(ii) For employees to carry out work of particular kind in the place where the employee was employed have ceased or diminished or are expected to cease or diminish

37. If I accept the respondent's reason for dismissal was redundancy, I must then look at the procedure followed by the respondent and consider if it was a procedure a reasonable employer would adopt. Polkey v AE Dayton Services Ltd 1988 ICR 142 sets out guidance for a redundancy but also establishes that, if a dismissal is unfair procedurally, the Tribunal may consider whether if a claimant would have been fairly dismissed if a fair procedure had been followed. However, in Speller v Golden Rose Communications Ltd EAT 1360/96 the EAT observed that in exceptional cases an employer did not need to warn of redundancies or consult an individual employee.

38. If the reason for the dismissal is the text and if I conclude this amounts to a misconduct dismissal I will then go on to consider the guidance in British Home Stores Ltd v Burchell [1980] ICR 303 namely:

(i) Did the respondent have an honest belief in misconduct?

(ii) Did the respondent have reasonable grounds to sustain that belief?

(iii) Did the respondent undertake as much investigation into the misconduct as was reasonable in all the circumstances?

(iv) Was a fair disciplinary procedure followed?

39. If I conclude that the dismissal was unfair then I must look to remedy and in doing so will consider Section 123 of The Act.

The amount of compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer

and

Section 123(6) of the Act

Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount

of the award by such proportion as it considers just and equitable having regard to that finding

40. Under the heading of 'just and equitable' it is open for a respondent to argue that the claimant should not receive an award because of subsequently discovered misconduct. (W Devis & Sons Ltd v Atkins 1977 ICR 662). In Soros v Davis 1994 ICR 590] Mr Justice Tudor Evans observed: '*In our opinion, the House of Lords in [the* Devis *case] held that when assessing compensation for unfair dismissal, a tribunal should have regard to the loss sustained in consequence of the dismissal but should then ask itself whether it is just and equitable that the employee should be compensated, fully or at all, for that loss, bearing in mind the circumstances [of the particular case].*'

41. In relation to misconduct or facts known to the employer at the time of the dismissal the case of *Devonshire v Trico-Folberth Ltd 1989 ICR 747, CA*, held it is not just and equitable for a tribunal to take account of such misconduct as a basis for reducing the compensatory award. The employer had specifically chosen not to rely on the employee's attendance as a reason for dismissal and therefore could not rely on it when attempting to reduce her compensatory award.

42. The Tribunal may also consider whether the claimant would have been dismissed if a fair procedure had been followed as set out in Polkey, (above) if a respondent wishes to rely upon it.

Submissions

Claimant

43. Counsel on behalf of the claimant made submissions on five particular aspects of the case, 1) evidence, 2) the reason for dismissal, 3)fairness, 4)conduct, 5) Polkey. In relation to evidence Counsel criticises the respondent for not adducing evidence from the decision maker, Mr Gibson, rather the evidence came from a 'foot soldier' who related conversations she had with Mr Gibson some of which would be hearsay. Further the respondent is now trying to change the reason for dismissal to conduct or SOSR. This is as unfair a redundancy as you could possibly have, as there was no procedure caried out. With regard to the Polkey point, there is insufficient evidence for a determination of this issue.

Respondent

44. The respondent's case is there was a genuine redundancy situation as the needs of the business for drivers had diminished. It is conceded that the respondent did not consult but Mr Bloom asks me to consider that this is a

case where such a procedure was not required. There was only one chauffeur, the text had destroyed the trust and confidence between the parties and Mrs Gibson wouldn't allow the claimant to drive her daughter. The claimant was clearly inflexible and took pleasure in taking a week off after the family's return from their holiday. Therefore, this can be an exception to the Polkey guidance. A reasonable employer could make that decision.

45. Turning to the issue of conduct or some other substantial reason; again, there is no procedure, but no reasonable employer would accept the explanation proffered. In particular the claimant has lost the trust and confidence of the family and in a situation where there is such a close working relationship this is important. The contract of employment is explicit that such behaviour may amount to gross misconduct.

46. Even if the dismissal is unfair the claimant should not receive any compensation, or it should be reduced. The claimant's behaviour in sending the text is contributory conduct. The claimant could have been dismissed for misconduct.

Discussions and Conclusion

47. Whilst I accept that there were issues with the claimant's flexibility which led to the change in his contract in March 2018, this flexibility appears to relate to the claimant's unwillingness to work for the respondent direct rather than Mr Gibson. I am also satisfied that the issues continued after that date although neither the respondent nor Mr Gibson was so concerned that it instigated disciplinary action against the claimant. It is evident that the problems persisted because of the text sent by the claimant to Mr Gibson's partner in July 2019.

The reason for the dismissal

48. Having considered the evidence, I am satisfied that the real reason for the claimant's dismissal was misconduct the text sent on 10th July 2019. In particular I rely on the evidence of Ms Flanagan that the claimant was sacked for misconduct but to be able to make it easier for him to get a job in the future it was to be referred to as a redundancy dismissal.

49. I considered whether the claimant's position was redundant. I am not satisfied that the respondent has established that the post of Senior Chauffeur was no longer required. The claimant's role was predominately to provide a service to Mr Gibson and his family. I accept that Mr Simpson has been providing a similar service to Mr Gibson as shown by the Facebook posts. These clearly indicate

that Mr Simpson believes he has a new job which includes driving Mr Gibson to Middlesbrough's Football Stadium. Although there have been occasions when chauffeurs have been used, I reject the argument that the Jaguar is now a pool car for all staff to use. On the balance of probabilities, it is highly unlikely that a businessman would retain such a car as a pool car.

50. The evidence of Ms Flanagan on the issue of Mr Simpson was unsatisfactory suggesting that he may be an 'odd job' man who used the car. I am satisfied that whatever the title given to the role undertaken by Mr Simpson, part of that role was being a chauffeur to the family.

Was the dismissal fair

51. Because this was a misconduct dismissal, there are a number of issues to consider. First, the delay between the alleged misconduct and the dismissal. The claimant carried on working for the family from 10th July until his dismissal on 16th August. He was never put on notice that the conduct would be considered as a disciplinary offence. Ms Flanagan's evidence was that Mr Gibson was just too busy. However, it would not have been difficult for the claimant to be told in a short letter that the issue of the text may be misconduct and would be investigated fully once the family returned.

52. When Mr Gibson did return, on the evidence I heard and accept the claimant was not informed of the possible issue of misconduct in relation to the text message. The evidence shows that the claimant requested and was granted time off to visit his father, still there was no mention of disciplinary action.

53. In fact, the issue was never raised with the claimant. The respondent carried out no procedure in determining if the claimant was to be dismissed. The evidence from Ms Flanagan on behalf of the respondent was that Mr Gibson and the claimant spoke about the issue and they both decided the claimant would be made redundant. The evidence of the claimant was that no such conversation took place. I have accepted the claimant's account as the only direct evidence I have of the conversation. The principles in BHS v Burchell, set out above, have not been followed.

54. Even, if I had found the real reason was redundancy, no fair procedure was followed. I considered the argument that consultation was not required in this case; I disagree; the issues raised by Mr Bloom in relation to trust and confidence and inflexibility relate more to a misconduct dismissal than a redundancy dismissal. Although there may have been no consultation the issue of the claimant's position being varied to include carrying out other work as well as driving could have been considered. There was no consultation with the

claimant concerning how to avoid a redundancy. This would have included the possibility of suitable alternative employment. Whilst I note that Mr Simpson works direct for Mr Gibson, there was no evidence adduced to suggest that the claimant would not be suitable or even able to transfer his employment direct to Mr Gibson in order to maintain his employment, even if this meant his job role was modified to carry out other tasks as well as chauffeur services. Therefore, I am not satisfied that the respondent has established that the role of chauffeur was redundant.

Polkey

55. I have to consider whether the claimant would have been dismissed if the respondent had followed a fair procedure. A fair Disciplinary Procedure would be to notify the claimant as soon as possible that he may be subject to a disciplinary process; Ms Flanagan could have carried out an investigatory meeting with the claimant whilst the family were away and then spoken to the Gibsons upon their return. Having investigated, Ms Flanagan should have referred the matter to an independent person for a decision, the obvious person would be Mr O'Neill. A formal disciplinary hearing would be held for the claimant to state his position before a decision was made.

56. What is the chance that the claimant would have been dismissed had a fair procedure been followed? The argument for the respondent was that there is no doubt in light of the language in the text that the claimant would be dismissed because the trust and confidence between the parties was irreparably broken. For the claimant Mr Morgan argues that there is insufficient information to make a decision. I disagree, a Tribunal must try and grapple with the Polkey issue if there is any evidence upon which it can consider it. Here I note, that following the text the claimant continued working for the family, in particular collecting items from one house to deliver to another and driving the daughter of the family. I have now heard the claimant's explanation for the text. Although I have not heard from Mr Gibson who made the decision to dismiss. I am not satisfied that dismissal was a foregone conclusion although the likelihood of it happening is high. I conclude this, in particular because of the behaviour of Mr Gibson immediately after the text, the claimant still driving for the family immediately after the text and following the wedding. The text was not raised as an issue with the claimant until his return from Glasgow. If the dismissal was a foregone conclusion he would have been notified much earlier. Therefore, I am satisfied that if a fair procedure had been carried out the claimant may have been dismissed and I assess the likelihood of dismissal if a fair procedure had been carried out as 50%.

Just and Equitable

57. Mr Bloom argues for a nil award on the grounds it is just and equitable. In particular he has referred me to cases where misconduct was discovered subsequent to dismissal. This is not such a case, as Mr Gibson was clearly aware of the text message shortly after it was sent. I have considered whether it is just and equitable to reduce the award in any event because of the behaviour of the claimant. I have concluded that it was not. Any misconduct of the claimant is outweighed by the respondent's sham reason for the dismissal.

Remedy

58. Having concluded that the real reason for the dismissal was the misconduct, should the compensatory award be reduced under section 123(6) of The Act? I concluded that it should not; the respondent chose to dismiss for redundancy, a reason which I have found was a sham. In all the circumstances and relying upon the Devonshire case I do not consider it just and equitable to reduce the award for contribution.

Conclusions

a. The reason for the claimant's dismissal was his misconduct.
b. The claimant was unfairly dismissed;
    i. as the respondent used a sham reason for dismissing the claimant.
    ii. it did not follow any fair procedure before dismissing the claimant.
c. applying the rule in Polkey, there was a 50% chance of the claimant being dismissed in the event a fair procedure had been followed.
d. It is not just and equitable to reduce the award because of the claimant's misconduct, because the respondent choose to dismiss for a reason other than the misconduct. The reason for the dismissal was a sham.

Employment Judge AE Pitt

Date15th February 2021